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A CONSTITUTIONAL REVIEW OF THE PRE-QUALIFICATION PROVISIONS UNDER THE PUBLIC PROCUREMENT BILL

Tsukudu Moroeng

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ABSTRACT

This article undertakes a critical analysis of mandatory prequalification as a mechanism for preferential procurement, focusing on the concept itself and its expression in section 18 of the Public Procurement Bill [B18-2023], the clause on prequalification for preferential procurement. The aim is to measure mandatory prequalification itself, and its articulation in section 18 of the Bill, against section 217(1) of the Constitution to determine if both pass constitutional muster. Viewed in the context of the meaning of prequalification, other equity mechanisms and concerns raised in respect to equity and preference mechanisms, this article finds that introducing a compulsory element to prequalification may perpetuate the issues faced by the public procurement system by creating more opportunities for "double-dipping" and fronting. Having discussed mandatory prequalification as a principle, its articulation in section 18 of the Bill, and the impact of both on the five principles enunciated in section 217 of the Constitution, this article submits that, while discretionary prequalification on its own serves as a useful equity mechanism to promote equity, mandatory prequalification harms the balance between fairness, equity, transparency, cost-effectiveness, and competitiveness (the five principles). This is because procuring institutions are obliged to apply prequalification criteria even if the situation faced by the relevant procuring institution does not require the promotion of equity. Section 18 of the Bill is therefore potentially inconsistent with the Constitution, and invalid, to the extent that it requires procuring institutions to apply prequalification criteria in circumstances where it is not necessary to meet the aims of the Constitution. This article, therefore, proposes that Parliament review the wording of section 18 to ensure that it does not result in outcomes that violate section 217 of the Constitution.

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Tsukudu Moroeng
BA LLB LLM (Rhodes)
Attorney (Legal Resources Centre)

1 Introduction

In his recent critique of the Constitutional Court ("CC") judgment in *Minister of Finance v Afribusiness NPC* ("*Afribusiness CC*"),[1] Volmink notes that the majority sidestepped a critical issue when discussing the nature of the Minister's powers under the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA).[2] This case concerned the use of race and gender prequalification criteria in tender processes. On this issue, the Supreme Court of Appeal ("SCA") in *Afribusiness NPC v Minister of Finance*[3] ("*Afribusiness SCA*") already held that the use of prequalification criteria in regulation 4 of the Preferential Procurement Regulations[4] ("2017 Regulations") "deviated from"[5] section 217(1) of the Constitution of the Republic of South Africa, 1996, and the principles contained therein, namely, fairness, equity, transparency, cost-effectiveness, and competitiveness ("the five principles").

The SCA's reasons for holding regulation 4 suspect are not entirely clear. Klaaren holds the view that there is ambiguity on whether the SCA's misgivings about prequalification are based on statutory, constitutional or a combination of statutory and constitutional grounds.[6] It seems that the SCA was concerned that the 2017 regulations providing for prequalification were made in the absence of an enabling framework law[7] - a separate issue to whether the mechanism of prequalification itself was unconstitutional in principle. It seems that the SCA was suspicious of prequalification not only because the criteria in regulation 4 did not constitute a "framework" (which in terms of section 217 should be provided in national legislation), but also because it was inconsistent with the five principles.[8] Regarding the latter concern, this would mean that the SCA had misgivings about the notion of prequalification *per se* as a constitutionally valid means to achieve preferential procurement goals. The SCA's views are difficult to discern because it does not, expressly discuss the constitutionality of prequalification in

[1] 2022 (4) SA 362 (CC) .
[2] Volmink 2022:1.
[3] 2021 (1) SA 325 (SCA).
[4] GN R32 GG 40553, 20 January 2017.
[5] *Afribusiness SCA* para 38.
[6] Klaaren 2021:20.
[7] Klaaren 2021:22.
[8] In terms of s 217(3) of the Constitution.

principle, rather, its focus was whether the existing framework law (the PPPFA) allowed for prequalification in the first place. In any case, neither the majority nor minority judgment in *Afribusiness CC* were critical of the use of prequalification criteria in general, and decided the case on the premise that prequalification were *per se* acceptable as a preference mechanism.[9]

In an earlier critique,[10] Volmink and Anthony argued that the notion that prequalification was incompatible with section 217(1) of the Constitution was wrong for three main reasons. First, section 217 read as a whole provides for prequalification, especially if regard is had to the meaning of "equity" under section 217(1) and the effect of sections 217(2) and (3).[11] Secondly, the notion that prequalification conflicts with the five principles does not bear scrutiny if regard is had to section 9 of the Constitution and our jurisprudence on substantive equality, which permits the use of remedial measures to achieve socio-economic redress.[12] Thirdly, the proposition may create a "chilling effect" on the legitimacy of other types of equity mechanisms (such as preference) similar to prequalification (such as set-asides)[13] which the state can adopt to achieve equity goals. Volmink and Anthony, therefore, hold the view that the use of prequalification is not "constitutionally suspect *per se*" and therefore should not be seen as inherently or *prima facie* unconstitutional.[14] What will determine the constitutionality of prequalification provisions must depend on how they are designed and implemented.

The discourse on prequalification always entailed an assumption that prequalification was discretionary. Therefore, in addition to leaving out the question of the constitutional validity of prequalification in principle, neither the SCA nor the CC raised the question of *mandatory* prequalification. Indeed, the use of prequalification has always been viewed as discretionary in nature, in other words, that organs of state had the choice to decide if they wanted to apply prequalification requirements when calling for bids.[15] The Public Procurement Bill B18-2023 ("the Bill"), however, introduces a significant development in this regard. Section 18 of the Bill provides that, within certain thresholds and conditions prescribed by the Minister,[16] an organ of state *must* apply prequalification criteria. Section 18, therefore, seeks to introduce mandatory prequalification in the bidding process, with the effect that organs of state will be obliged to apply prequalification criteria to target specific bidders. This is a

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[9] Klaaren 2021:28 notes that "the force of much of the judgment's discussion is that the pre-qualification criteria are arbitrary and irrational without such a framework".
[10] Volmink & Anthony 2021:1.
[11] Volmink & Anthony 2021:9.
[12] Ibid.
[13] I explain what set-asides are later in this article.
[14] Volmink & Anthony 2021:10.
[15] *Afribusiness SCA* para 37; Klaaren 2021:23 and 29. This is evident in the use of the word "if" in regulation 4(1) of the 2017 Regulations.
[16] These thresholds and conditions are not clear as these regulations are not yet available.

radical step away from the previous dispensation, where organs of state could decide whether to mobilise prequalification as a tool based on need. This radical shift raises questions about whether mandatory prequalification is appropriate, and whether discretionary prequalification is more suitable for organs of state to retain some flexibility in determining who to exclude from participating in bids.

