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Private Bag X9165
CAPE TOWN
8000

TREASURY CIRCULAR NO. 07 /2022

THE PREMIER

THE MINISTER OF AGRICULTURE

THE MINISTER OF COMMUNITY SAFETY

THE MINISTER OF CULTURAL AFFAIRS AND SPORT

THE MINISTER OF EDUCATION

THE MINISTER OF FINANCE AND ECONOMIC OPPORTUNITIES

THE MINISTER OF HEALTH

THE MINISTER OF HUMAN SETTLEMENTS

THE MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING

THE MINISTER OF SOCIAL DEVELOPMENT

THE MINISTER OF TRANSPORT AND PUBLIC WORKS

THE SPEAKER: PROVINCIAL PARLIAMENT

THE DEPUTY SPEAKER: PROVINCIAL PARLIAMENT

THE EXECUTIVE AUTHORITY: WESTERN CAPE GAMBLING AND RACING BOARD (MINISTER D MAYNIER)

THE EXECUTIVE AUTHORITY: WESTERN CAPE NATURE CONSERVATION BOARD (MINISTER A BREDELL)

THE EXECUTIVE AUTHORITY: WESTERN CAPE INVESTMENTS AND TRADE PROMOTION AGENCY (MINISTER D MAYNIER)

THE EXECUTIVE AUTHORITY: SALDANHA BAY IDZ LICENCING COMPANY (MINISTER D MAYNIER)

THE EXECUTIVE AUTHORITY: WESTERN CAPE CULTURAL COMMISSION (MINISTER A MARAIS)

THE EXECUTIVE AUTHORITY: WESTERN CAPE LANGUAGE COMMITTEE (MINISTER A MARAIS)

THE EXECUTIVE AUTHORITY: WESTERN CAPE HERITAGE (MINISTER A MARAIS)

THE EXECUTIVE AUTHORITY: CASIDRA (MINISTER IH MEYER)

THE EXECUTIVE AUTHORITY: WESTERN CAPE LIQUOR AUTHORITY (MINISTER A MARAIS) (ACTING)

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THE ACCOUNTING OFFICER: VOTE 9: ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING (MS K SHIPPEY)

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THE ACCOUNTING OFFICER: VOTE 11: AGRICULTURE (DR M SEBOPETSA)

THE ACCOUNTING OFFICER: VOTE 12: ECONOMIC DEVELOPMENT AND TOURISM (MR S FOURIE)

THE ACCOUNTING OFFICER: VOTE 13: CULTURAL AFFAIRS AND SPORT (MR G REDMAN)

THE ACCOUNTING OFFICER: VOTE 14: LOCAL GOVERNMENT (MR G PAULSE)

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THE CHIEF FINANCIAL OFFICER: VOTE 14: LOCAL GOVERNMENT (MS B SEWLALL-SINGH)

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INTERIM ARRANGEMENTS FOR THE WESTERN CAPE GOVERNMENT AS IT RELATES TO PREFERENTIAL PROCUREMENT POST THE CONSTITUTIONAL COURT JUDGMENT DECLARING THE PREFERENTIAL PROCUREMENT REGULATIONS, 2017 INVALID

1. PURPOSE

- 1.1 The purpose of this circular is to communicate the interim arrangements, as endorsed by Provincial Cabinet on 09 March 2022, for the Western Cape Government (WCG) as it relates to Preferential Procurement in terms of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5) given the recent Constitutional Court judgment declaring the Preferential Procurement Regulations, 2017 invalid.

