

REPUBLIC OF SOUTH AFRICA

**DRAFT**

**PUBLIC PROCUREMENT BILL**

22 May 2023

**Subject to final vetting & certification by the Office of the Chief State  
Law Adviser and proof reading before introduction in Parliament**

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(As introduced in the National Assembly (proposed section 76); explanatory  
summary of Bill published in Government Gazette No. of )  
(The English text is the official text of the Bill)

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**(MINISTER OF FINANCE)**

**DRAFT BILL**

**To regulate public procurement; to prescribe a framework within which preferential procurement must be implemented; and to provide for matters connected therewith.**

**PREAMBLE**

**WHEREAS** section 217(1) of the Constitution of the Republic of South Africa, 1996, stipulates that contracting of goods and services by organs of state in the national, provincial sphere of government, and other institutions identified in national legislation, must occur in accordance with a system which is fair, equitable, transparent, competitive and cost-effective;

**AND WHEREAS** section 217(2) of the Constitution permits organs of state and the identified other institutions, to implement a procurement policy providing for categories of preference in the allocation of contracts and the protection or advancement of persons disadvantaged by unfair discrimination within a framework prescribed by national legislation;

**AND WHEREAS** section 216(1) of the Constitution requires national legislation to prescribe measures to ensure both transparency and expenditure control in each sphere of government by introducing, among others, uniform treasury norms and standards;

**AND WHEREAS** section 195(1) and (3) of the Constitution provides that national legislation must among others ensure the promotion in public administration of the following principles:

- A high standard of professional ethics;
- efficient, economic and effective use of resources; and
- development-oriented, accountability and transparency;

**AND RECOGNISING** that legislation regulating procurement by organs of state is fragmented and legislation regulating preferential procurement constrains justified advancement of persons or categories of persons;

**AND IN ORDER TO** create a single framework that regulates public procurement, including preferential procurement, by all organs of state, which among others—

- promotes the use of technology for efficiency and effectiveness; and
- enhances transparency and integrity, among others, to combat corruption,

**BE IT THEREFORE ENACTED** by the Parliament of the Republic of South Africa, as follows:—

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Draft Bill - Subject to Office of Chief State Law Adviser's certification

**CHAPTER 1**  
**DEFINITIONS, OBJECTS, APPLICATION AND ADMINISTRATION OF ACT**

**Definitions**

1. (1) In this Act, unless the context indicates otherwise—
- "**accounting authority**" means an accounting authority as defined in section 1 of the Public Finance Management Act;
- "**accounting officer**" means—
- (a) in relation to a department or constitutional institution, the accounting officer as defined in section 1 of the Public Finance Management Act;
  - (b) in relation to a municipality, the municipal official referred to in section 60 of the Municipal Finance Management Act; or
  - (c) in relation to a municipal entity, the official of the entity referred to in section 93 of the Municipal Finance Management Act;
- "**bid**" means a written offer, in the form determined by instruction, in response to an invitation for procurement through any method envisaged in this Act;
- "**bid committee**" means persons appointed by the accounting officer or accounting authority to perform functions in respect of different stages of considering bids;
- "**bid document**" means a written or electronic document, in the form determined by instruction, required to be submitted in response to an invitation to bid;
- "**bidder**" means any person or an association of two or more persons that submit a bid;
- "**capital asset**" means an asset that is tangible and generally illiquid property which a procuring institution intends to use to generate revenue and expects its usefulness to exceed 12 months;
- "**Constitution**" means the Constitution of the Republic of South Africa, 1996;
- "**corruption**" means an offence under the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004);
- "**days**" means any days other than Saturdays, Sundays or public holidays as defined in the Public Holidays Act, 1994 (Act No. 36 of 1994);
- "**decision**" means—
- (a) a decision by a procuring institution, the Public Procurement Office or a provincial treasury in terms of this Act (herein referred to as "the decision");
  - (b) an omission to take the decision within the period prescribed or specified in this Act;
  - (c) an omission to take the decision within a reasonable period, if this Act does not prescribe or specify a period;
  - (d) an action taken as a result of the decision; or
  - (e) an omission to take action as a result of the decision within the prescribed period or if not prescribed, within 30 days;
- "**emergency**" means an event which is unexpected and requires immediate action to alleviate one or more of the following:
- (a) human injury, death or suffering or deprivation of human rights;
  - (b) serious damage to property or financial loss;
  - (c) livestock suffering or death;
  - (d) serious environmental damage or degradation; or
  - (e) interruption of essential services;

**"immediate family member"** means—

- (a) the spouse, civil partner or life partner;
- (b) the previous spouse, civil partner or life partner;
- (c) a child or stepchild or a spouse, civil partner or life partner of the child or stepchild;
- (d) a parent; or
- (e) a sibling or step sibling or a spouse, civil partner or life partner of the sibling or step sibling;

**"infrastructure"** means the physical facilities and systems that are required to directly or indirectly provide services to the public;

**"instruction"** means an instruction issued by the Public Procurement Office in terms of section 5;

**"member of the Tribunal"** means a member of the Tribunal referred to in section 33;

**"Minister"** means the Cabinet member responsible for financial matters;

**"municipal entity"** has the meaning assigned to it in section 1 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000);

**"Municipal Finance Management Act"** means the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003);

**"municipality"** when referred to as—

- (a) a corporate body, means a municipality as described in section 2 of the Local Government: Municipal Systems Act, 2000; or
- (b) a geographic area, means a municipal area determined in terms of the Local Government: Municipal Demarcation Act, 1998 (Act No. 27 of 1998);

**"national security"** includes the protection of the people of the Republic and the territorial integrity of the Republic against—

- (a) the threat of use of force or the use of force;
- (b) foreign acts directed at undermining the constitutional order of the Republic;
- (c) terrorism or terrorist related activities;
- (d) espionage;
- (e) exposure of a state security matter with the intention of undermining the constitutional order of the Republic;
- (f) exposure of economic, scientific or technological secrets vital to the Republic;
- (g) sabotage;
- (h) serious violence directed at overthrowing the constitutional order of the Republic; and
- (i) acts directed at undermining the capacity of the Republic to respond to the use of, or the threat of the use of, force and carrying out of the Republic's responsibilities to any foreign country and international organisation in relation to any of the matters referred to in this definition, whether directed from, or committed within, the Republic or not, but does not include lawful political activity, advocacy, protest or dissent;

**"National Treasury"** means the National Treasury established by section 5 of the Public Finance Management Act;

**"official"** means an employee of a procuring institution;

**"organ of state"** has the meaning assigned to it in section 239 of the Constitution;

**"panel"** means a panel of the Tribunal constituted in terms of section 41;

**"prescribed"** means prescribed by regulation in terms of section 58;

**"procurement"** means—

- (a) the acquisition of goods, services, infrastructure or capital assets;
  - (b) the construction, repair or maintenance of infrastructure or capital assets;
  - (c) the letting or disposal of assets,
- by a procuring institution;

**“procurement system”** means a procurement system envisaged in section 18(1);

**“procuring institution”** means an institution referred to in section 3(1);

**“Promotion of Administrative Justice Act”** means the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000);

**“provincial treasury”** means a provincial treasury established by section 17 of the Public Finance Management Act;

**“Public Finance Management Act”** means the Public Finance Management Act, 1999 (Act No. 1 of 1999);

**“public office bearer”** means—

- (a) a member of Cabinet or a Deputy Minister;
- (b) a member of the National Assembly;
- (c) a permanent delegate to the National Council of Provinces;
- (d) a member of an Executive Council;
- (e) a member of a provincial legislature;
- (e) a judicial officer envisaged in section 174 of the Constitution;
- (f) a member of a Municipal Council;
- (g) a member of the National House of Traditional and Khoi-San Leaders;
- (h) a member of a provincial house of Traditional and Khoi-San leaders;

**“public-private partnership”** means a contract between a procuring institution and a private party where the private party—