This article argues that mandatory prequalification in principle, and the way it is articulated in section 18 of the Bill, as it is currently designed, may be unconstitutional and invalid. This is because mandatory prequalification, without counter mechanisms to maintain competition and cost-effectiveness, disrupts the balance of the five principles and therefore is inconsistent with section 217(1) of the Constitution. In doing so, the arguments made by Kohn in her critique of the 2017 Regulations in which she suggests that the prequalification provisions in the regulations undermined the five principles are supported.[17] This contribution argues that there are much less restrictive means of achieving the purpose of section 217; means which already exist under the current legal framework, and which will maintain the careful balance that must be struck between the five principles. Discretionary prequalification serves as a viable equity mechanism to achieve these means.

In advancing this argument, this article discusses prequalification for equity purposes as a legislative mechanism to facilitate meaningful participation of historically disadvantaged people in government contracting and to achieve substantive equality. For purposes of this article, it is assumed that prequalification measures (as a concept) are *prima facie* constitutional on the bases advanced by Volmink and Anthony. It is further assumed that "poorly designed prequalification … may be struck down as unconstitutional".[18] The question this article grapples with is: When will prequalification framework provisions giving effect to section 217(3) be so "poorly designed" that it would render them unconstitutional? In answering this question, this article critically analyses the "design" and effect of section 18 of the Bill.

2 Context

It is first necessary to discuss the context within which the prequalification provision is located and to highlight the prevailing concerns arising from that context. The main issues highlighted are: the Bill's apparent erasure of the PPPFA's points-based system for adjudicating bids; the proliferation of multiple equity mechanisms in the Bill, and the lack of conceptual clarity between preference, pre-qualification and set-asides.

[17] Kohn 2019:1.
[18] Volmink & Anthony 2021:11.

2.1 Prequalification defined

The Bill does not define prequalification. However, prequalification can be understood as a mechanism whereby a procuring institution restricts the bidding process to certain categories of bidders, which must be outlined in the invitation to bid, and disqualifies those that do not meet the criteria.[19] The main purpose of prequalification in the context of sections 217(2) and (3) of the Constitution is to achieve substantive equity by providing opportunities only to a defined class of bidders (i.e. historically disadvantaged persons), in order to facilitate greater participation in the economy.

When prequalification takes place, bidders who do not satisfy the requirements in the invitation to bid are disqualified, and the remainder of the procurement process is conducted exclusively for identified categories of bidders. Thereafter, the bids presented by the identified bidders will be adjudicated in terms of the usual rules, namely, assessment on functionality,[20] price, *and preference*. I emphasise preference because there seems to be no bar to assessing the bid on preference after the prequalification stage. This is because, as will be discussed later, prequalification is not a form of preference but rather a mechanism to achieve substantive equality. The effect of applying both prequalification and preference mechanisms in any given bidding process is that mechanisms aimed at achieving substantive equality (or fulfilling the principle of equity) will be applied twice, thus potentially giving too much undue emphasis on equity at the expense of the other four principles. This aspect will be discussed in more depth in the analysis below.

2.2 The development of equity mechanisms in the parliamentary process on the Bill

On 22 May 2023, the much-anticipated Public Procurement Bill B18-2023 was introduced into National Assembly ("the May version").[21] The May version[22] of the Bill contained one clause on preferential procurement.[23] In its submissions to the Standing Committee on Finance, the African Procurement Law Unit commented on the preferential procurement clause, a comment which reflected the general sentiment among procurement scholars and practitioners at the time:

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[19] Quinot 2020:212.

[20] See *Contour Technology (Pty) Ltd v Chairperson of the Bid Adjudication Committee: Modimole Local Municipality* [2017] ZAGPPHC 496, 11 August 2017, for an example where the High Court declared the award of a tender unlawful partly because the organ of state failed to apply functionality criteria. The court merely skipped over adjudicating on functionality by awarding the bidders equal points for functionality.

[21] An amended final version was presented by the Standing Committee of Finance later in 2023, discussed below.

[22] Tabled in September 2013.

[23] S 17.

> "This section is welcomed as is the replacement of the PPPFA by this regime in an attempt to consolidate procurement rules, including preferential procurement rules. The *flexibility inherent in moving away from prescribing the exact preferential mechanisms* and levels *in the Bill itself*, but rather in regulations".[24] [emphasis added]

It is trite that national legislation must prescribe a framework for the implementation of any preferential procurement policy. The Bill proposes to repeal the current framework under the PPPFA. The PPPFA framework provides that procuring institutions must determine their preferential procurement policies based on a points system.[25] In terms of the points system, contracts must be awarded to a bidder that scores the highest points based on objective criteria.

This contribution submits that the PPPFA's points-based system, as an adjudication methodology,[26] is a prudent approach to determining who should be a successful bidder. This is because it serves as a mathematical calculation of who the most appropriate bidder is through criteria that advances the five principles, and then calls for a weighting exercise where one bidder is preferred over another based on the outcome of the assessment. In this system, bidders are allocated up to 20 (out of 100) points for criteria directed at uplifting historically disadvantaged persons. The remaining 80 points are allocated for price.[27] The PPPFA then complements this system by providing for other objective criteria to be considered when adjudicating bids, if such criteria are contained in the tender documents, and by providing for rules to ensure the fair and transparent evaluation and adjudication of bids.[28]

It is evident then that the points-based system contributes to achieving a fair balance between the five principles by affording points for important criteria, while also limiting the number of points that can be allocated for those criteria to prevent giving them undue weight, and finally, containing other mechanisms to mediate the points system's focus on price and preference. It is important to note that the points-based system is regarded as a preference mechanism because it calls for procuring institutions to prefer one bidder over another *during the bidding process* and based on objective criteria which give effect to most of

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[24] African Procurement Law Unit (APLU):8.
[25] *Mosene Road Constuction v King Civil Engineering Contractors* 2010 (4) SA 359 (SCA) para 2.
[26] Quinot 2020:223.
[27] Quinot 2020:210.
[28] This also upholds the principles of fairness, as it allows all bidders the opportunity to properly respond to a bid. See *Westinghouse Electric Belgium Societe Anonyme v Eskom Holdings (SOC) Ltd* [2016] 1 All SA 483 (SCA) paras 32.-50. It also promotes the principles of transparency and competitiveness. See *Stiegelmeyer Africa (Pty) Ltd v National Treasury of South Africa* [2015] ZAWCHC 9, 9 February 2015, para 60 where it was held that "competitors are entitled to know beforehand on what basis their tenders are to be evaluated".

the five principles, as opposed to outright excluding them from the bidding process (such as in a system of prequalification or set-asides).[29]

On 8 December 2023, the Standing Committee on Finance submitted an amended version of the Bill ("the December version") in the National Assembly.[30] This version of the Bill contained a much more detailed and prescriptive chapter on preferential procurement (Chapter 4), with an increase in the number of sections contained therein from one section in the May version to nine sections in the December version of the Bill.