2. BACKGROUND

- 2.1 On Wednesday, 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). This application was brought by the national Minister of Finance ("the Minister") against Afribusiness NPC, and concerns the validity of the Preferential Procurement Regulations, 2017 ("Procurement Regulations" as referred to in the judgment) promulgated by the Minister on 20 January 2017, in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000 ("Procurement Act" as referred to in the judgment).
- 2.2 The SCA held that the Minister's promulgation of regulations 3(b) (to determine whether pre-qualification criteria are applicable to the tender as envisaged in regulation 4), regulation 4 (prequalification criteria for preferential procurement) and regulation 9 (subcontracting as a condition of tender) of the Procurement Regulations are unlawful.
- 2.3 Due to the interconnectedness of the regulations, the SCA declared the entire Procurement Regulations invalid on the basis that the content of the Regulations exceeded the Minister's power on what could permissibly be regulated on in terms of section 5 of the Procurement Act and section 217 of the Constitution.
- 2.4 The declaration of invalidity was suspended for 12 months which ended 02 November 2021. The matter was then heard by the Constitutional Court where the majority judgment dismissed the appeal against the SCA judgment. The majority judgment was silent on the question of remedy and did not address the specific issue of the status of the SCA's order of suspension. The minority judgment addresses the issue at footnote 28, where it asserts that "the period of suspension expired on 02 November 2021". The Constitutional Court hence in both its majority and minority judgments technically did not address the issue of suspension in the body of their orders.
- 2.5 In response, the National Treasury has indicated that the national Minister has on an urgent basis on 04 March 2022, sought confirmation from the Constitutional Court whether or not the invalidity of the Procurement Regulations has been and continues to be suspended. Confirmation is sought by way of declaration, variation and/or clarification. In other words, guidance is required as to whether the Procurement Regulations remain valid until 15 February 2023, unless repealed sooner. The Constitutional Court has subsequently issued a directive that the last date for parties to file papers in this matter is 25 March 2022.
- 2.6 It must be noted that the WCG has, since the issuance of the Preferential Procurement Regulations, 2017, contested the content thereof as it relates to local content designated sectors; pre-qualification criteria; sub-contracting and the negotiation and passing over mechanism introduced in the Regulations. The Provincial Treasury in conjunction with Legal Services and the Supply Chain Management (SCM) Policy focus group (which includes various departments) reviewed the Procurement Regulations (2017) and identified certain implementation challenges.
- 2.7 Based on these challenges, an assessment of implementation risks and impact of the Procurement Regulations was tabled at Cabinet on 22 March 2017 and approved via Cabinet Minute 87/2017, that the WCG:
 - a) Apply its discretion not to apply pre-qualification criteria;
 - b) Apply its discretion not to implement the negotiation process [Regulation 6(9)(a)–(c) and 7(9)(a)–(c)]; and
 - c) Conduct empowerment assessments for all procurement above R10 million or less if so, dictated by institutional analysis and the implementation of regional indicators to target local suppliers.

- 2.8 Whilst the above interim strategy was appropriate at that stage, the recent Constitutional Court judgment has declared the entire set of Procurement Regulations invalid and hence the above strategy was re-assessed to determine its viability for implementation, the results of which are included in the interim arrangements for the WCG hereunder.
- 2.9 It must be noted that whilst the judgment has been welcomed and supported by the WCG it has left a *lacuna* as it relates to value thresholds and the evidence burden to claim preference points. These matters can only be prescribed via regulations by the national Minister. The fact that the entire regulations have been declared invalid exacerbates the issue in that, through the declaration of invalidity, the thresholds and evidence burden to claim points via the preference points system are also invalid, despite this not being in dispute. Hence an extensive process was followed by the WCG to determine an appropriate way forward taking into account the primary risks for the province due to the *lacuna* created by the court ruling. i.e., continuous delivery of critical services, irregular expenditure, and potential supplier litigation.

3. NATIONAL TREASURY LETTER DATED 25 FEBRUARY 2022 AND 03 MARCH 2022

- 3.1 The National Treasury has in the interim (whilst seeking guidance from the Court on the date of invalidity of the regulation) issued a letter on 25 February 2022 (attached hereto marked **Annexure A**) indicating that whilst awaiting the outcome of guidance from the Constitutional Court, organs of state are advised that:
- a) tenders advertised before 16 February 2022 be finalised in terms of the Procurement Regulations;
 - b) tenders advertised on or after 16 February 2022 be held in abeyance; and
 - c) no new tenders be advertised.
- 3.2 The National Treasury subsequently, on 03 March 2022 (attached hereto marked **Annexure B**), issued a further letter indicating in summary that:
- a) the advice provided on 25 February 2022 excluded procurement with a Rand value less than R30 000 obtained through price quotations;
 - b) regulations will be issued providing for the thresholds for the points system. Note that draft regulations in this respect were subsequently issued on 10 March 2022, with the comment period closing on 11 April 2022; and
 - c) until the new regulations take effect that organs 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, limiting this to procurement that cannot await the new regulations or Constitutional Court's guidance.
- 3.3 It must be noted that the above-mentioned letters do not have any binding effect in law, given that the format and content of the letters is advisory in nature and is not issued under any authority contained in the Public Finance Management Act, 1999 (Act No. 1 of 1999), or otherwise. However, the letters have now been issued to all organs of state and hence there is an obligation to assess the impact of the requirements to determine whether and to what extent the letters should be applicable to procuring institutions given that the Auditor-General South Africa (AGSA) may audit all subsequent procurement based on this advice.
- 3.4 Paragraph 2.6.2 of Provincial Treasury Instructions, 2019 provides for the process to be followed when any new Instruction is issued by the National Treasury. **Although the advisory letters do not constitute an instruction, directive or an associated requirement**, the Provincial Treasury conventionally assesses the following factors in this respect, and has done so without prejudice in this case:

