



Enquiries :
Ref :

PROVINCIAL TREASURY CIRCULAR NO 24 OF 2022

TO:

DIRECTOR-GENERAL: OFFICE OF THE PREMIER OF MPUMALANGA: VOTE 1: MR M MAMPURU

HEAD: PROVINCIAL TREASURY: VOTE 3: MS GUGU MASHITENG

HEAD: CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS: VOTE 4: MR S NGUBANE

HEAD: AGRICULTURE, RURAL DEVELOPMENT, LAND NAD ENVIRONMENTAL AFFAIRS: VOTE 5: MR C CHUNDA

ACTING HEAD: ECONOMIC DEVELOPMENT AND TOURISM: VOTE 6: MS GUGU MASHITENG

HEAD: EDUCATION: VOTE 7: MRS LH MOYANE

HEAD: PUBLIC WORKS, ROADS AND TRANSPORT: VOTE 8: MR MC MOROLO

ACTING HEAD: COMMUNITY SAFETY, SECURITY AND LIAISON: VOTE 9: MR GS NTOMBELA

ACTING HEAD: HEALTH: VOTE 10: MS DC MDLULI

HEAD: CULTURE, SPORT AND RECREATION: VOTE 11: MR GS NTOMBELA

HEAD: SOCIAL DEVELOPMENT: VOTE 12: MR SM MTSWENI

ACTING HEAD: HUMAN SETTLEMENTS: VOTE 13: MS HN ZITHA

THE CHIEF EXECUTIVE OFFICER (ACTING): MPUMALANGA ECONOMIC REGULATOR: MS C BASTOS

THE CHIEF EXECUTIVE OFFICER (ACTING): MPUMALANGA REGIONAL TRAINING TRUST: (MR MS MAKGOBA)

THE CHIEF EXECUTIVE OFFICER: MPUMALANGA TOURISM AND PARKS AGENCY: MR HM VILAKAZI

THE CHIEF EXECUTIVE OFFICER (ACTING): MPUMALANGA ECONOMIC GROWTH AGENCY: (MR MI MAHLANGU)

THE CHIEF DIRECTORATE: SUSTAINABLE RESOURCE MANAGEMENT: MS G MILAZI

THE CHIEF DIRECTORATE: ASSETS AND LIABILITIES MANAGEMENT: MR CT DLAMINI

THE CHIEF DIRECTORATE: FINANCIAL GOVERNANCE: MS MJF BEZUIDENHOUT

CIRCULAR ON THE CONSTITUTIONAL COURT JUDGEMENT REGARDING PREFERENTIAL PROCUREMENT REGULATIONS, 2017 AND RECOMMENDED INTERIM ARRANGEMENTS FOR DEPARTMENTS AND PUBLIC ENTITIES

1. INTRODUCTION

The purpose of this Circular is to disseminate the National Treasury communications to all Organs of State on the matter of the Minister of Finance v Afribusines NPC Case CCT 279/20 pertaining to the invalidity of the Preferential Procurement Regulations of 2017 by the Constitutional Court.

2. BACKGROUND

- 2.1. On 02 November 2020, the Supreme Court of Appeal (SCA) made a ruling that found the pre-qualification criteria contained in the Preferential Procurement Regulations (PPR) of 2017 invalid. Consequently, it held that the Minister's promulgation of regulations 3(b), 4 and 9 was unlawful. Thus the PPR 2017 were declared invalid as they were inconsistent with the Preferential Procurement Policy Framework Act No. 05 of 2000 and section 217 of the Constitution; and the SCA suspended the declaration of invalidity for a period of twelve (12) months which expired on 01 November 2021, in order to allow the Minister of Finance sufficient time to amend the PPR 2017.
- 2.2. Subsequent to the events in 2.1. above, the Minister of Finance applied for leave to appeal against the order of the SCA in the Constitutional Court. Leave to appeal was granted, however, the appeal was dismissed with costs in terms of the Constitutional Court judgement which was handed down on 16 February 2022