By repealing the PPPFA, the points-based system is erased. The Bill then introduces a range of what the Bill regards as preference mechanisms. These include, *inter alia*:[31] set-asides; prequalification; subcontracting; designation of sectors for local production and content, and other mechanisms. Reyburn has already raised a concern about the lack of conceptual clarity provided for the different forms of mechanisms prescribed in a previous version of the Bill, which itself may raise constitutional problems.[32] Chapter 4, therefore, provides, with legislative force, a plethora of means for "preferential" procurement, and indicates a radical shift away from the more prudent points-based framework for evaluating bids and preference. While a discussion of this is outside the scope of this article, it seems that the effect of this new dispensation is that the exercise of preferencing may only come into play if sections 17 to 19 (the equity mechanisms) do not apply.[33] Meaning that preferencing, under the Bill, may potentially be a matter of last resort.

2.3 Preference, prequalification and set-asides: Reyburn's concerns re-surface

The Bill does not define preference or set-asides. One must therefore look at the effect of the provisions giving effect to these concepts to discern what they mean. "Preference" or "preferential" is not defined in the Bill (nor is it defined in the PPPFA). Viewed through the lens of the operative provisions of the PPPFA, "preference" refers to a mechanism whereby procuring institutions evaluate *all* received bids based on objective criteria and then prefers one bidder over the other based on how their bid performs in terms of that criteria. This mechanism achieves substantive equality and equity by crafting criteria based on historically disadvantaged persons and ensuring bidders are favoured for their status as persons who fall into the category of persons that the procuring institution seeks to uplift. As explained above, this is currently achieved through the PPPFA's points-based system. Note that preferencing does not appear to entail outright exclusion before the evaluation takes place.

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[29] Reyburn 2020:47.
[30] See Public Procurement Bill [B18B-2023].
[31] Ch 4 of the Bill.
[32] Reyburn 2020:48.
[33] S 21 of the December 2023 Bill.

A definition of prequalification is provided above. Briefly, it is a mechanism whereby criteria are set out in an invitation to bid, and only bidders who meet that criterion may respond to that bid, thereby excluding certain bidders from participating in the bidding process upfront. Set-asides, a mechanism introduced in section 17 of the Bill, are described as a mechanism whereby procuring institutions "reserve" certain bids "for specified categories of persons, such as black people, black women, women, persons living with disabilities and small enterprises, subject to targets prescribed by the Minister of Finance in the regulations".[34]

The effect of both is that they exclude certain bidders from participating in the bidding process before it even begins. This is different from preference, primarily because in the case of prequalification and set-asides, bidders do not participate at all, so their lack of success does not arise from ranking low relative to other bidders in the bid's criteria. It is for this reason that they are not regarded as preference mechanisms, but rather as mechanisms aimed at achieving equity. A comparison between the three concepts shows that they function differently – preference entails weighing up bidders against each other based on criteria while prequalification and set-asides entails a complete bar on bidder participation. It, therefore, is confusing to refer to "prequalification for preferential procurement" or "set-asides for preferential procurement" as sections 17 and 18 of the Bill do.

While the above definitions are borne out of the literature, whether National Treasury and Parliament understand these concepts in this way is not clear. In an analysis of the Minister's framework powers under the Draft Public Procurement Bill 2020 ("Draft Bill"),[35] Reyburn expresses the following concerns:

> "[S]ome aspects of the mandate given to the Minister in section 26 (of the Draft Bill) are conceptually unclear. Section 26(2)(c) permits the Minister to prescribe by regulation, 'measures for *preference* to *set aside* the allocation of contracts to promote [various categories of suppliers/goods referred to therein]'. A preference-based system is different from a system of set-asides. The intention of this parameter is not obvious. There is conceptual unclarity elsewhere as well. Section 26(2) states the framework to be prescribed by the Minister must include 'measures to advance a category or category of persons or business or a sector'. Again, the intention of this distinction is not clear."[36] [emphasis added]

This confusion persists in the December 2023 version of the Bill. While the Bill has provided clarity on what equity mechanisms it requires procuring institutions to implement (which explains the proliferation of the mechanisms in contrast to

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[34] Reyburn *et al* 2023.
[35] Published on 19 February 2020, and long before the May and December versions of the Bill.
[36] Reyburn 2020:48.

the May version of the Bill), the conceptual distinctions between the mechanisms introduced in this Bill are still unclear. This is especially true for prequalification and set-asides. When one looks at the operative provisions of sections 17 and 18, they effectively seem to achieve the same result, except that they target different categories of persons. In the case of set-asides, a procuring institution must "set aside a bid for categories of persons".[37] In the case of prequalification, a procuring institution must "apply prequalification criteria to promote preferences in the allocation of contracts".[38]

The effect of both is that the bidding process is reserved for participation by historically disadvantaged people only. The only two distinctions that *may* be drawn are that (a) the *method* of limiting the bidders is different and (b) set-asides are targeted at categories of persons and prequalification is targeted at categories of "bidders" (enterprises and cooperatives) in addition to categories of persons. However, one cannot be entirely sure of the intended distinction between set-asides and prequalification because none of the mechanisms are fully defined, and the wording of the provisions themselves do not make this entirely clear. Therefore, there seems to be an overlap between the concepts of prequalification and set-asides, which has manifested itself in the Bill. Sections 17 and 18 are thus potentially open to constitutional challenges on grounds of vagueness.

3 Mandatory prequalification

3.1 Mandatory prequalification in the Bill

Section 18 of the Bill is located within Chapter 4. Section 18(1) of the Bill reads as follows:

> "18. (1) A procuring institution *must*, in accordance with the prescribed thresholds and conditions, apply prequalification criteria to promote preferences in the allocation of contracts, by advertising a bid with a specific bid condition that only one or more of the following bidders may respond:
>
> *(a)* A bidder having a stipulated minimum B-BBEE status level of contributor;
>
> *(b)* persons referred to in section 18(3)*(a)*, *(b)*, *(c)*, *(d)*, *(e)* or *(f)*; or
>
> *(c)* a bidder subcontracting a prescribed minimum percentage to—
>
> (i) a small enterprise which is owned by black people;
>
> (ii) a small enterprise which is owned by black people who are youth;
>
> (iii) a small enterprise which is owned by black people who are women;

[37] S 17(1) of the Bill.
[38] S 18(1) of the Bill.