- a) whether and to what extent the requirements are in line with the provisions of the Constitution and other legislation;
 - b) the practicality and rationality of the requirements;
 - c) whether and to what extent the WCG has existing or improved methods of satisfying the same purpose, which methods negate the need for strict compliance with some or all those requirements;
 - d) the impact of implementing the requirements from a process, resource, value for money, red tape, and systems perspective; and
 - e) the cost-benefit implications of ensuring strict compliance with the requirements.
- 3.5 The issuance of both the NT letters creates significant risks for the province should procurement not proceed as intended as service delivery and the ability to spend on both the current and forthcoming financial year's budget as planned for in terms of procurement planning and budget planning initiatives, will be impacted. This will be to the detriment of the citizens of the province, as it will result in the non-delivery of goods, services and infrastructure and potentially also derogate their Constitutional rights.
- 3.6 Accounting officers' and accounting authorities' inability to spend their budgets will result in under expenditure that may have future budgetary implications, albeit not within the control of the accounting officer or accounting authority.
- 3.7 It must also be noted further that procurement has been impacted by COVID-19 where departments and public entities could not procure the goods or services as originally planned for and hence certain procurement processes were delayed or put on hold for a later date. The National Treasury letters will now have an impact on the delivery of those goods and services and infrastructure, again to the detriment of the citizen.
- 3.8 This is exacerbated further by the uncertainty on whether or not the court will extend the suspension of invalidity, and when this clarification will be made. If indeed it does provide clarity that the suspension of invalidity has not been extended, then the *lacuna* persists up until such time that the national Minister issues replacement Procurement Regulations.
- 3.9 It is therefore critical that the province puts in place its own interim arrangements to mitigate the risk of non-delivery, underspending and the impact on citizens that any moratorium on procurement will create, even for just a short period. These interim arrangements will also provide risk mitigation coverage for accounting officers and accounting authorities, enable synergy in decision-making and ensure that there is consistent application across the board when accounting officers and accounting authorities are exercising their obligations.

4. PROCESS FOLLOWED BY THE WCG TO DETERMINE A WAY FORWARD AND TO MITIGATE SERVICE DELIVERY RISK

- 4.1 The province has, since the issuance of the Constitutional Court judgment, followed an extensive consultation process with key stakeholders to determine an interim way forward that would mitigate the risks emanating from the current circumstances, as outlined above. The consultation process included:
- a) Consultation with the provincial Minister for Finance and Economic Opportunities , the National Treasury and Legal Services (various meetings from 16 February to date).
 - b) Written communication by the provincial Minister for Finance and Economic Opportunities to the national Minister of Finance on 27 February 2022 that:

- Reiterated the WCG's support to approach the Constitutional Court urgently to seek clarity on the suspension of invalidity of the 2017 Regulations;
 - Requested that the OCPO immediately recall the communication dated 25 February 2022 and re-issue an appropriate communication and advisory note;
 - Requested that urgent steps be taken to draft and publish succinct regulations for those areas in which the national Minister has the authority to issue regulations; and
 - Indicated that the various localization designations and related National Treasury Circulars must be recalled with immediate effect.
- c) A risk assessment undertaken by the Provincial Treasury from 16 February 2022, which is regularly being reviewed;
 - d) Consultation with the Policy Focus Group and Legal Services on 27 February 2022;
 - e) Supply Chain Management (SCM) Forum meeting held with SCM Managers and the broader complement of SCM officials 01 March 2022;
 - f) Provincial representation and tabling of concerns at the meeting of the Technical Committee on Finance (TCF), consisting of Provincial Heads of Treasuries and the National Treasury on 01 March 2022;
 - g) Risk assessments undertaken on the impact of the National Treasury letters by departments and public entities and submitted to the Provincial Treasury from 01 and 10 March 2022;
 - h) The development of a framework for interim arrangements sent to Accounting Officers and Chief Financial Officers for input and comment on 02 March 2022;
 - i) An extended Provincial Top Management (PTM) Meeting to table interim arrangement proposals on 03 March 2022;
 - j) Interim arrangement proposals tabled at Cabinet the briefing session held on 04 March 2022; and
 - k) Interim arrangement proposals formally tabled at Provincial Cabinet was noted and approved on 09 March 2022.

