

**12 July 2022**

**Ms Alice Muller**

Head of Portfolio: Audit Support  
Auditor-General South Africa  
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Dear Ms Muller

**RE: IMPACT OF 2017 PREFERENTIAL PROCUREMENT REGULATIONS  
CONSTITUTIONAL COURT JUDGEMENT ON THE 2021/22 AUDIT OUTCOMES**

**Background**

On 16 February 2022, the Constitutional Court handed down judgment in the application for leave to appeal against a judgment and order of the Supreme Court of Appeal (SCA) in *Minister of Finance v Afribusiness NPC [2022] ZACC 4* case in which the SCA held that the Minister's promulgation of regulations 3(b), 4 and 9 of the 2017 Preferential Procurement Regulations was unlawful. The SCA further held that due to the interconnectedness of the Regulations, the entirety of the 2017 Regulations was declared invalid on the basis that the content of the 2017 Regulations exceeded what the Minister could permissibly regulate in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000 (the Act) and section 217 of the Constitution of the Republic of South Africa (the Constitution). The declaration of invalidity was suspended for 12 months.

**National Treasury's response to the Constitutional Court Judgement**

1. The Minister of Finance brought an application to the Constitutional Court to clarify and confirm if the suspension of the invalidity of the 2017 Regulations remained following the judgement and specifically whether the Regulations:
  - a. remained valid until 15 February 2023, unless repealed sooner; or
  - b. are no longer valid from 16 February 2022.
2. On 25 February 2022, the Director-General of National Treasury (the DG) issued communication to all organs of state indicating that:



- a. tenders advertised before 16 February 2022 be finalised in terms of the 2017 Regulations;
  - b. tenders advertised on or after 16 February 2022 be held in abeyance; and
  - c. no new tenders be advertised (available on NT's website).
3. Due to the confusion caused by the communication issued on 25 February 2022, the DG issued further communication on 03 March 2022 indicating that:
- a. the communication issued on 25 February 2022 was advice and not an instruction to the organs of state;
  - b. according to section 217(2) of the Constitution, read with section 2 of the Act, 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 Act and other applicable legislation;
  - c. 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 clarity.

**Constitutional Court Judgement on the Minister of Finance's application to the Constitutional Court seeking clarity on its judgement of 16 February 2022**

4. On 30 May 2022, the Constitutional Court handed judgement on the Minister of Finance's application for clarity and indicated that:
- a. section 18(1) of the Superior Courts Act suspended the operation of the Supreme Court of Appeal's 12-month suspension of the invalidation of the 2017 Regulations;
  - b. in practical terms, the countdown on the 12-month period of suspension commenced immediately after the date of suspension. The countdown, however, was halted by the lodgement of the application for leave to appeal in the Constitutional Court; and
  - c. the countdown resumed on 16 February 2022, when the Constitutional Court dismissed the Minister's appeal against the Supreme Court of Appeal's order.
5. Therefore, the above judgement confirmed that the declaration of the order of invalidity of the 2017 Regulations was still valid for the remainder of the 12-month period, namely until 26 January 2023 which meant that as of 30 May 2022:
- a. the 2017 Regulations in their entirety are still valid.
  - b. all exemptions granted to deal with the period of uncertainty following the Court's judgment of 16 February 2022, lapse (according to the condition in the letters of exemptions).
  - c. a quotation requested or a tender advertised before 30 May 2022 must be dealt with in terms of the exemption and the internal procurement policy in place for the duration of the exemption.



### **Impact on the 2021/22 audit outcome**

6. Members of the South African Institute of Chartered Accountants (SAICA) have raised concerns on the constant changes in communication from National Treasury and Court Judgements that resulted in confusion by organs of states and provinces, and which led to different interpretation and applications.
7. The difference in interpretation and application may result in misstatement of irregular expenditure on the financial statements which will ultimately affect the audit outcome of an entity.
8. It should be noted that in some instances, the procurement could not be properly managed and/or avoided due to the impact it may have on service delivery.
9. SAICA kindly requests that the AGSA provides guidance and/or its approach based on its interpretation of National Treasury's communication and Court judgements, and its audit methodology to assist organs of states to comply and fairly disclose irregular expenditure in its financial statements.
10. SAICA appreciates the AGSA's consideration to the above request and looks forward to a favourable response.
11. Please contact me (Natashia Soopal) at [natashias@saica.co.za](mailto:natashias@saica.co.za) or Odwa Benxa at [odwab@saica.co.za](mailto:odwab@saica.co.za) should you like to discuss the content of this letter further.

Kind regards,

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**Milton Segal**  
**Executive Director: Standards**

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**Natashia Soopal**  
**Executive: Ethics Standards and Public Sector**