(iv) a small enterprise which is owned by black people with disabilities;

(v) a small enterprise which is owned by black people within a particular geographical area;

(vi) a small enterprise which is owned by black people who are military veterans;

(vii) a small enterprise;

(viii) a co-operative which consists of members who are black people; or

(ix) a co-operative" (emphasis added).

Section 18 presents, in national legislation, a specific equity mechanism, and its content is fairly detailed. This is a radical advancement, since there are currently no prequalification mechanisms prescribed at the level of primary legislation, as prequalification criteria have previously only been provided for in either subordinate legislation[39] or policy documents.[40] Nevertheless, as Volmink and Anthony have suggested, the focus should be on the design (content) and implementation of prequalification, and not its mere existence. It is important to remember that the function of national legislation in the context of sections 217(2) and (3) is to provide a framework within which policies will be implemented. The fact that prequalification is singled out in the Bill, and the detailed formulation of section 18, raises doubts as to whether it is serving as a "framework", or whether it is doing more than that.

Section 18(1) obligates procuring institutions to apply prequalification criteria within the thresholds and conditions prescribed by the Minister. This means that procuring institutions will no longer have a discretion regarding whether to apply prequalification criteria or not when dealing with bids[41] – a power they had when the 2017 PPPFA Regulations were still in force[42] – provided that the thresholds and conditions outlined in the Minister's regulations are satisfied. The thresholds and conditions will be prescribed[43] by regulations issued by the Minister in terms of section 64 of the Bill. Section 64(1)(a)(ix) provides that the Minister *must* make

[39] 2017 PPPFA Regulations.
[40] This is by way of interpretation of ss 9(1)(b), 9(6), 10(1)(a) and (b), 10(2)(a) and 10(3) of the Broad-Based Black Economic Empowerment Act 53 of 2003. Volmink & Anthony 2021:12 note that under this section, the Minister may issue Codes of Good Practice on B-BBEE which may include prequalification criteria for preferential purposes for procurement.
[41] A "bid" is defined in the Bill as a "written offer, which is capable of acceptance and conversion into a contract, in the form determined by the procuring institution in line with its compliance requirements in response to an invitation for procurement through any prescribed procurement method".
[42] *Afribusiness CC* para 124.
[43] In terms of the Bill, "prescribed" means "prescribed by regulation in terms of section 64".

regulations regarding the circumstances and procedures for pre-qualification of bidders.[44]

If we read sections 18(1) and 64(1)(a)(ix) together, what we see is an express obligation on the Minister to set out thresholds and conditions for prequalification in regulations, and an express obligation on procuring institutions to apply prequalification criteria within the ambit of the regulations. However, what is alarming is that the entirety of section 18 is quite prescriptive, a considerable departure from what is contained in the initial version of the Bill. As a mandatory, and prescriptive provision, the effect of section 18 is that it pre-emptively excludes a large category of potential bidders as a matter of law of general application. Procuring institutions are unduly restricted as to the range and quality of bidders they may invite to submit bids. While a discussion of the full effects is outside the scope of this contribution, it can be briefly mentioned that the mandatory exclusion of bidders who do not fall into the section 18 categories may affect operational efficiency and agility, because procuring institutions can be less creative about the criteria they include in bids and thus the bidders they can invite to meet their goods and service needs.

Section 18(1) states specifically *what* the application for prequalification criteria must be for (i.e. to promote preferences in allocating contracts); *how* prequalification criteria must be applied (by advertising a bid with a specific bid condition, which means only certain bidders may respond); and *who* or which bidders may respond (the bidders listed in section 18(1)(a) to (c)). Operational efficiency and agility are thus negatively affected because procuring institutions are hamstrung when they need to procure goods or services, unless:

a) they want to use prequalification to promote a principle other than equity because equity has already been given effect to by another mechanism;

b) the unique circumstances demand that prequalification be applied before or after advertising a bid; or

c) there are no bidders who meet the section 18 criteria and who can provide the goods or services required.

There also appears to be no exceptions, or a framework for exceptions, contained in section 18, meaning that no exceptions can be contained in regulations lest they become vulnerable to challenge for being *ultra vires*.[45] Whereas section 63 of the Bill[46] allows the Public Procurement Office to

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[44] In respect to the regulation of preferential procurement, s 64(1)(a)(ix) reflects the power conferred on the Minister by s 5 of the PPPFA, which gives the Minister the power to "make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Act". The objects of the Act are "to give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution".

[45] Suffering the same fate as the 2017 PPPFA Regulations in *Afribusiness CC*.

[46] S 63(1) of the Bill provides that:

authorise a departure from an instruction, there is no similar provision for departure from the regulations. However, section 62 of the Bill provides that the Minister may *exempt* procuring institutions from any provision of the Bill but in very limited (extremely exceptional) circumstances.[47]

On the upside, section 18(1) overcomes the *Afribusiness* Problem[48] in two ways.[49] Firstly, it grants the Minister express powers to make regulations to regulate the application of pre-qualification criteria, thereby bringing the application of pre-qualification criteria within the bounds of legality because they will now be located within national legislation giving effect to section 217(3). Secondly, it uses unambiguous language in conferring this power. The question of whether the issuing of regulations is, for example, "necessary or expedient" is not a matter that will arise anymore, since the power to issue regulations on pre-qualification criteria is clear and unqualified: the Minister not only can but *must* make regulations regarding thresholds and conditions for the application of prequalification criteria. While section 18 resolves this problem, its detailed design makes it inherently problematic, because it potentially undermines the purpose of the legislation which is to create a framework within which such policies should be implemented; it should not serve as the policy itself.

3.1.1 Disqualification

Section 18(7) of the Bill reads as follows:

> "(7) A bidder that fails to meet any prequalification criteria stipulated in the bid documents is an unacceptable bid and must be disqualified."

Section 18(7) provides that a bidder who fails to meet the prequalification criteria will be disqualified on the basis that their bid will constitute an unacceptable bid. The Bill does not define an "unacceptable bid". It defines an "acceptable bid" as "a bid which complies with the specifications and conditions of a bid set out in the invitation to bid". This is similar to the definition of "acceptable tender" under the PPPFA which is defined as any tender which complies with the specifications

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"The Public procurement office may, with or without conditions, authorize a departure from a provision of an instruction, issued in terms of section 5(2) if –
(a) It is impossible, impractical or uneconomical to comply with the instruction;
(b) Market conditions or behaviour do not allow effective application of the instruction; or
(c) National security could reasonably be expected to be compromised."

[47] Such as when national security is compromised, when the procurement is funded by grants, when a disaster is declared or when there is a state of emergency. See s 63(1)(a) – (c).