4.2 The Provincial Cabinet noted and approved the interim arrangements as articulated further in this Circular via Cabinet Minute 85/2022 dated 09 March 2022.

5. INTERIM ARRANGEMENTS FOR THE WCG UP UNTIL THE NEW REGULATIONS COMES INTO EFFECT

5.1 The national Minister is obligated to issue regulations in terms of section 2(1) of the Preferential Procurement Policy Framework Act, to prescribe the value thresholds that apply to the preference point system. Section 2(1) states that:

"(a) A Preference point system must be followed;

(b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goods as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;

(ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goods as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price"

5.2 The National Treasury published draft regulations for public comment on 10 March 2022, with the comment period closing on 11 April 2022 (attached as **Annexure C**). The Provincial Treasury communicated the draft regulations to departments and public entities for comment with a due date of 24 March 2022. It must however be noted that these draft regulations are not at present applicable and will only be formally gazetted after the period for public comment has closed. Hence in the absence of the Regulations the interim arrangements hereunder will apply to procurement up until the new Regulations are formally issued or clarity is provided by the Constitutional Court.

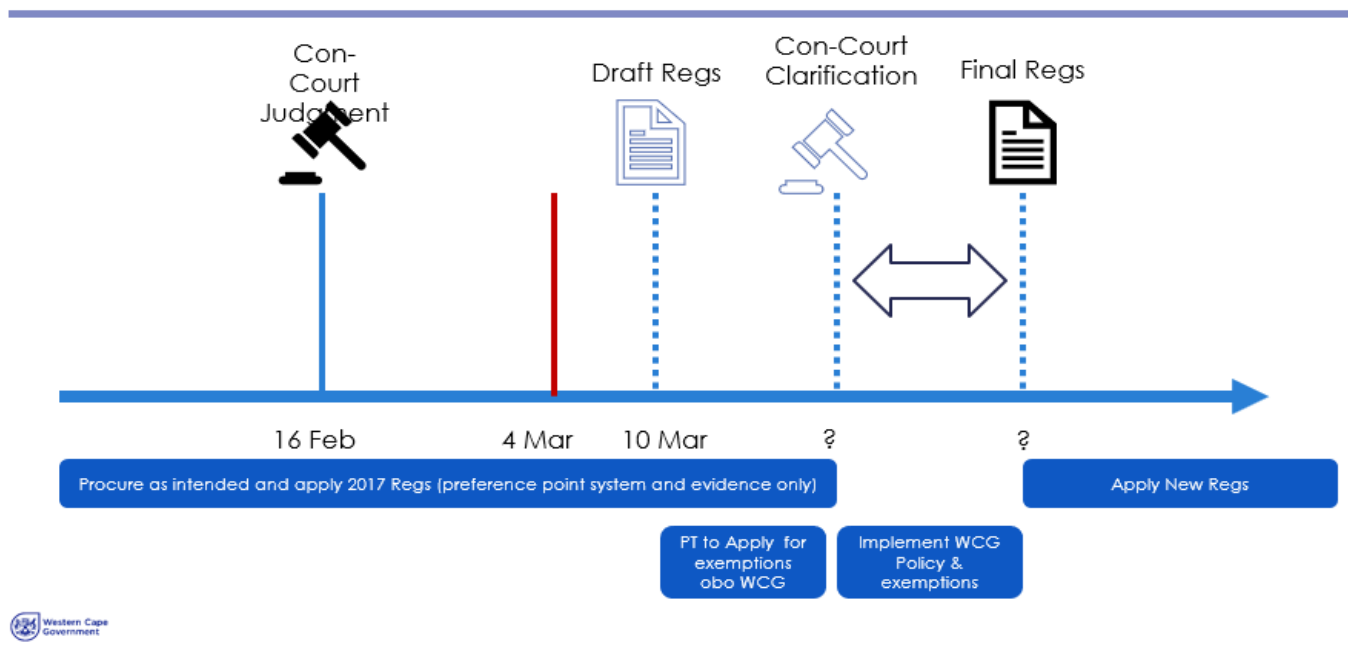
- 5.3 The WCG will maintain the status quo and apply the Preferential Procurement Policy Framework Regulations, 2017 (PPPFR) up until such time as the Constitutional Court clarifies the applicable date of the invalidity of said Regulations, or new Procurement Regulations come into effect.
- 5.4 The Provincial Cabinet has re-affirmed the preferential procurement policy statements for the province as defined in Cabinet Minute 87 of 2017 up until the Constitutional Court clarifies the applicable date of the invalidity of such regulations. Practically this means that procuring entities must:
- a) use the pre-existing points system with thresholds and associated formulas as per the PPPFR, 2017, i.e., 80/20 preference point system for procurement with a rand value equal to or above R30 000 up to R50 million and the 90/10 preference point system for procurement above R50 million (all applicable taxes included).
 - b) use the pre-existing mechanism to address the evidence requirements as it relates to the allocation of points for preference i.e., B-BBEE certificates and affidavits given that these matters were not in dispute and will be covered by the new National Treasury regulations;
 - c) the status quo as communicated via Treasury Circular 12/2017 in respect of the non-application of pre-qualification criteria remains applicable (Treasury Circular 12/2017 is attached herewith for ease of reference as **Annexure D**);