- (a) performs a function on behalf of the procuring institution or acquires the use of property of an organ of state for its own commercial purposes;
- (b) assumes substantial financial, technical and operational risks in connection with the performance of that function or the use of that property; and
- (c) receives a benefit for performing that function or from using that property, either by way of—
  - (i) a consideration payable by the procuring institution;
  - (ii) charges or fees to be collected by the private party from users or customers of a service provided to them; or
  - (iii) a combination of such consideration and such charges or fees;

**“Public Procurement Office”** means the Public Procurement Office established by section 4;

**“publish”** means publication in the *Gazette* or on a website;

**“regulation”** means a regulation made in terms of section 58;

**“related persons”** means persons who are connected to one another in any manner envisaged in section 2(1)(a) to (c), read with section 2(2), of the Companies Act, 2008 (Act No. 71 of 2008);

**“standard bid documents”** means standard bid documents issued in terms of section 18(4);

**“supplier”** means a person awarded a bid in terms of this Act;

**“transversal term contract”** means a contract arranged by the relevant treasury for procurement that is required by two or more procuring institutions;

**“treasury”** means the National Treasury or a provincial treasury;

**“Tribunal”** means the Public Procurement Tribunal established by section 32;



**"Tribunal rules"** means rules made in terms of section 42;

**"this Act"** includes the regulations, codes of conduct and instructions made in terms of this Act.

(2) Any decision, approval, determination, instruction, notification, notice, report or request in terms of this Act must be in writing.

### **Objects of Act**

2. (1) The objects of this Act are, with due regard to sections 195, 216 and 217 of the Constitution, to—

- (a) introduce uniform treasury norms and standards for all procuring institutions to implement their procurement systems as envisaged in section 217(1), read with section 216(1), of the Constitution;
- (b) determine a preferential procurement framework for all procuring institutions within which to implement their procurement policies as envisaged in section 217(2) and (3) of the Constitution.

(2) The uniform treasury norms and standards referred to in subsection (1)(a) must, among others—

- (a) ensure value for money in the use of public funds through, among others, the assessment of the costs, benefits and risks;
- (b) advance ethical conduct and combat corruption through access to procurement information and other transparency measures and introducing enforcement and appropriate sanctions for transgressors;
- (c) advance transformation, beneficiation and industrialisation;
- (d) stimulate economic development by supporting—
  - (i) goods that are produced and services provided in the Republic;
  - (ii) procurement which is developmental in nature;
  - (iii) innovation; and
  - (iv) investment;
- (e) improve efficiency and effectiveness in procurement by streamlining procurement processes, amongst others, through the use of technology;
- (f) provide for effective and expedited dispute resolution of procurement related decisions; and
- (g) promote a sustainable environment.

### **Application and administration of Act**

3. (1) This Act applies to—

- (a) a department as defined in section 1 of the Public Finance Management Act;
- (b) a constitutional institution listed in Schedule 1 to the Public Finance Management Act;
- (c) a municipality or a municipal entity; and
- (d) a public entity listed in Schedule 2 or 3 to the Public Finance Management Act.

(2) Chapter 4 and the definitions in section 1 and regulations made under section 58, applicable to Chapter 4, apply to Parliament and provincial legislatures.

(3) This Act applies to—

- (a) all procurement carried out by a procuring institution, including procurement through donor or grant funding; and
- (b) any person who submits a bid or has been awarded a bid.
  - (4) In the event of a conflict between a provision of this Act and a provision of any other pre-existing legislation, the provision of this Act prevails.
  - (5) The Minister is responsible for the administration of this Act.

Draft Bill - Subject to Office of Chief State Law Adviser's certification

**CHAPTER 2**  
**PUBLIC PROCUREMENT OFFICE, PROVINCIAL TREASURIES AND**  
**PROCURING INSTITUTIONS**

**Part 1**  
**Public Procurement Office**

**Establishment of Public Procurement Office**

4. (1) There is hereby established a Public Procurement Office within the National Treasury.

(2) The Head and officials of the Public Procurement Office must perform their functions in terms of this Act impartially and without fear, favour or prejudice.

**General functions of Public Procurement Office**

5. (1) The Public Procurement Office must, in accordance with this Act—

- (a) promote compliance with this Act by procuring institutions;
- (b) promote and implement necessary measures to maintain the integrity of procurement;
- (c) guide and support officials and procuring institutions to ensure compliance with this Act and in doing so—
  - (i) provide advice and assistance to procuring institutions;
  - (ii) ensure the professional development and training of officials involved in procurement;
- (d) develop and implement measures to ensure transparency in procurement;
- (e) promote standardisation in procurement;
- (f) promote the use of technology and innovation and learning towards modernisation of the public procurement system;
- (g) monitor and oversee the implementation of this Act;
- (h) intervene by taking appropriate steps to address a material breach of this Act by a procuring institution as may be prescribed;
- (i) create, maintain and publish one or more databases to facilitate the implementation of this Act; and
- (j) perform any other duties imposed by this Act.

(2) The Public Procurement Office may, in accordance with this Act—

- (a) issue binding instructions as provided for this Act and on any other procurement matter for the effective implementation of this Act;
- (b) issue non-binding guidelines to assist procuring institutions with the implementation of this Act or any other procurement related matter;
- (c) determine a model procurement policy for different categories of procuring institutions and different categories of procurement;
- (d) if of the view that the procurement policy applied by a procuring institution does not comply with a provision of this Act, review it and advise the institution on amendments; and

- (e) exercise other powers conferred by this Act.
- (3) The Public Procurement Office may issue different instructions in terms of subsection (2) for—
- (a) different categories of procuring institutions; and
  - (b) different categories of procurement.

## **Part 2**

### **Provincial treasuries**

#### **Functions of provincial treasuries**

- 6.** (1) A provincial treasury must—
- (a) within its province—
    - (i) monitor and oversee the implementation of the procurement function by a procuring institution; and
    - (ii) promote and enforce effective management and transparency in respect of the procurement function of procuring institutions;
  - (b) intervene by taking appropriate steps to address a material breach of this Act by a procuring institution within its province as may be prescribed;
  - (c) provide any information required by the Public Procurement Office in terms of this Act; and
  - (d) perform other duties imposed by this Act.
- (2) A provincial treasury, within its province, may—
- (a) issue binding provincial instructions on procurement matters for the effective implementation of this Act and not inconsistent with an instruction issued by the Public Procurement Office;
  - (b) issue non-binding guidelines to assist procuring institutions with the implementation of this Act or any other procurement related matter;
  - (c) assist procuring institutions in building their capacity for efficient, effective and transparent procurement management;
  - (d) if of the view that the procurement policy applied by a procuring institution does not comply with a provision of this Act, review it and advise on amendments; and
  - (e) exercise other powers conferred by this Act.
- (3) A provincial treasury may issue different instructions in terms of subsection (2)(a) for—
- (a) different categories of procuring institutions; and
  - (b) different categories of procurement.
- (4) If a provincial treasury is of the view that the procurement policy applied by a procuring institution, which is a municipality or municipal entity in its province, does not comply with a provision of this Act, the provincial treasury may, after consultation with the Public Procurement Office, review the policy and advise on amendments.

## **Part 3**

### **Procuring institutions**

### **Decision-making for procuring institution**

7. The accounting officer or accounting authority, as the case may be, is responsible for making decisions on behalf of the procuring institution in terms of this Act.

### **Duties of procuring institution**

8.(1) A procuring institution must—

- (a) conduct procurement in accordance with this Act;
- (b) develop and implement an effective and efficient procurement system as envisaged in section 18;
- (d) define procurement needs by compiling a statement of requirements and the statement must be included in the invitation documents, evaluation process and contracts;
- (e) procure in accordance with the prescribed thresholds;
- (f) clearly state the methodology and criteria to be used in the evaluation of bids;
- (g) provide procurement information as may be prescribed or as the Public Procurement Office or the relevant provincial treasury may require; and
- (h) take steps to prevent non-compliance with this Act.