[48] The Constitutional Court set aside the 2017 Regulations because, as it held, the PPPFA did not afford the Minister powers to make regulations for prequalification. Under the current legal framework then, the Minister is not empowered to prescribe prequalification criteria as a method of preference. For purposes of this article, I call this the "*Afribusiness* Problem".

[49] There may be more, but I focus on two for purposes of this article.

and conditions of tender set out in the tender document. An unacceptable bid, then, is a bid that does not meet the specifications in the invitation to bid.

Section 18(7) "operates as a filter to allow only those bidders which meet the prequalification criteria to participate in the tender".[50] Given the peremptory wording of the clause, section 18, therefore, calls for a *mandatory* threshold inquiry[51] before a bidder even participates in the remainder of the bidding process. When inviting to bid, procuring institutions will include prequalification criteria in the bid, which will be informed by the conditions and thresholds contained in the regulations. If a bidder does not meet the prequalification criteria, it will not even be entitled to bid. Such a bidder is automatically excluded from participating, even if they would have performed better on the other objective criteria set out in the bid.

It follows that mandatory prequalification provisions guarantee that the classes of bidders that do not fall into the section 18 categories will hardly ever be eligible to submit bids and to provide goods and services on behalf of procuring institutions. This is unless they fall outside the thresholds and conditions determined by the Minister (which must be within the scope of section 18) or if the exceptional, and highly unlikely, circumstances in sections 63(1)(a) – (c) arise. In my view, the effect of the provision places an undue restriction on procuring institutions to *always* apply prequalification criteria, when instead they should be granted the flexibility to apply prequalification when the circumstances call for it.

3.2 Mandatory prequalification in principle

Notwithstanding the issues discussed above regarding section 18 of the Bill, it is important to briefly discuss the notion of mandatory prequalification. This issue merits a full discussion in a separate article, so the discussion here is simply to anchor the arguments made below.

The notion of prequalification was defined in part 2.1 already. Mandatory prequalification for equity purposes entails the compulsory exclusion of bidders if they fall outside the defined categories. Unlike in the case of discretionary prequalification, mandatory prequalification means that the procuring entity will have no choice but to exclude bidders based on the listed criteria, making it slightly more restrictive. This is different to discretionary prequalification because procuring entities could simply choose not to apply it.

The effect of mandatory prequalification is that prequalification criteria must be applied regardless of the context faced by the procuring institution. This could mean, for example, that an unqualified bidder who meets the criteria would be allowed to participate instead of a qualified bidder who does not meet the

[50] Volmink & Anthony 2021:10.
[51] Penfold & Reyburn 2013:18.

criteria. Furthermore, depending on the scope of the provision (national, provincial, local or sector-specific), the provision may disproportionately exclude an entire class of bidders at a national scale (if the bidding is national). This could lead to some absurd consequences, such as not being able to source a good because none of the qualifying persons supply the needed goods. Finally, this could exacerbate instances of fronting[52] and the inclusion of historically disadvantaged persons simply as a "tick-box exercise" to escape disqualification – at the expense of meaningful participation of such persons. Ultimately, the provisions that give expression to prequalification must be flexible to allow procuring entities to respond appropriately to the prevailing needs – needs that vary between provinces, municipalities, sectors, and functions. Making prequalification mandatory defeats this flexibility.

4 Analysis

Having highlighted some issues with section 18 as a mandatory prequalification provision, what follows is a discussion of the main reasons why section 18(1) to (9) is problematic. This article argues that section 18 may be unconstitutional because it violates section 217(3) as its detailed and specific nature does not constitute a "framework", but rather constitutes a policy position on which equity mechanism must be used in certain circumstances. Moreover, it undermines the balance to be struck by the five principles and, consequently, the public procurement system in three ways. Firstly, the Bill contains no guardrails to ensure that no other equity mechanism may be used when the entity is obliged to apply prequalification. This creates the "double-dipping" problem alluded to earlier in this article, offsetting the balance between the five principles by placing undue emphasis on equity at the expense of competition and cost-effectiveness.[53] Secondly, there seems to be no legal basis for making prequalification mandatory. Thirdly, it otherwise strips procuring entities of the flexibility they require to be able to respond appropriately to the need at hand. These arguments are subsequently expanded on.

4.1 First principles

Before evaluating section 18, some initial points bear mentioning. Firstly, Section 2 of the Constitution states that the Constitution is the supreme law of the Republic and that any law inconsistent with it is invalid. Secondly, Parliament is an organ of state in the national sphere of government under section 239[54] and therefore section 217 applies to it. Thirdly, one must consider the role legislation plays in regulating the public procurement system and giving effect to section 217 as a whole.

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[52] Kohn 2019:1.

[53] For example, in bids where the thresholds and conditions for both set-asides and prequalification overlap, you could potentially have one.

[54] See s 239 of the Constitution.

Bishop and Raboshakga remind us of the trite principle that parliament has a "wide degree of latitude" in its law-making provided it makes law within the limits of the Constitution.[55] One of the limits to Parliament's law-making powers is the principle of legality. In *Affordable Medicines Trust v Minister of Health*[56] Ngcobo J said the following about the principle of legality:

> "The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of our law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."[57]

To comply with the principle of legality, the provision in national legislation must be rationally related to a legitimate government purpose.[58] If the provision is arbitrary, or is inconsistent with the Constitution, it is invalid.

The principal purpose of section 217 of the Constitution is to control the expenditure of public funds.[59] But protecting public funds does not mean that procuring institutions should not implement mechanisms to achieve substantive equality. So, sections 217(2) and (3), read in context, encourages procuring institutions to implement mechanisms aimed at addressing the ongoing

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[55] Bishop & Raboshakga 2013:18.

[56] 2006 (3) 247 (CC).

[57] Para 49.

[58] Yacoob J in *New National Party of SA v Government of the RSA* 1999 (3) SA 191 (CC) at para 24 said this:

> "Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances, review is competent because the legislation is arbitrary. Arbitrariness is inconsistent with the rule of law which is a core value of the Constitution."

Rationality was explained in *Pharmaceutical Manufacturers* at para 90 as follows:

> "[It] does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately."

In *United Democratic Movement v President of RSA* 2003 (1) SA 488 (CC) at para 56 the CC held that:

> "Courts are not…concerned with the motives of the members of the legislature who vote in favour in particular legislation, nor with the consequences of legislation unless it infringes rights protected by the Constitution, or is otherwise inconsistent with the Constitution."

[59] Penfold & Reyburn 2013:6.

negative impacts of the systemic, historic, and ongoing exclusion of black people from meaningful participation in the economy.[60] The goal of preferential procurement is therefore to achieve substantive equality, and to give effect to the principle of "equity" in section 217(1).