 - d) sub-contracting requirements as contemplated in the 2017 Procurement Regulations have also been declared as invalid. Empowerment impact assessments for procurement above R10 million will not be applied as the decision taken in the province to conclude empowerment impact assessments was in terms of the sub-contracting requirements included in the PPPFR. CIDB prescripts/ regulations in terms of empowerment impact assessments may still be concluded and sub-contracting as per the CIDB prescripts/ regulations in terms of the different CIDB contracts may still be used in terms of the different contracting models for construction-related bids; and
 - e) the status quo in terms of the advertisement and evaluation and awarding of quotations below R30 000 as articulated in the Provincial Treasury Instructions, 2019 and procuring entities accounting officers systems will be maintained.
- 5.5 Cabinet further approved the policy position to not implement pre-qualification criteria related to local content in terms of the PPPFA, given that this approach has been declared unconstitutional; until such time that the National Treasury and the Department of Trade, Industry and Competition (dtic) have determined a legal and viable modality for implementation. Hence procuring entities must not apply the local content and production requirements for designated sectors when advertising bids (including quotations). The local content and production Circulars issued by the Provincial Treasury are therefore held in abeyance as articulated in paragraph 6 hereunder.
- 5.6 In respect of NT's letter issued on 25 February 2022, the following must be noted:
- a) tenders advertised before 16 February 2022 must be finalised in terms of the PPPFR, 2017;
 - b) tenders advertised on or after 16 February 2022 must be evaluated as intended given the WCG's interim arrangements to maintain the status quo in terms of the PPPFR, 2017; and
 - c) in order to mitigate the risks for procuring entities as articulated above, accounting officers and accounting officers may proceed with the advertisement of new bids (including quotations) as intended and apply the interim arrangements as it relates to the evaluation of bids as articulated in paragraph 5.4 and 5.5 above.
- 5.7 It must be noted further that the WCG via the Provincial Treasury will apply for exemption from the national Minister of Finance from section 2 (1)(b)–(g) and subsection 2 of the PPPFA to apply its own preferential procurement policy for certain categories of procurement up until National Treasury issues new regulations to the Act, and to the extent that they meet the exemption requirements in terms of

section 3 of the PPPFA. The exemption will only be implemented should the suspension of the invalidity of the regulations not be granted by the court and up until the new regulations are issued.