(2)(a) A procuring institution may, as prescribed, reconsider a decision it made in terms of this Act, if the decision was based on error of law or fact or fraud.

(b) Paragraph (a) does not apply to a decision referred to in section 31(1).

## **CHAPTER 3**

### **PROCUREMENT INTEGRITY, DEBARMENT AND DECLARING PROHIBITED PRACTICES**

#### **Codes of conduct**

9. (1) An accounting officer or other official, a member of an accounting authority, a bid committee or the Tribunal, a bidder or a supplier or any other person, involved in procurement in terms of this Act, must comply with the prescribed code of conduct.

(2) Any contravention of the prescribed code of conduct by an accounting officer or other official, or a member of accounting authority, a bid committee or the Tribunal constitutes misconduct and steps must be taken in terms of the applicable procedure.

#### **Conduct of persons involved in procurement**

10. An accounting officer or other official, or a member of an accounting authority, bid committee or the Tribunal, or any other person, involved in procurement in terms of this Act must—

- (a) exercise powers and perform duties impartially and with the degree of care and diligence that a reasonable person would exercise in similar

- circumstances;
- (b) not use their position, or information obtained because of their position, improperly to gain an advantage for themselves or someone else or cause prejudice to any other person;
  - (c) not interfere with or exert undue influence on any person involved in procurement; and
  - (d) avoid conflict of interest.

### **Due diligence and declaration of interest regarding persons involved in procurement**

**11.** (1) A procuring institution must take steps in accordance with prescribed procedures to identify—

- (a) automatically excluded persons as envisaged in section 13 and their immediate family members; and
- (b) related persons as envisaged in subsection (3).

(2) (a) The steps envisaged in subsection (1) include the prescribed declaration of interest to be made by—

- (i) all bidders, in the case of bids; and
- (ii) all applicants, in the case of applications for registration on a database created by the Public Procurement Office in terms of section 5(1)(j).

(b) A failure to submit a declaration or submitting a false declaration renders a bid invalid.

(3) If a person related to an accounting officer or other official or a member of an accounting authority, a bid committee or the Tribunal involved in procurement in terms of this Act, has, or intends to acquire, a direct or indirect personal interest in a procurement matter, the accounting officer or other official or a member of an accounting authority, a bid committee or the Tribunal—

- (a) must disclose such interest, immediately after receiving the agenda of the meeting of a bid committee of the procuring institution regarding a procurement, or on notification of a matter being brought to the attention of the bid committee or at any time during the consideration of the bid when the official or other person becomes aware of the interest; and
- (b) may not be present at or participate in the deliberations or decision-making process of the procuring institution in relation to the agenda item or the matter in question.

(4) A disclosure of interest made in terms of subsection (3) must be recorded in the minutes of the meeting at which it is made, or it relates to or any document seeking a decision.

### **Undue influence**

- 12.** (1) No person may—
- (a) interfere with, or influence, the procurement process of a procuring institution;
  - (b) impede the accounting officer or the accounting authority or an official in fulfilling his or her responsibilities in terms of this Act; or
  - (c) tamper with any bid after its submission or any bid after its award.

(2) Subsection (1) does not apply to an official or any other person exercising a power or performing a duty in terms of legislation.

(3) Subsection (1) may not be construed to prohibit any person from disclosing an irregularity regarding a procurement process.

### **Automatic exclusion from procurement**

**13.** (1) The following persons may not submit a bid:

- (a) A public office bearer;
- (b) a leader of a political party registered in terms of the Electoral Commission Act, 1996 (Act No. 51 of 1996);
- (c) a person appointed in terms of section 9 or 12A of the Public Service Act, 1994 (Proclamation No. 103 of 1994);
- (d) an official or employee of a constitutional institution listed in Schedule 1 to the Public Finance Management Act;
- (e) an official or employee of a public entity listed in Schedules 2 and 3 to the Public Finance Management Act;
- (f) an official or employee of a municipality or municipal entity;
- (g) any entity in which a person mentioned in paragraphs (a) to (f) is a director or has a controlling or other substantial interest;
- (h) a bidder or supplier debarred in terms of section 16;
- (i) an entity in which a bidder or supplier debarred in terms of section 16—
  - (i) has a controlling interest; or
  - (ii) is a director or a member; and
- (j) an executive member of a controlling body of a procuring institution.

(2) A non-executive member of a controlling body of a procuring institution may not submit a bid in that institution.

(3) A person related to a person referred to in paragraph (a), (c), (d), (e) or (f) of subsection (1) may not submit a bid in the institution in which the person is a member or employed.

### **Directions inconsistent with Act**

**14.** (1) If an accounting officer, an accounting authority, a member of an accounting authority or an official of a procuring institution (herein called "the affected person") is directed by any person with authority over the affected person (herein called "the person with authority"), to do or omit to do anything in respect of procurement, which the affected person believes he or she is not authorised in terms of this Act, the affected person must not comply with the direction and immediately—

- (a) submit in writing to the person with authority, the objection and the reason for the objection; and
- (b) inform in writing his or her supervisor, where applicable, and the Public Procurement Office, of the direction, the objection and the reason for the objection.

(2) The affected person may not, despite any term of his or her employment, be subjected to any disciplinary measures due to the non-compliance with the direction of the person with authority.

### Prohibition of certain practices

- 15.** (1) The Public Procurement Office—
- (a) may in accordance with a prescribed process declare a particular procurement practice to be prohibited for all or a category of procuring institutions; and
  - (b) must publish the declaration.
- (2) The Public Procurement Office must take into account the following principles when considering whether to prohibit a practice:
- (a) That the practice concerned is not likely to result in fairness, equity, transparency, competitiveness or cost-effectiveness, or to promote socio-economic, industrial or environmental development; and
  - (b) that if the practice is allowed to continue, it is likely to defeat the objects of this Act.
- (3) A procurement practice prohibited in terms of subsection (1) may not be applied by a procuring institution subject to the declaration.

### Debarment

- 16.** (1) Before issuing a debarment order in terms of this section, the Public Procurement Office must provide the bidder or supplier or any of the directors, members, trustees or partners of that bidder or supplier (herein called "the affected person") with a notice stipulating the reasons for the intended debarment.
- (2) The notice must—
- (a) indicate the reason for the intended debarment; and
  - (b) invite the affected person to provide reasons within 10 days why he or she must not be debarred.
- (3) The Public Procurement Office must issue a debarment order against a bidder or supplier, and may issue a debarment order against any of the directors, members, trustees or partners of that bidder or supplier, if the bidder or supplier—
- (a) provided false information in a bid or any other document submitted to a procuring institution in connection with a procurement process or contract;
  - (b) provided false information for purposes of registration in a database as envisaged in this Act;
  - (c) connived to interfere with the participation of other bidders;
  - (d) committed any offence involving corruption, fraud, collusion or coercion, price fixing, a pattern of under-pricing or breach of confidentiality relating to procurement by a procuring institution;
  - (e) accepted, delivered against, or made a claim for payment against, an order knowing that the order had not been authorised or was not in a prescribed format or had been issued by a person not authorised to do so;
  - (f) refused to sign a contract without reasonable justification or to furnish a performance security in accordance with the terms of the bid;
  - (g) has not performed a material contractual obligation not due to circumstances beyond the control of the supplier;
  - (h) has been convicted of an offence relating to—
    - (i) obtaining or attempting to obtain a contract or subcontract; or



