

SAA's procurement policy illegal - lawyers

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17 Aug 2017

SAA's procurement policy, which sets aside 30% to small businesses, is illegal and will expose the airline to legal action by suppliers, including Bidair Services, according to a legal opinion obtained by the national carrier. The policy, which favours small, medium and micro enterprises owned by military veterans, rural women and previously disadvantaged youth, was introduced in 2015 after a board resolution taken on 26 August that year.



At the time, SAA invoked President Jacob Zuma's 2015 state of the nation address when it introduced the controversial stipulation that set it on a collision course with the Treasury and the Department of Trade and Industry.

SAA spokesman Tlali Tlali on Tuesday confirmed the airline had obtained the legal opinion.

Tlali said: "The opinion is privileged advice for the benefit of the board. We are not in a position to comment on it. "It [the legal opinion] was not meant for the consumption of external parties," he said.

The Treasury and the Department of Trade and Industry have previously locked horns with SAA on the policy, with both departments having written to the airline advising the national carrier that it was acting outside the law and prescribed regulations.

The department had advised the airline, during their engagements, to apply for a deviation and exemption from Trade and Industry Minister Rob Davies if SAA wanted to go ahead with its procurement policy.

In terms of the legal opinion - which was issued to SAA on 27 July - the national carrier was advised to withdraw any tender entered into where the procurement policy was used as a frame of reference, as well as all pending tenders. This was necessary as the policy had been implemented before the Treasury published updated regulations of the Preferential Procurement Policy Framework Act in January 2017, which came into effect on 1 April and provides for the 30% set aside within a set criteria.

"The regulation was unlawful and invalid in the light of the fact that the regulatory framework up to 31 March 2017 did not cater for the 30% procurement spend by an organ of state on small, medium and micro enterprises," says the legal opinion. "SAA should, in accordance with its [memorandum of incorporation] and [supply chain management] policies, at all times follow and adhere to guidelines and directives issued by National Treasury pertaining to the 30% requirements," according to the legal opinion.

Liable to claims

Bidair Services is contracted by the airline to provide grooming, toilet and water services. The company had not responded to e-mailed questions at the time of going to print, and neither had the Treasury.

"In [the] light of the invalidity of the 30% procurement spend requirement until 31 March 2017, SAA may be liable to claims from tenders such as Bidvest/Bidair on whom this requirement was imposed." SAA is warned in the opinion, however, "it is not necessary to rescind the 2015 resolution but any tenders that are currently pending in terms thereof and in terms whereof SAA has imposed the 30% obligation should be withdrawn or renegotiated to reflect the correct legal position".

Criteria

Also, as of 1 April 2017 SAA was allowed to use the 30% procurement spend in terms of the updated Procurement Policy Framework Act, but only if it fulfilled the following criteria: advancement of designated groups, a contract above R30m, and feasibility of subcontracting a R30m-plus contract.

Tali declined to respond whether SAA had started acting on the legal advice that it review contracts on which it had imposed the requirement prior to the updated regulations coming into effect in 2017.

The legal opinion was required within 48 hours and its drafters based it on the premise that SAA had ticked all the correct boxes in terms of taking its resolution with a quorate board.

Source: Business Day