In this context, this entails the achievement of at least two goals: promotion of equality and alleviation of poverty.[61] The former goal entails the active and meaningful participation of historically disadvantaged (mainly black) people in the South African economy. Public procurement is thus used as a policy tool to address the ever-enduring systemic economic oppression of, and the discriminatory and unfair practices and policies against, black people during apartheid.[62] Preferential procurement is currently used as the mechanism to achieve this policy goal. Whether we understand prequalification as a method of attaining *preferential* procurement or more accurately, substantive equality, the main point is that section 217 permits the state to implement mechanisms to uplift historically disadvantaged persons due to our past. Prequalification is just one of the many potential equity mechanisms that the state can rely on to achieve this purpose.

The challenge is that section 217(1) requires a procurement system which contains an equal balance between competitiveness, cost-effectiveness, equity, fairness, and transparency in public procurement. Any law, policy or element in the system that offsets this balance undermines section 217(1) of the Constitution.[63] However, section 217 acknowledges that preferential procurement policies may be viewed as being uncompetitive, costly, or unfair because they have the effect of excluding bidders who may provide goods or services at better value for money in favour of bidders who need to be empowered. Sections 217(2) and (3), therefore, permit this sort of discrimination and preference to achieve broader constitutional goals for the sake of achieving substantive equality.[64] However, the mechanism employed to achieve substantive equality must not be blind to the principal purpose of section 217 namely, to use the public purse effectively.

4.2 Section 18 violates the notion of a "framework"

What is important to note is that, while sections 217(2) and (3) allow procuring institutions to apply policies to achieve substantive equality, they must do so within a national legislative "framework". The question then is whether section 18

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[60] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* [2010] ZACC 21; 2011 (1) SA 327 (CC) paras 1 – 2. See also *Airports Company South Africa v Imperial Group Limited* 2020 (4) SA 17 (SCA) para 64.

[61] Helmrich 2014:61 raises doubts about the effectiveness of preferential procurement in achieving these goals. However, a discussion on this aspect is outside the scope of this work.

[62] Ambe & Badenhorst-Weiss 2012:242.

[63] Bolton 2007:56.

[64] *Afribusiness CC* para 61.

goes over and above being a "framework" for purposes of sections 217(2) and (3). This requires an understanding of what a "framework" is within this context.

A framework is defined as "a supporting structure around which something can be built" and "a system of rules, ideas, or beliefs that is used to plan or decide something".[65] In contrast, a "policy" is defined as "a set of ideas or a plan of what to do in particular situations that has been agreed to officially by a group of people, a business organization, a government, or a political party".[66] Perhaps a more appropriate expression of a policy is that it is an internal organisational decision that helps how the organisation functions.[67] The meaning of these concepts in law is similar. Within the public procurement context, a framework (or norms) is contained in national legislation (the "what"). Regulations and policies give effect to the norms by prescribing means, detailed content, and guidelines to achieve the norms expressed by the provisions of the Act (the "how").[68]

As foreshadowed in part 3.1 above, section 18 seems to be providing the "what" and the "how" all in the same provision. Section 18(1) serves as an instruction to procuring entities to achieve equity within these thresholds and conditions [the "what"] by applying prequalification criteria set out in 18(1)(a) to (c) [the "how"]. Section 18(4) goes further by instructing institutions to "identify procurement opportunities to promote preferences in the allocation of contracts and apply any or more of the prequalification criteria referred to in (1)(a) to (c)". This is another way of dictating to procuring institutions how they should apply this equity mechanism.

This article argues that the detailed nature of section 18 is contrary to what is to be understood as a "framework" and thus violates section 217(3). Rather, section 18 should simply permit the use of prequalification criteria and give the Minister powers to regulate how prequalification criteria should be applied. It should also set broad limits for when prequalification will apply and establish norms which will bring prequalification into effect. This is after all, what the CC meant when it said that a national legislative framework must provide "guidance" for the application of policies.[69] This must be understood as saying that the framework should not constitute the policy itself but merely set the framework within which such policies may be developed and applied. By prescribing mandatory prequalification as an exact preferential mechanism in the Bill, it created constraints that are not envisaged in section 217 of the Constitution.

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[65] Cambridge Dictionary [online].
[66] Cambridge Dictionary [online].
[67] Wrensch 2023 describes it further as
> "a formal statement of a principle that should be followed by its intended audience. Each policy should address an important issue concerning the achievement of the overall purpose of the organization."

[68] *Afribusiness CC* para 103.
[69] *Dawood v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 44.

4.3 The "must" in section 18(1) upsets the balance between the five principles

Section 217(1) provides that procuring institutions must contract "in accordance with a *system* …". Bolton states that the word "system"[70] denotes an interrelatedness between the five principles which should always be balanced and given appropriate weight to in any given context.[71] Given the close relationship between the five principles and other fundamental constitutional values, it makes sense that any procurement legislative provision should be construed in accordance with these five principles.[72] If the word "system" is to be understood as the amalgamation of a range of elements working together to achieve a desired result, then the laws and policies that govern public procurement must be considered as one of the necessary elements forming part of this system. The framework must also achieve an appropriate balance between the five principles – in other words – without favouring one principle over the other.

While it is trite that preferential procurement policies are necessary to achieve substantive equality, should national legislation make their application *mandatory*? In other words, does section 217 permit Parliament to require (in national legislation) that procuring institutions *must* implement specific equity mechanisms via their policies? What about the nature of mechanisms that pre-emptively exclude certain bidders such as prequalification and set-asides? Is it necessary to *always* implement exclusionary policies to achieve substantive equality? Or are there circumstances where pre-emptive exclusion will be inappropriate?

National Treasury, in its report on the comments submitted to Parliament on the Bill,[73] stated that it did not agree with the notion that preferential procurement was discretionary. This is because:

> "Section 217(1) of the Constitution already mentions the concept of "equitable" as one of the five principles that must be adhered to when conducting procurement. The term "equitable" has a two-pronged focus, namely distribution and redistribution: (i) distribution is about sharing the wealth, opportunities, and resources of the country; and (ii) redistribution is about distributing something in a different way, typically to achieve socio-economic equality."[74]

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[70] A group or combination of interrelated, interdependent, or interacting elements forming a collective entity; a methodological or coordinated assemblage of parts, facts, concepts, etc.; a set of things working together as a mechanism or interconnecting network.
[71] Bolton 2007:56.
[72] S 2 of the Constitution.
[73] Circulated to stakeholders on 16 November 2023.
[74] National Treasury, *Report on Comments to the Public Procurement Bill*: 11.

National Treasury therefore relies on equity as a basis for its position that mechanisms to achieve equity must be mandatory (or at least that they are not discretionary). The existence of an equity mechanism and making a specific mechanism compulsory in a new legislative framework are two separate issues. To the extent that National Treasury's view is interpreted as authority for the proposition that equity mechanisms must be crafted in mandatory terms, it is incorrect as a matter of law and of practice.