- (ii) business or professional activities;
- (i) attempted, or conspired with, aided, abetted, induced or incited another person to contravene a provision of this Act; or
- (j) contravened a provision of this Act.
  - (4) (a) The Public Procurement Office must consider the reasons submitted in terms of subsection (2)(b) and decide whether to issue a debarment order.
    - (b) The Public Procurement Office must inform the affected person of the decision within five days from the date of the decision.
  - (5) A debarment order takes effect from—
    - (a) the date on which it is served on the affected person; or
    - (b) if the order specifies a later date, the later date.
  - (6) (a) A debarment order may not exceed the prescribed period.
    - (b) Different periods may be prescribed for debarment in terms of subsection (3).
  - (7) A debarment order prohibits the affected person, for the period specified in the debarment order, from participating in procurement by procuring institutions generally or in circumstances specified in the order.
  - (8) (a) A person debarred in terms of this section may not engage in conduct that, directly or indirectly, contravenes the debarment order.
    - (b) Without limiting paragraph (a), a person debarred contravenes that paragraph if the person enters into an arrangement with another person to engage in the conduct that directly or indirectly contravenes a debarment order in accordance with the directions of the person debarred.
  - (9) A procuring institution must—
    - (a) inform the Public Procurement Office of any bidder or supplier alleged to have committed any of the acts listed in subsection (3) for possible debarment; and
    - (b) submit the relevant evidence in support of the allegation.
  - (10) A procuring institution must take all reasonable steps to comply with the conditions of the debarment order.
  - (11) The Public Procurement Office may, after informing the relevant procuring institution, on application by the affected person—
    - (a) reduce the period of the debarment order; or
    - (b) revoke the debarment order, if the order was made in error of fact or law or fraud.
  - (12) The Public Procurement Office must—
    - (a) establish and maintain a debarment register for persons debarred in terms of this section; and
    - (b) make the register publicly available.

## CHAPTER 4 PREFERENTIAL PROCUREMENT

### Preferential procurement policy

- 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 (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 to make regulations under this Chapter regarding a matter pertaining to the portfolio of the first-mentioned Minister.

Draft Bill - Subject to Office of Chief State Law Adviser's certification

**CHAPTER 5  
GENERAL PROCUREMENT REQUIREMENTS**

***Part 1***

***Procurement system and methods and related matters***

**Procurement system and methods**

**18.** (1) The Minister must prescribe—

- (a) a procurement system for procuring institutions for—
  - (i) procurement and strategic sourcing of goods or services;
  - (ii) procurement and strategic sourcing of infrastructure and capital assets and goods or services related to infrastructure and capital assets; and
  - (iii) the disposal and letting of assets of a procuring institution;
- (b) types of procurement methods;
- (c) methods for disposal and letting of assets by a procuring institution;
- (d) the requirements and procedure to be followed for each method prescribed in terms of paragraph (b) or (c); and
- (e) procurement thresholds.

(2)(a) The types of procurement methods to be prescribed, must include, but are not limited to, transversal term contracting and public-private partnerships.

(b) The regulations envisaged in paragraph (a) for transversal term contracting must determine—

- (i) a process for identifying what is to be procured through transversal term contracts; and
- (ii) when a procuring institution must participate in a transversal term contract.

(3) A procurement system referred to in subsection (1) must provide for the following matters in a manner consistent with this Act:

- (a) Procurement policy;
- (b) institutional and governance arrangements;
- (c) demand management;
- (d) procurement planning and budgeting;
- (e) acquisition management;
- (f) contract management, including assessment of projects against outcomes;
- (g) risk management;
- (h) logistics management;
- (i) asset management;
- (j) disposal management;
- (k) monitoring and assessment of procurement performance; and
- (l) reporting.

(4) The Public Procurement Office may, by instruction, determine standard bid documents.

(5) A procuring institution may stipulate in the bid documents, irrespective of the procurement method, that bidders may only quote in South African currency, inclusive of all applicable taxes.

(6) The Public Procurement Office must create and maintain a database in terms of section 5(1)(i) for prospective suppliers and procuring

institutions may only procure from suppliers listed in that database.

(7) A procuring institution may not split procurement or use different procurement methods to avoid the prescribed threshold.

### **Use of another organ of state**

- 19.** A procuring institution may, as prescribed—
- (a) acquire goods, services, infrastructure or capital assets from another organ of state;
  - (b) use another organ of state to construct, repair or maintain infrastructure or capital assets;
  - (c) let assets to another organ of state; or
  - (d) transfer, or otherwise dispose of assets, to another organ of state.

### **Function performed by another person or organisation**

**20.** If a procuring institution transfers funds to a person or organisation other than an organ of state to perform a function on behalf of the procuring institution in terms of legislation authorising it, any procurement required to perform the function must be in accordance with this Act.

### **Measures to prevent abuse of procurement system**

- 21.** The accounting officer or accounting authority of a procuring institution must—
- (a) take necessary steps to prevent non-compliance with this Act and abuse of its procurement system;
  - (b) take necessary steps to ensure that no person interferes with its procurement system or is able to amend or tamper with any bid or contract;
  - (c) investigate any allegation against an official or other role player of corruption, improper conduct or failure to comply with its procurement system, and—
    - (i) where necessary, take steps against that official or other role player, and inform the Public Procurement Office and the relevant provincial treasury of those steps; and
    - (ii) report to the South African Police Service any conduct that may constitute a criminal offence;
  - (d) reject a recommendation for the award of a bid if the recommended bidder has—
    - (i) made a misrepresentation or submitted false documents in competing for a particular contract;
    - (ii) been convicted of any offence involving corruption, fraud, collusion or coercion in competing for any contract; or
  - (f) cancel a contract awarded to a supplier—
    - (i) if it becomes aware that the supplier has made a misrepresentation, submitted false documents or information or has been convicted of any offence involving corruption, fraud, collusion or coercion in competing for a particular bid or during the execution of the contract;

- or
- (ii) if any official or other role player was convicted of any offence involving corruption, fraud, collusion or coercion act during the bidding process or during the execution of the contract.

### **Establishment of procurement units**

**22.** (1) Every procuring institution must establish a procurement unit as part of its procurement system.

(2) The responsibilities of the procurement unit must at least include the following:

- (a) implementation of functions allocated to the unit in terms of this Act and the procurement system of the procuring institution;
- (b) maintenance of its procurement system to ensure effectiveness and efficiency;
- (c) regular reporting to the procuring institution on the performance of its procurement system;
- (d) rendering assistance and administrative support to the line function managers and other officials of the procuring institution in the performance of their procurement responsibilities;
- (e) providing advice to a procurement committee on request; and
- (f) any other functions that the accounting officer or accounting authority may consider necessary.

### **Bid committee system**

**23.** (1) The Minister must prescribe a bid committee system for procuring institutions and the functions of each committee.

(2) The following persons may not be members of a bid committee envisaged in subsection (1):

- (a) A public office bearer;
- (b) a person appointed in terms of section 12A of the Public Service Act; and
- (c) any person having a conflict of interest.

## **Part 2**

### **Use of technology in procurement**

#### **Information and technology-based procurement system**

**24.** (1) (a) The Public Procurement Office must develop an information and communication technology-based procurement system for all procurement to enhance efficiencies, effectiveness, transparency and integrity and to combat corruption and that complies with section 18.

(b) The system must provide for the following components progressively:

- (i) A single platform that at least provides access for officials, bidders, suppliers

- and members of the public to all procurement related services;
- (ii) standardised and interoperable open data across the procurement cycle to be used by procuring institutions according to their maturity levels;
- (iii) uniform procurement procedures and processes;
- (iv) reporting requirements on procurement;
- (v) a marketplace to enable quick and efficient procurement of common goods and services;
- (vi) a hub hosting all procurement data to enable easy reporting, analysis, research and oversight of procurement transactions.

### **Use of technology by procuring institutions**

**25.** (1) Procuring institutions must—

- (a) to the extent possible, use technology in the implementation of this Act;
- (b) when available, use the different components of the procurement system, referred to in section 24(1)(b).

