



Cell. 082 496 1657 E-mail. gerrit@taranisco.co.za | Website: www.taranis.co.za

Western Cape High Court rules that the use of Specific Goals is not “Irrational”

The Western Cape High Court recently ruled in a case instituted by H & I Civil & Building (Pty) Ltd and H & I Construction (Pty) Ltd against the City of Cape Town's new preferential procurement scoring system introduced for construction tenders, that the use of “Specific Goals” in tenders are not “Irrational” as made out to be by the Applicants.

The Applicants argue that the scoring system introduced by the City in January 2023, which allocates preference points based on race, gender, and disability, is irrational, unconstitutional, and exclusionary, particularly for established construction companies like theirs.

The Applicants seek to have the new scoring system declared unlawful and for the City to revert to its previous system, which awarded preference points based solely on the Broad-Based Black Economic Empowerment (B-BBEE) status of a bidder.

The case hinged on section 217 of the South African Constitution, which governs public procurement, requiring it to be fair, equitable, transparent, competitive, and cost-effective, while also promoting historically disadvantaged individuals.

The City's current system, in contrast to the previous one, awards preference points not just based on B-BBEE status but also on ownership by women, black individuals, and disabled persons, as well as the promotion of small and micro enterprises.

Under the City's previous system, preference points were awarded strictly according to a bidder's B-BBEE contributor status, with higher levels gaining more points.

The change in the City's scoring system follows the 2022 Procurement Regulations, which grant organs of state the flexibility to define their own criteria for awarding preference points, beyond just B-BBEE status.

The change was influenced by the **Afribusiness** judgment, where the Constitutional Court declared the previous 2017 Procurement Regulations unconstitutional, allowing more flexibility for organs of state regarding their preferential procurement policies.

The Applicants claim that the new system drastically reduces their chances of winning contracts, as they are now only eligible for 3 to 6 points under the new system, compared to the full 10 points they previously received based on their B-BBEE level.

The case includes two separate legal actions, including the Applicants initially seeking an urgent interdict to stop the City from using the new scoring system in evaluating tenders, pending this full judicial review.

The final judgment was delivered on 18 October 2024 with an outright dismissal of the application.

The court found that the grounds advanced by the applicants to challenge the City's new preferential procurement scoring system lacked merit.

The court held that the new system was lawful and did not require the City to revert to its previous scoring system, which was based exclusively on B-BBEE status.

This judgment gives leeway to organs of state in the Western Cape to determine their procurement policy and apply whichever point scoring system it prefers.

Contact: Gerrit Davids. Lead Advisor | **TaranisCo Advisory CC**

Mobile. +27 (0) 82 496 1657 **E-mail:** gerrit@taranisco.co.za

TaranisCo Advisory © 2024