As a matter of constitutional interpretation, neither the Constitution nor our courts have established that national legislation must contain compulsory equity mechanisms to give effect to section 217. Moreover, from a practical viewpoint it is incorrect, because there may be circumstances where the only bidders available to provide a good or service may either not be historically disadvantaged persons, or where such bidders can be objectively identified as being "substantively equal" to their competitors. Implementing equity mechanisms in this context would serve as a mere tick-box exercise, would not in fact promote equity, and could unjustifiably violate competition and cost effectiveness if bidders were excluded as a result. As will be shown later, it is for both these reasons that the application of prequalification criteria has historically been discretionary.

The view held in this article is that the obligation created by section 217(3) was satisfied by section 17 of the May version of the Bill (which was not framed in mandatory terms).[75] Section 17 presented a decent preferential procurement

[75] S 17 provided as follows:

"17.(1) When implementing a procurement policy providing for— (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons or categories of persons, disadvantaged by unfair discrimination, a procuring institution must do so in accordance with the objects of this Act, this Chapter and section 10(1)(b) of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003)."

(2) The policy envisaged in subsection (1) must include— (a) one or more preference point systems and thresholds; (b) measures regarding preference for— (i) a category or categories of persons or enterprises or a sector; (ii) goods that are produced in the Republic; and (iii) services provided in the Republic; (c) measures— (i) to set aside the awarding of bids to promote any of the preferences referred to in paragraph (b); (ii) to set subcontracting as a bid condition to promote any of the preferences referred to in paragraph (b); (iii) for subcontracting by suppliers awarded bids that promote any of the preferences referred to in paragraph (b); (iv) to advance transformation, beneficiation, industrialisation, innovation, creation of jobs, intensification of labour absorption and economic development; (v) to balance the economic impacts of imported goods or services, unless the procuring institution is exempted by the Minister; and (vi) to advance a sustainable environment.

(3) Regulations— (a) must be made regarding the application of subsection (2)(a) and (b)(ii) and (iii); and (b) may be made regarding any other provision of this Chapter.

(4) Without limiting the generality of subsection (1)(b), the policy must include preferences for— (a) citizens and permanent residents of the Republic; (b) small enterprises, as defined in section 1 of the National Small Enterprise Act, 1996

framework because it gave procuring institutions the flexibility to apply equity mechanisms when they were required.[76] Section 17 needs not to be framed in mandatory terms to serve as a legitimate mechanism to achieve substantive equality, nor does it need to be framed in mandatory terms to comply with section 217 of the Constitution.

Moreover, National Treasury's approach (accepted by Parliament's Standing Committee of Finance and now manifested in the December version of the Bill) gives the impression that the current preferencing framework is deficient in giving effect to the principle of equity. The Bill now seeks to address this by, firstly, requiring that preferential procurement must be mandatory, and secondly, prescribing extremely detailed prequalification mechanisms. However, this loses sight of the fact that equity can be fulfilled even if equity mechanisms are couched in discretionary terms. Procuring entities simply must be diligent to apply them in contexts where historically disadvantaged persons must be promoted.

The view that the equity mechanisms must be compulsory is a radical departure from National Treasury's historically prudent approach, which is evident in, for example, its previous prohibition on the use of set-asides.[77] National Treasury's own Supply Chain Management Practice Note from 2006 makes the point clearly:

> "In our view, there is nothing in the PPPFA that permits an organ of state to exclude any person or category of persons to bid for a tender contract. The preferential procurement policy is aimed thereat to give HDI's, according to a preferential points system, an advantage above other bidders to redress historical imbalances and increase opportunities for those previously disadvantaged from participating in the country's mainstream economy. This is as far as the policy goes. *Since the HDI's factor has already been taken into account as a specific goal*, it could not be regarded as objective criteria, or threshold criteria, in awarding a tender. As explained above, this would mean

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(Act. No. 102 of 1996); (c) enterprises based in townships, rural or underdeveloped areas or in a particular province or municipality.

(5) Persons referred to in subsections (1)(b) and (2)(b)(i) include, but are not limited to— (a) black people, as defined in section 1 of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); (b) women; (c) people with disabilities, as defined in the Employment Equity Act, 1998 (Act No. 55 of 1998); and (d) youth, as defined in section 1 of the National Youth Development Agency Act, 2008 (Act No. 54 of 2008).

(6) Before making a regulation under this Chapter, the Minister must consult with the Ministers responsible for trade, industry and competition, small business, women, people with disabilities and youth and any other relevant Minister whose portfolio is affected by the draft regulation.

(7) Any Minister, referred to in subsection (6), may submit a request to the Minister of Finance to make regulations under this Chapter regarding a matter pertaining to the portfolio of the relevant Minister.

[76] As opined by the APLU in its comment on s 17 of the Bill.

[77] See National Treasury 2006.

> that HDIs would compete against each other as a category (sic) bidders, with no need to award preferential points if there are no other categories of person (white bidders) bidding for the same tender. A specific condition in the tender contract disallowing a certain category (i.e. whites) of the public not to bid for such a contract appears to be contrary to the principles of fairness and equitability, as well as the principles of competitiveness and cost-effectiveness. We are therefore of the opinion that it will be unconstitutional to exclude "white tenders" to bid in a tender process."[78] [emphasis added]

While the statement is made in the context of the PPPFA, the principled point remains. The SCM Note takes issue with set-asides (and similar mechanisms)[79] *per* se, in that these categories of persons benefit from qualifying on empowerment-based criteria, and then benefit again on empowerment criteria during the preferencing stage. It also takes issue with the fact that automatically disqualified bidders are not able to have the substance of their bids evaluated at all. While this article accepts that this challenge is now overcome by prequalification being placed in national legislation, thereby sufficing as a legitimate equity mechanism, the fact that it is *mandatory* brings the issues highlighted in the SCM Note back to the surface, namely that the automatic exclusion of certain groups of people is unfair, uncompetitive, and unduly costly in circumstances where equity has already been achieved or is unnecessary. This infringement is unjustified in a system where preference is still available as an equity mechanism and is indeed used as a primary tool to evaluate bids.