(3) (a) During the development of the procurement system, referred to in section 24(1)(a), the Public Procurement Office must, by instruction, determine requirements for digitisation, automation, reporting and innovations that information and communication technology may enable, applicable to procurement processes by procuring institutions.

(b) The requirements referred to in paragraph (a) must include the provision for—

- (i) analysis and publication of data; and
- (ii) maturity assessments for procurement technology.

## **Part 3**

### **Access to procurement processes and information**

#### **Access to procurement processes**

**26.** (1) The Public Procurement Office must determine by instruction measures for the public, civil society and the media to—

- (a) access procurement processes;
- (b) scrutinise procurement;
- (c) monitor high-value or complex procurement that entail significant risks of mismanagement and corruption.

(2) The instruction referred to in subsection (1)—

- (a) must put in place measures to ensure candid deliberations and to protect officials from undue influence and threats and to provide for disallowing or terminating access by the public or a specific category of persons or a specific person if such access resulted in, or is likely to, inhibit candid deliberations or result in undue influence of, or threats to, officials; and
- (b) may be limited to certain categories of procurement or procurement above a specified threshold.

#### **Disclosure of procurement information**

**27.** (1) The Public Procurement Office must, by instruction, determine requirements to disclose information regarding procurement.

(2) The instruction envisaged in subsection (1) must, among others, require—

- (a) the categories of information to be disclosed to enable effective monitoring of procurement, which includes among others—
  - (i) the reasons for the decision, where a decision is made to not follow an open competitive tender process;
  - (ii) all information regarding a bid;
  - (iii) the identity of each entity which submits a bid, including information relevant to that entity contained in the companies register established under section 187(4) of the Companies Act, 2008 (Act No. 71 of 2008), if applicable;
  - (iv) the date, reasons for and value of an award to a bidder, including the record of the beneficial ownership of that bidder required under section 56(12) of the Companies Act, 2008 (Act No. 71 of 2008);
  - (v) contracts entered into with a supplier and invoices submitted by the supplier;
- (b) that the information referred to in paragraph (a) be published as quickly as possible—
  - (i) on an easily accessible central online portal that is publicly available free of charge;
  - (ii) in a format that—
    - (aa) enables tracking of information relevant to the entire process of a specific procurement;
    - (bb) is electronic and interoperable;
    - (cc) if it contains confidential information, only that information is severed.

(3) For purposes of this section "confidential information" means—

- (a) personal information protected in terms of the Protection of Personal Information Act, 2013 (Act No. 4 of 2013);
- (b) commercial information, the disclosure of which is likely to damage a commercial interest of a bidder;
- (c) information that is likely to endanger the life or safety of a person;
- (d) information that is likely to prejudice or impair the security of a building, structure or critical system, including but not limited to, a computer system, a communication system and a transportation system;
- (e) information that is likely to prejudice law enforcement or legal proceedings; or
- (f) information that is likely to prejudice national security.

### **Documents to be made available**

**28.** (1) The Public Procurement Office must ensure that copies of—

- (a) this Act and any regulations made thereunder; and
- (b) all instructions, guidelines and codes of conduct that are issued in terms of this Act,



are accessible at the offices of the Public Procurement Office and its website.

(2) The copies referred to in subsection (1) must be published in such form as the Public Procurement Office considers will make them readily accessible.

### **Access by certain authorities to information held by Public Procurement Office and provincial treasuries**

**29.** (1) Subject to any applicable law, the Public Procurement Office or the provincial treasury may make information pertaining to this Act in its possession available to—

- (a) an investigating authority in the Republic;
- (b) the National Prosecuting Authority;
- (c) an intelligence division in an organ of state;
- (d) the Public Protector;
- (e) the Auditor-General;
- (f) the South African Revenue Service;
- (g) an investigating authority outside of the Republic subject to the approval of the Minister; or
- (h) a person who is entitled to receive such information in terms of an order of court or other national legislation.

(2) Information envisaged in subsection (1) may only be made available to an entity referred to in subsection (1)(a) to (e)—

- (a) at the initiative of the Public Procurement Office, the relevant provincial treasury or the request of an authorised official of the entity; and
- (b) if the Public Procurement Office or the relevant provincial treasury reasonably believes such information is required to investigate suspected unlawful activity or if the Public Procurement Office reasonably believes it is in the public interest to provide such information.

(3) A request for information envisaged in subsection (2)(a) must specify the required information and the purpose for which the information is required.

(4) The Public Procurement Office or the relevant provincial treasury may, as a condition to the provision of any information envisaged in subsection (1), make the procedural arrangements regarding the furnishing of such information that the Public Procurement Office or the relevant provincial treasury considers appropriate to maintain the confidentiality of the information before the information is provided.

(5) A person who obtains information from the Public Procurement Office or the relevant provincial treasury may use that information only—

- (a) within the scope of that person's power or duty in terms of any legislation; or
- (b) for the purpose specified in the request.

(6) The Public Procurement Office or the relevant provincial treasury must make information in its possession available to the appropriate Intelligence Structure, as defined in section 1 of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994), if it reasonably believes that the information relates to any potential threat or threat to the national security.

## Protection of information

**30.** (1) No person may disclose confidential information held by or obtained from the Public Procurement Office or a provincial treasury for purposes of this Act, except—

- (a) for carrying out a provision of this Act or any other legislation;
- (b) with the permission of the Public Procurement Office or the relevant provincial treasury;
- (c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or
- (d) in terms of an order of court.

(2) The Public Procurement Office or a provincial treasury must take appropriate measures in respect of personal information in its possession or under its control to prevent—

- (a) loss of, damage to or unauthorised destruction of the information; and
- (b) unlawful access to or processing of personal information, other than in accordance with this Act and the Protection of Personal Information Act, 2013 (Act No. 4 of 2013).

## CHAPTER 6

### DISPUTE RESOLUTION

#### *Part 1*

#### *Reconsideration of decision to award*

#### **Reconsideration by procuring institution**

**31.** (1) A bidder may submit an application for reconsideration to the procuring institution if not satisfied with a decision to award a bid by that institution.

(2) An application envisaged in subsection (1) must be submitted to the procuring institution within 10 days of the date the bidder is informed of the decision to award a bid.

(3) A procuring institution may dismiss an application for reconsideration if the application was not submitted within 10 days of the date the bidder is informed of the decision to award a bid.

(4) Unless the application is dismissed as envisaged in subsection (3) or withdrawn by the bidder, the procuring institution must—

- (a) immediately institute an investigation; and
- (b) make a decision and inform the bidder within the prescribed timeframes.

(5) A decision referred to in subsection (4)(b)—

- (a) must state whether the application is granted or dismissed, in whole or in part;
- (b) must state the reasons for the decision; and
- (c) may state any corrective measures to be taken.

(6) A bidder seeking a reconsideration of a decision to award a bid must pay the prescribed fee.

**Part 2**  
**Public Procurement Tribunal**

**Establishment of Tribunal**

- 32.** (1) The Public Procurement Tribunal is hereby established to review decisions taken by—
- (a) a procuring institution in terms of section 31; and
  - (b) the Public Procurement Office to debar a bidder or supplier in terms of section 16.
- (2) The Tribunal—
- (a) is independent;
  - (b) must be impartial and exercise its powers without fear, favour or prejudice;
  - (c) is a tribunal of record; and
  - (d) must perform its function in accordance with this Act and other relevant legislation.

**Composition of Tribunal**

- 33.** (1) The Tribunal consists of as many members as the Minister appoints with due regard to section 34.
- (2) The members of the Tribunal must include—
- (a) one person who is a retired judge who must be the Chairperson;
  - (b) a sufficient number of persons with ten years' experience in law; and
  - (c) a sufficient number of persons with ten years' experience in procurement.
- (3) The Minister must appoint the Chairperson with the concurrence of the Minister responsible for justice.
- (4) The Minister must appoint a member of the Tribunal referred to in subsection (2)(b) as the Deputy Chairperson.