3. DISCUSSION

- 3.1 Subsequently the Minister has, on an urgency basis, brought an application to the Constitutional Court to seek confirmation that the order of invalidity of the PPR 2017 has been and continues to be suspended; and such confirmation being sought by way of declaration, variation and/or clarification in order to establish to establish the following regarding the 2017 Regulations:-
 - 3.1.1. whether the 2017 Regulatons remain valid until 15 February 2023, unless repealed sooner; or
 - 3.1.2. whether they are no longer valid from 16 February 2022, the date of the Constitutional Court Judgement.
- 3.2. Whilst awaiting the outcome or guidance from the Constitutional Court as sought in terms of 3.1. above, the National Treasury has to date issued advisories as follows:-
 - 3.2.1. The first self explanatory advisory dated **25 February 2022** (attached as **annexure A**) advised Organs of State to the effect that:-
 - 3.2.1.1. Tenders advertised before 16 Febraury 2022 be finalised in terms of the PPR 2017,
 - 3.2.1.2. Tenders advertised on or after 16 Febraury 2022 be held in abayence; and
 - 3.2.1.3. No new tenders be advertised.

- 3.2.2. In its communication of 03 March 2022 (attached as **annexure B**) still addressed to all Organs of State, National Treasury advised that:
- 3.2.2.1. Stated that the first advisory of 25 February 2022 was a response informed by the numerous requests for guidance regarding how to deal with the implications of the Constitutional Court Judgement and further stated 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.
 - 3.2.2.2. Further that at the time of authoring the advisory of 3 March 2022, the National Treasury was preparing **new draft regulations** in terms of the PPPFA which were subsequently published for comments on 10 March 2022 with a closing date of 11 April 2022 and we would like to believe that departments and public entities ceased the opportunity and submitted their comments in this regard.
 - 3.2.2.3. The communication of 3 March 2022, further provides for **interim measures** to the effect that, 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, and further provided that such requests should be limited to procurement requirements that cannot await the new regulations or Constitutional Court's guidance.
 - 3.2.2.4. The Communication further confirmed that the papers for seeking the Constitutional Court's clarity were being finalised and organs of state will be advised once these were finalised, and the Minister's application in this regard was filed on 4 March 2022 and all parties served by 7 March 2022.
- 3.2.3. National Treasury has subsequently issued another communication dated 11 March 2022 (attached as **annexure C**) to all Organs of State advising that:
- 3.2.3.1. The communication of 25 February was furnished to curtail the risk of awarding tenders based on regulations that may no longer be valid.
 - 3.2.3.2. Further that in view of the advise to request for exemptions in terms of section 3 of the Act, as National Treasury they acknowledge the need to process such requests as quickly as possible, and reassured organs of state that a process of submissions of requests for exemption for the Minister's consideration, daily as far as possible, are in place.
 - 3.2.3.2.1. Further that provision is also made for the acting Chief Procurement Officer to communicate to an organ of state the Minister's decision on its exemption request.

4. PROVINCIAL TREASURY'S RECOMMENDATION

In the interim and whilst waiting for all processes stated above to unfold and in order to ensure that the Province applies a uniform approach in this regard, Departments and Public Entities are advised as follows:-

- 4.1. To request for exemption in terms of section 3 of the PPPFA for a specific procurement or category of procurement requirements that cannot await the new regulations or Constitution Court's clarity.
- 4.2. All requests for exemptions must be submitted to the National Treasury's email address: cpo@treasury.gov.za and also copy the Provincial Treasury on rmasambo@mpg.gov.za order for the Province can track the number of exemptions requested by the Province for accounting purposes.

5. APPLICABILITY

This Circular and attached National Treasury communications addressed to all Organs of State apply to all Departments and Public Entities in the Mpumalanga Province.


6. DISSEMINATION OF INFORMATION

Kindly ensure that all relevant officials receive copies of this Circular and attached National Treasury communications addressed to all Organs of States.

7. ENQUIRIES

Should there be any enquiries regarding the contents of this Circular and the enclosed National Treasury communications addressed to all Organs of State, please contact - Mr R Masambo email address @ rmasambo@mpg.gov.za

Kind Regards,



MS GUGU MASHITENG
HEAD: PROVINCIAL TREASURY
DATE: 13/04 /2022