As stated above, the purpose of section 217 of the Constitution is to control the expenditure of public funds. The principle of competitiveness entails that procuring institutions allow the greatest number of bidders possible to participate so that they can compete with one another in the procurement process. This will have the effect of driving prices down, which allows procuring institutions to obtain goods and services at the best possible price, ultimately benefiting citizens in the long run. National Treasury has framed this principle into one of its "five pillars" as "Open and Effective Competition".[80] Mandatory prequalification has the potential to hike prices for goods and services at a substantial rate due to the demand created by the restricted number of bidders as a consequence of prequalification. Mandatory prequalification means that the limitation on competition is inescapable, even if the limitation on competition is unjustified, as they would be in circumstances where no other principle will derive a benefit from the limitation. Mandatory prequalification therefore appears to have unjustifiably negative effects on competitiveness and cost-effectiveness.[81]

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[78] See National Treasury 2006:para 1.1.6.
[79] In the note, set-asides are defined very similarly to how prequalification functions in terms of section 18.
[80] National Treasury of the Republic of South Africa *General Procurement Guidelines*:5.
[81] Penfold & Reyburn 2013:11.

This is not to say that competition or cost-effectiveness are factors that should (or that do) override equity. It is to say that mandatory prequalification tips the scale completely towards equity, which already finds expression in other equity mechanisms (such as preference) that do not automatically exclude bidders from participating at all. Mandatory prequalification will not always be necessary to achieve substantive equality or equity. Moreover, even if preferencing was not an option, the principle of equity would still be fulfilled by, for example, applying prequalification or set-asides *if* and *when* needed. These mechanisms do not have to be made compulsory for them to promote equity.

Furthermore, a provision for prequalification in national legislation gives effect to sub-sections 217(1) and (2) when it forms part of a framework within which procuring institutions can apply prequalification criteria if they choose to do so. However, the application of prequalification criteria need not be mandatory to achieve its preferential procurement goals, because section 217 does not expressly or impliedly, *demand* that prequalification criteria be applied as a means to achieve equity. This is because there may indeed be situations where employing prequalification (and automatic exclusion) is not required. The availability of prequalification in the framework therefore duly satisfies section 217 of the Constitution.

In *Afribusiness CC*, a factor that persuaded the SCA that the prequalification regulations were *ultra vires*, was the fact that the regulations did not provide organs of state with a framework to guide the exercise of their discretion to apply prequalification criteria.[82] On an application of section 18, discretionary power is

[82] Zondi JA in *Afribusiness SCA* paras 37 and 38 put it this way:

> "As s 5 of the Framework Act itself makes plain, the Minister's powers are not unconstrained. He may only make regulations 'regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Act'. Section 2 of the Framework Act is headed 'Framework for the implementation of preferential procurement policy'. On a proper reading of the regulations the Minister has failed to create a framework as contemplated in s 2. It is correct that the application of the pre-qualification requirements is largely discretionary. But the regulations do not provide organs of state with a framework which will guide them in the exercise of their discretion should they decide to apply the pre-qualification requirements. The discretionary pre-qualification criteria in regulation 4 of the 2017 Regulations constitutes a deviation from the provision of s 217(1) of the Constitution which enjoins organs of state when contracting for goods or services, to do so in in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Any pre-qualification requirement which is sought to be imposed must have as its objective the advancement of the requirements of s 217(1) of the Constitution. The pre-qualification criteria stipulated in regulation 4 and other related regulations do not meet this requirement. Points are to be allocated to bidders based on the goals set out in s 2 of the Framework Act. The discretion which is conferred on organs of state under regulation 4 to apply pre-qualification criteria in certain tenders, without creating a framework for the application of the criteria, may lend itself to abuse and is contrary to s 2 of the Framework Act.

erased if a bid falls into the thresholds and conditions contained in the regulations. This contribution argues that this effect is inconsistent with the permissive language in section 217(2) of the Constitution. Therefore, while a framework provision for prequalification equalizes the balance between the five principles, the provision for *mandatory* prequalification offsets that balance. It is thus submitted that a provision for compulsory prequalification is possibly either *ultra vires* section 217, or inconsistent with it, and therefore section 18 may be unconstitutional.

4.4 What is the solution?

This article proposes the following solution: A more prudent approach would be for Chapter 4 to contain a broad framework that allows for a points system which allocates a number of points to achieve each goal intended by the five principles, to create an equal balance between price and preference. Then the Chapter should lay out a broad framework (or guidelines) which the Minister can invoke to establish a range of equity mechanisms in regulations. The mechanisms included in regulations could include prequalification, subcontracting and set-asides. Such regulations should include a non-exhaustive list of mechanisms for procuring institutions to choose from. Importantly, equity mechanisms which exclude bidders purely on empowerment criteria should do so only where the other principles will not be compromised by their application. In this regard, Kohn said it best:

> "Government is therefore urged to go back to the basics and develop a future-fit Procurement Framework that does justice to *all* the constitutional procurement prescripts and hence does not lose sight of the significance of price in the equation. As Occam's Razer holds, the best answer is typically the simplest one and so perhaps the most legitimate and sustainable way of furthering equity, without compromising the other prescripts, is to alter the price-to-preference ratios under the empowering Act (to say, an 80/20 and 70/30 split respectively). This would tip the scales in favour of preference in a lawful and rational manner that does not serve as a bar to meaningful consideration of price."[83]

It can be added that this approach would not bar a meaningful consideration of equity and empowerment goals but will ensure that they are given the necessary attention while ensuring that the other principles are not ignored.

In sum, section 18 of the Bill must be drafted in permissive terms so that procuring institutions can choose to apply prequalification criteria in appropriate circumstances, particularly where the section 217(1) scale of principles tips too much towards equity at the expense of competition and cost-effectiveness, thus achieving an appropriate balance between both price and empowerment. Indeed, there may be exceptional circumstances where applying both

[83] Kohn 2019:34.

prequalification and preference in respect to a particular bid may be necessary. However, it must be left to the relevant procuring institution to decide when to apply the mechanisms in this way, within the Act's framework and the Minister's regulatory guidelines, to respond to the need at hand.

5 Conclusion

This article argued that mandatory prequalification, as expressed in section 18 of the Public Procurement Bill, undermines section 217 of the Constitution because it provides more than the "framework" envisaged in section 217(3) and because it elevates equity above the remaining five principles. It is argued that a balanced approach that achieves the ideal of uplifting historically disadvantaged individuals can be realised without mandatory prequalification provisions. This article's criticism of the prequalification provisions is not against prequalification as a concept, nor as an equity mechanism. Rather, it is against mandatory prescribed equity mechanisms that place undue emphasis on one principle over another without adequate countermeasures to ensure that equity mechanisms are not applied at the expense of competition and cost-effectiveness. In this case, section 18 falls into this category.

It is proposed that the Bill should return to its previous form which gave the Minister broad powers to prescribe preferential mechanisms and levels in the regulations. The Bill should, in non-mandatory terms, list the available forms of preference mechanisms that can be employed by the Minister, giving the Minister, and procuring institutions the room to exercise the ingenuity needed to redress socio-economic wrongs and achieve socioeconomic prosperity for historically disadvantaged individuals.

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