**Qualification of members of Tribunal**

- 34.**(1) A person may be appointed as a member of the Tribunal if that person—
- (a) possesses the necessary skills, expertise and knowledge; and
  - (b) is a citizen or permanent resident of the Republic.
- (2) The Minister must, by notice in the *Gazette* and at least two newspapers circulating widely in the Republic, invite any interested person within the Republic to nominate a person meeting the requirements for appointment to the Tribunal as a candidate for appointment.

**Functions of Chairperson and Deputy Chairperson of Tribunal**

- 35.** (1) The Chairperson—
- (a) must preside at meetings of the Tribunal; and
  - (b) is responsible for managing the work of the Tribunal.
- (2) The Deputy Chairperson performs the functions of the

Chairperson—

- (a) on delegation by the Chairperson;
- (b) in the absence of the Chairperson; or
- (c) if the office of the Chairperson is vacant.

### **Disclosure of interest by members of Tribunal**

**36.** (1) Subject to subsection (2), a member of the Tribunal may not participate in the proceedings at any meeting of the Tribunal, if in relation to any matter before the Tribunal—

- (a) the member or a person related to him or her is a director, member or partner of, or has controlling interest or any financial interest in the business of the bidder or any person who made representations in relation to the application by the bidder; or
- (b) the member has any interest which precludes him or her from performing his or her functions as a member in a fair, unbiased and proper manner.

(2) (a) If at any stage during the proceedings before the Tribunal it appears that a member has or may have any interest envisaged in subsection (1), the member must immediately fully disclose the nature of the interest and leave the proceedings to enable the remaining members to determine whether the member must be precluded from participating in the proceedings by reason of a conflict of interest.

(b) The disclosure envisaged in paragraph (a) and the decision taken by the remaining members regarding the determination must be recorded in the minutes of the proceedings.

(c) If any member fails to disclose any interest envisaged in subsection (1) or if, having such interest, the member attends or in any manner contributes to the proceedings of the Tribunal, the contribution must be disregarded, but the decision of the Tribunal is not invalid.

### **Term of office, re-appointment, termination of membership and terms and conditions of service of members of Tribunal**

**37.** (1) A member of the Tribunal holds office for a period of five years, or the shorter period that the Minister determines.

(2) A member of the Tribunal may be re-appointed at the expiry of a term for a further term not exceeding three years.

(3) A member of the Tribunal may resign by giving at least three-months' notice to the Minister, or such shorter period as the Minister may approve.

(4) The Minister may terminate the appointment of a member of the Tribunal if—

- (a) the member is unable to perform the functions of office due to ill health or other reasons accepted by the Minister;
- (b) the member fails to disclose an interest in terms of section 36(2); or
- (c) an independent inquiry by the Minister has found that the member has—
  - (i) failed in a material way to discharge his or her responsibilities; or
  - (ii) acted in a way that is inconsistent with continuing to hold office.

(5) Subject to the Promotion of Administrative Justice Act, if an independent inquiry has been undertaken in terms of subsection (4)(c), the Minister may suspend the affected member from office pending a decision.

(6) The Minister must determine the remuneration and other terms and conditions of service for members of the Tribunal.

### **Finances of Tribunal**

**38.** The Tribunal is financed from—

- (a) money that is appropriated by Parliament; and
- (b) prescribed fees for the Tribunal.

### **Resources of Tribunal**

**39.** The Chairperson may—

- (a) for the effective functioning of the Tribunal—
  - (i) appoint persons as employees and determine their conditions of service in accordance with the Public Service Act, 1994 (Proclamation No. 103 of 1994);
  - (ii) second persons in accordance with applicable law; or
  - (iii) engage persons on contract otherwise than as employees;
- (b) enter into contracts;
- (c) acquire and dispose of assets; and
- (d) do anything else necessary for the effective functioning of the Tribunal.

### **Conduct of persons involved in work of Tribunal**

**40.** A member of the Tribunal or a person referred to in section 39(a) may not use his or her position or any information by virtue of his or her work for the Tribunal to impede the Tribunal's ability to perform its functions.

### **Panels of Tribunal**

**41.** (1) The Chairperson must constitute a panel for each application envisaged in section 43 or 44.

(2) Any reference in this Act to the Tribunal must be construed as including a reference, where appropriate in the case of an application envisaged in section 34, to a panel to whom a review is or was assigned.

(3) The panel—

- (a) is the decision-making body for that particular application; and
- (b) performs the functions of the Tribunal when hearing the application.

(4) A panel consists of—

- (a) a member of the Tribunal as Chairperson of the panel;
- (b) a member of the Tribunal referred to in section 33(2)(b);
- (c) a member of the Tribunal referred to in section 33(2)(c); and
- (d) such other members of the Tribunal as the Chairperson of the Tribunal decides.

(5) If, for any reason, a member of the panel is unable to complete

a hearing of an application, the Chairperson may—

- (a) replace the member;
- (b) direct that the proceedings continue before the remaining members of the panel; or
- (c) constitute a new panel and direct the new panel to either continue the proceedings or start proceedings afresh.

### **Tribunal rules**

**42.** (1) The Tribunal must make rules regarding proceedings for applications, envisaged in sections 43 and 44, including the finalisation thereof, and may amend or revoke such rules.

(2) The Tribunal must give notice in the *Gazette* or its website where the Tribunal rules, and amendments and revocations of Tribunal rules, may be available.

## **Part 3** **Review process**

### **Review of decision of procuring institution**

**43.** (1) If a bidder is not satisfied by a decision made by a procuring institution in terms of section 31, that bidder may, within 10 days of being informed of the procuring institution's decision, submit an application for review to the Tribunal.

(2) Despite the period stated in subsection (1), a bidder may request the Tribunal to consider an application for review filed after the expiry of the period mentioned in subsection (1), but not later than 15 days of being informed of the procuring institution's decision, on the ground that the application raises public interest considerations.

(3) The Tribunal must inform the bidder of its decision in terms of subsection (2) and the reasons within five days from the date of receipt of the request.

### **Review of decision to debar**

**44.** (1) A person debarred in terms of section 16(3) may, within 10 days of being informed of the decision to debar, submit an application for review to the Tribunal.

(2) Despite the period stated in subsection (1), a bidder may request the Tribunal to consider an application for review filed after the expiry of the period mentioned in subsection (1), but not later than 15 days of being informed of the procuring institution's decision, on the ground that the application raises public interest considerations.

(3) The Tribunal must inform the bidder of its decision in terms of subsection (2) and the reasons within five days from the date of receipt of the request.

## Fee

**45.** A bidder or a person debarred seeking a review of a decision in terms of this Part must pay the prescribed fee.

## Review proceedings

**46.** (1) In review proceedings—

- (a) the Chairperson of the panel must determine the procedure for proceedings, subject to this Act and Tribunal rules;
- (b) the Panel must strive to ensure that proceedings are conducted with as little formality and technicality, and as expeditiously, as the requirements of this Act and a proper consideration of the matter permit; and
- (c) any party may be represented by a legal representative during the proceedings.

(2) The Chairperson of a panel may give directions to facilitate the conduct of proceedings subject to subsection (1) and the Tribunal rules.

(3) A panel must conduct a hearing in public, but the Chairperson of the panel may direct that a person be excluded from a hearing on any ground on which it would be proper to exclude a person from civil proceedings before the High Court.

(4) (a) The Chairperson of a panel—

- (i) may, on good cause shown, by order, subpoena a specified person to appear before the panel at a time and place specified in the order to give evidence, to be questioned or to produce any document; and
- (ii) must administer an oath to, or accept an affirmation from, any person called to give evidence.