- 5.8 The categories of procurement that will be included in the exemption request is attached hereto marked **Annexure E**. The information reflected in the annexure is as received from procuring entities, however should procuring entities want to augment the information, an update may be provided to the Provincial Treasury via SupplyChainManagement.HDPFMA@westerncape.gov.za by no later than 31 March 2022.
- 5.9 The abovementioned interim arrangements are depicted diagrammatically hereunder in Illustration 1 for ease of reference of the requirements:

Illustration 1:

Proposed Way Forward



- 5.10 The Provincial Treasury will approach the National Treasury and the Auditor-General (AG) for approvals and concurrence, where necessary with our approach. This must be understood in the context of the PPPFA providing for organs of state to determine their own Preferential Procurement Policies and for the National Treasury to determine the threshold values and the calculations associated with the application of preferences.
- 5.11 The Provincial Treasury will provide the following support to departments and public entities:
- Making a consolidated application for exemption to the National Treasury as contemplated in section 3 (c) of the Procurement Act.
 - Consolidating all awards reported for the Province and making these available to the Auditor General;
 - Procurement assistance and guidance via the SCM helpdesk;
 - Data requests providing SCM Insights as it relates to expenditure and procurement planning progress via the procurement planning toolkit;
 - eProcurement including WC Supplier Evidence Bank and financial system support;

- f) Partnerships with departments in liaising with the Office of the Chief Procurement Officer and the Auditor-General;
- g) Regular engagements via CFO and SCM fora; and
- h) Communication of audit finding (Comaf) support.

5.12 The Provincial Treasury will re-assess the situation and the direction provided in this Circular once the Constitutional Court direction has been received via the National Treasury or the new Regulations are formally issued and take effect. The Constitutional Court has indicated that the last date for filing with respect to the matter is 25 March 2022

5.13 Further guidance will be issued by the Provincial Treasury should any supervening communication or action be taken by the National Treasury or by way of Court direction require that the interim arrangements be reviewed.

6. ACCOUNTING OFFICERS SYSTEM REQUIREMENTS

6.1 The Provincial Treasury issued the revised pro-forma Accounting Officers System (AOS) via Treasury Circular 30 of 2022 with an implementation date of 31 March 2022. Given the current context in terms of the regulations and the fact that procuring entities may not have had sufficient time to revise its AOS, the Provincial Treasury herewith postpones the implementation date of the AOS to **01 July 2022**. However, should procuring entities be in a position to implement its revised AOS sooner than 1 July 2022, it may do so, however it must be noted that the requirements mentioned in paragraph 6.2 and more specifically in Table 1: hereunder must be held in abeyance.

6.2 The following sections of the AOS as well as any other section referencing the PPPFR, 2017 are held in abeyance until the necessary clarity is received. Procuring entities are required to note that all Treasury Circulars issued in respect of local content and production are also held in abeyance:

Table 1:

Reference	Paragraph
Paragraph 9.2.12 (a-b)	Invitation of price quotations (local production and content and evaluation of bids based on functionality)
Paragraph 10.3.10	WCBD 6.2
Paragraph 10.5.1 to 10.5.4	Bids featuring functionality
Paragraph 10.6	local production and content
Paragraph 10.12:	evaluation of bids based on functionality as a criterion
Paragraph 10.11.1 (c)	consideration of any functionality criteria
Paragraph 10.11.3 (b)	Exclusion of Phase 2 of evaluation: where applicable, evaluate functionality compliance with bid specifications and the bidder's ability to perform.
Paragraph 10.13	evaluation of bids based on a stipulated minimum threshold for local production and content
Paragraph 10.16:	Subcontracting as a condition of tender
Paragraph 10.17	Sub-contracting after award
Annexure 5	Documented process on the implementation of local production and content requirements

7. REQUEST

- 7.1 Accounting Officers and accounting authorities must note the content of this Provincial Treasury Circular and communicate these requirements to officials under their control and responsible for the functions depicted in this Circular.
- 7.2 Accounting officers and accounting authorities must also note that this Circular augments Treasury Circular 12/2017 in terms of the interim strategy articulated in the Circular. However, the following remains applicable:
 - a) further initiatives for implementation (paragraph 4 and 6.1); and
 - b) implementation of municipal regional indicators (paragraph 5.4)
- 7.3 Departments must record all risks, impact on service delivery, and budgetary implications as part of their record of decision and keep this as evidence for audit purposes.
- 7.4 Departments via their Accounting Officers are requested to provide comments to the draft Preferential Procurement Regulations attached herewith **Annexure C** in the enclosed WCG comments template marked **Annexure F**.

8. ENQUIRIES

- 8.1 All enquiries in respect of this circular or any other enquiries in respect of procurement planning must be directed to: SupplyChainManagement.HDPFMA@westerncape.gov.za.

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