(b) A person subpoenaed in terms of paragraph (a) may not—

- (i) without just cause, fail to appear before the panel at the time and place specified in the subpoena;
- (ii) refuse to be sworn in or to be affirmed as a witness;
- (iii) without just cause, fail to answer fully and satisfactorily to the best of his or her knowledge all questions lawfully put to him or her; or
- (iv) fail to produce any object or information, including but not limited to any working papers, statements, correspondence, books or other documents in his or her possession or custody or under his or her control, which he or she has been required to produce.

(c) A person subpoenaed in terms of paragraph (a) must be reimbursed for incidental costs for providing information and appearing before the panel by the person who requested the subpoena.

(5) A person giving evidence or information, or producing documents, has the protections and liabilities of a witness giving evidence in proceedings before the High Court.

## Tribunal orders

**47.** (1) In review proceedings envisaged in section 43, the panel may,

by order—

- (a) confirm a decision made in terms of section 31;
- (b) set aside a decision made under section 31 and refer the matter back to the relevant procuring institution for further consideration;
- (c) order a procuring institution not to make an award or cancel an award made for the procurement under review;
- (d) order that the procurement proceedings be terminated;
- (e) take such alternative action as is appropriate in the circumstances;
- (f) require the payment of compensation for any reasonable costs incurred by the bidder submitting an application as a result of an act or decision of, or procedure followed by, the procuring institution in procurement that does not comply with this Act; or
- (g) dismiss the application.

(2) In review proceedings envisaged in 44, the panel may, by

order—

- (a) confirm the debarment order of the Public Procurement Office;
- (b) substitute the debarment order for its own order;
- (c) set aside the debarment order of the Public Procurement Office; or
- (d) dismiss the application.

(3) If a panel is divided in opinion as to an order to be made, the opinion of the majority of the members of the panel prevails, but if they are equally divided in opinion, the opinion of the Chair of the panel prevails.

(4) The Tribunal may, in exceptional circumstances, make an order that a party to proceedings on an application for review of a decision pay some or all of the costs reasonably and properly incurred by the other party in connection with the proceedings.

(5) The Tribunal may, by order, summarily dismiss an application for review of a decision if the application is frivolous, vexatious or trivial.

(6) The decision of a panel in terms of subsection (1) is regarded as a decision of the Tribunal.

### **Judicial review and enforcement of Tribunal orders**

**48.** (1) Any party that is dissatisfied with an order of the Tribunal may institute proceedings for judicial review in terms of the Promotion of Administrative Justice Act or any applicable law.

(2) A party to proceedings may file with the registrar of a competent court a certified copy of an order made in terms of section 47(1) or (2) if—

- (a) no proceedings in relation to the making of the order have been commenced in a court by the end of the period for commencing such proceedings; or
- (b) the proceedings have been finally disposed of.

(3) The order, on being filed, has the effect of a judgment in civil proceedings, and may be enforced as if lawfully given in that court.

## **Part 4**

### **Stand still process**

#### **Prohibition on concluding contract during reconsideration or review**



## proceedings

- 49.** (1) If a procurement process is subject to—
- (a) a reconsideration in accordance with section 31, a procuring institution may not conclude a contract with the successful bidder within 10 days after completion of the reconsideration or review process; or
  - (b) review in accordance with section 43, a procuring institution may not conclude a contract with the successful bidder prior to completion of the review process.
- (2) Despite subsection (1), if an emergency requires procurement—
- (a) in the case of a procuring institution in the national sphere of government, the Public Procurement Office; or
  - (b) in the case of a procuring institution in the provincial or local sphere of government, the relevant provincial treasury,
- may upon request by the procuring institution authorise the conclusion of a contract with the successful bidder prior to the lapse of the period referred to in subsection (1)(a) or completion of the review process.
- (3) The conclusion of a contract, referred to in subsection (2), must be limited to the quantity required to meet the emergency until the completion of the reconsideration or review process.
- (4) The request of the procuring institution referred to in subsection (2) must—
- (a) state the emergency that require the conclusion of the contract;
  - (b) state the grounds for the emergency; and
  - (c) specify the quantity required to meet the emergency.

Draft Bill - Subject to Office of Public State Law Advisors Certification

## CHAPTER 7 GENERAL PROVISIONS

### Investigation by Public Procurement Office

**50.** (1) The Public Procurement Office may, if requested by the relevant treasury, a procuring institution or on its own initiative, investigate any alleged non-compliance with this Act other than an alleged commission of an offence, referred to in section 55.

(2) The Public Procurement Office must, if an investigation in terms of subsection (1) indicates—

- (a) non-compliance with this Act—
  - (i) instruct the procuring institution to take steps to stop or prevent the non-compliance; and
  - (ii) direct that appropriate action be taken against the official responsible for the non-compliance.
- (b) an alleged commission of an offence, referred to in section 55, refer the matter to the relevant law enforcement body.

(3) Where a procuring institution is required to act in terms of subsection (2), the procuring institution must, as required by the Public Procurement Office, report on the progress made.

### Power to enter and search premises

**51.** (1) The Public Procurement Office may, for purposes of section 50, authorise one or more suitably qualified persons (herein referred to as “the authorised person”) to enter and search any premises of—

- (a) a procuring institution without any prior consent or warrant;
- (b) an official of a procuring institution in accordance with subsection (2); or
- (c) a bidder, or supplier to whom a bid has been awarded in terms of this Act, in accordance with subsection (2).

(2) The authorised person referred to in subsection (1) may enter premises of an official referred to subsection (1)(b) or a bidder or supplier referred to in subsection (1)(c)—

- (a) with the prior consent of—
  - (i) in the case of a private residence—
    - (aa) of an official; or
    - (bb) the person apparently in control of the business reasonably believed to be conducted at the private residence, and the occupant of the private residence or the part of the private residence to be entered; or
  - (ii) in the case of any other premises, the person apparently in control of the premises, after informing that person that—
    - (aa) granting consent will enable the authorised person to enter the premises and for the authorised person to subsequently search the premises and to do anything envisaged in subsection (8); and

- (bb) he or she is under no obligation to admit the authorised person in the absence of a warrant; or
- (b) without prior consent and without prior notice to any person if the entry is authorised by a warrant.

(3) (a) The Public Procurement Office must issue the person authorised in terms of subsection (1) with a certificate stating that the person has been authorised in terms of subsection (1).

(b) When exercising powers in terms of this section, the authorised person must—

- (i) be in possession of a certificate of appointment; and
- (ii) immediately show that certificate to any person who is affected by the authorised person's actions in terms of this section or who requests to see the certificate.

(4) The authorised person has the authority to search the premises and to do anything envisaged in subsection (8).

(5) The authorised person exercising powers in terms of this section must do so with strict regard to—

- (a) an affected person's right to—
  - (i) dignity;
  - (ii) freedom and security;
  - (iii) privacy; and
  - (iv) other constitutional rights; and
- (b) decency and good order as the circumstances require, in particular by—
  - (i) entering and searching only such areas or objects as are reasonably required for the purposes of the investigation;
  - (ii) conducting the search discreetly and with due decorum;
  - (iii) causing as little disturbance as possible; and
  - (iv) concluding the search as soon as possible.

(6) An entry or search of premises in terms of this section may be done with or without the prior notification of the accounting officer or accounting authority of a procuring institution.

(7) The authorised person may be accompanied and assisted during the entry and search of any premises for an investigation by a person designated by the Public Procurement Office.

(8) (a) While on the premises in terms of this section, the authorised person has access to any part of the premises and to any document or item on the premises, and may do any of the following—

- (i) open or cause to be opened any strongroom, safe, cabinet or other container in which the authorised person reasonably suspects there is a document or item that may afford evidence required for the investigation;
- (ii) examine, make extracts from and copy any document on the premises;
- (iii) question any person on the premises to find out information relevant to the investigation;
- (iv) require a person on the premises to produce to the authorised person any document or item that is relevant to the investigation and is in the possession or under the control of the person;
- (v) require a person on the premises to operate any computer or similar system on or available through the premises to—

- (aa) search any information in or available through that system; and
- (bb) produce a record of that information in any media that the authorised person reasonably requires;
- (vi) if it is not practicable or appropriate to meet a requirement in terms of subparagraph (v), operate any computer or similar system on or available through the premises for a purpose set out in that subparagraph; and
- (vii) take possession of, and take from the premises, a document or item that may afford evidence required for the investigation.

(b) The authorised person must, on request, allow the person apparently in charge of the premises a reasonable opportunity to make copies of any document or item before it is taken as mentioned in paragraph (a)(vii).

(c) The authorised person must give the person apparently in charge of the premises a written receipt for documents or items taken as mentioned in paragraph (a)(vii).

(d) Subject to paragraph (e), the Public Procurement Office must ensure that any document or item taken by the authorised person as mentioned in paragraph (a)(vii) is returned to the procuring institution when —

- (i) retention of the document or item is no longer necessary to achieve the object of the investigation; or
- (ii) all proceedings arising out of the investigation have been finally disposed of.

(e) A document or item need not be returned to the procuring institution which produced it if it is not in the best interest of the public or any member or members of the public for the documents or items to be returned.

(f) A procuring institution from whose premises a document or item was taken as mentioned in paragraph (a)(vii), or its authorised representative, may, during normal office hours and under the supervision of the authorised person or another person designated by the Public Procurement Office, examine, copy and make extracts from the document or item.

(9) The authorised person or any person assisting that person as provided for in subsection (6), may use reasonable force to exercise any power in terms of this section.

(10) The law relating to privilege, as applicable to a witness subpoenaed to provide a book, document or object in a civil trial before a court applies, with the necessary changes, in relation to the production of any information, including but not limited to any working papers, statements, correspondence, books or other documents, to the Public Procurement Office acting in accordance with this section.

(11) (a) A person who is questioned or required to produce a document or information during an investigation in terms of this section, may object to answering the question or to producing the document or the information on the grounds that the answer, the contents of the document or the information may tend to incriminate the person.

(b) The authorised person must inform the person of the right to object in terms of this section at the commencement of the investigation.

(c) On such an objection, the authorised person may require the question to be answered or the document or information to be produced, in which case the person must answer the question or produce the document.

(d) Subject to paragraph (e), an answer given or a document or information produced, as required in terms of paragraph (c), may be used for the purposes of an investigation or other legal proceedings in terms of this Act.

(e) An incriminating answer given, and an incriminating document or information produced, as required in terms of paragraph (c), is not admissible in evidence against the person in any criminal proceedings, except in criminal proceedings for perjury or in which that person is tried for a contravention of section 53(1)(a) based on the false or misleading nature of the answer.

## Warrants

**52.** (1) (a) A judge or magistrate who has jurisdiction may issue a warrant for the purposes of section 51(2)(b) on application by a person authorised in terms of section 51(1).

(b) The judge or magistrate may issue a warrant in terms of this section—

(i) on written application by the person authorised in terms of section 51(1) setting out under oath or affirmation why it is necessary to enter and investigate the premises; and

(ii) if it appears to the judge or magistrate from the information under oath or affirmation that—

(aa) there are reasonable grounds for suspecting that non-compliance with this Act has occurred; and

(bb) entry and search of the premises are likely to yield information pertaining to the non-compliance with this Act.

(2) A warrant must be signed by the judge or magistrate issuing it.

(3) The person authorised in terms of section 51(1) who enters premises under the authority of a warrant must—

(a) if there is apparently no one in charge of the premises when the warrant is executed, fix a copy of the warrant on a prominent and accessible place on the premises; and

(b) on reasonable demand by any person on the premises, produce the warrant or a copy of the warrant.

(4) The warrant must identify the premises that may be entered and searched and specify the parameters within which the person authorised in terms of section 51(1) may perform an entry, search or seizure.

(5) A warrant is valid only until—

(a) the warrant is executed;

(b) the warrant is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;

(c) the purpose of issuing it has lapsed; or

(d) the expiry of one month after the date it was issued, whichever occurs first.

## Delegation

- 53.** (1) (a) The Minister may—
- (i) delegate to the Director-General: National Treasury any power conferred on the Minister by this Act, except the making of regulations; or
  - (ii) authorise that Director-General to perform any duty imposed on the Minister by this Act.
- (b) The Director-General: National Treasury may—
- (i) delegate to any official of the National Treasury any power delegated to him or her in terms of paragraph (a); or
  - (ii) authorise that official to perform any duty he or she is authorised to perform in terms of paragraph (a).
- (2) The accounting officer or accounting authority of a procuring institution may—
- (a) delegate to any official of the procuring institution any power conferred on the accounting officer or accounting authority by this Act; or
  - (b) authorise that official to perform any duty imposed on the accounting officer or accounting authority by this Act.
- (3) The Public Procurement Office may—
- (a) delegate to a provincial treasury any power conferred on the Public Procurement Office by this Act; or
  - (b) authorise a provincial treasury to perform any duty imposed on the Public Procurement Office by this Act.
- (4) A provincial treasury may—
- (a) delegate to any of its officials any power conferred on the provincial treasury by this Act; or
  - (b) authorise any of its officials to perform any duty imposed on the provincial treasury by this Act.
- (5) Any person to whom a power has been delegated or who has been authorised to perform a duty under this section must exercise that power or perform that duty subject to the conditions imposed by the person who made the delegation or granted the authorisation.
- (6) Any delegation of a power or authorisation to perform a duty in terms of this section—
- (a) must be in writing;
  - (b) does not prevent the person who made the delegation or granted the authorisation from exercising that power or performing that duty himself or herself; and
  - (c) may at any time be withdrawn in writing by that person.

## Limitation of liability

**54.** A person who exercises a power or performs a duty in terms of this Act is not liable for any loss or damage suffered or incurred by any person arising from a decision taken or action performed in good faith in the exercise of a power or performance of a duty in terms of this Act.

## Offences

**55.** (1) A person who—

- (a) knowingly gives false or misleading information under this Act;
- (b) interferes with or exerts undue influence on any official of a procuring institution or member of the Tribunal in the performance of his or her duties or in the exercise of his or her power under this Act;
- (c) without authorisation opens any sealed bid, including such bids as may be submitted through an electronic system and any document required to be sealed, or divulges their contents prior to the appointed time for the public opening of the bid documents;
- (d) connives or colludes to commit a corrupt, fraudulent, collusive or coercive or obstructive act related to procurement under this Act;
- (e) contravenes section 10(b) or (c), 12 or 16(8)(a); or
- (f) causes loss of public assets or funds as a result of a wilful act or gross negligence in the implementation of this Act,

commits an offence and is liable on conviction to a fine or to imprisonment for a term not exceeding 10 years or to both, and in addition to the penalty imposed in this section, the court may order that the amount of loss incurred by the complainant be compensated, failure of which the court may issue an order of confiscation of personal property of the person convicted in order to recover the loss.

(2) A person who—

- (a) without reasonable excuse fails or refuses to give information, produce any document, records or reports required in terms of this Act;
- (b) delays, without justifiable cause, the evaluation of a bid or the awarding of a bid;
- (c) fails to comply with a subpoena issued in terms of section 46(4),

commits an offence and is liable on conviction to a fine or to imprisonment for a term not exceeding three years or both.

(3) An accounting officer or accounting authority who fails to take reasonable steps to implement the procurement system of the procuring institution in accordance with this Act commits an offence and is liable on conviction to a fine or to imprisonment for a term not exceeding three years or both.

(4) A member of the Tribunal who fails to disclose an interest in terms of section 36(2) commits an offence and is liable on conviction to a fine or to imprisonment for a term not exceeding three years or both.

## Exemption

**56.** (1) The Minister may, with or without conditions, by notice in the *Gazette*, exempt a procuring institution from any provision of this Act, if—

- (a) national security could reasonably be expected to be compromised; or
- (b) the procurement is to be funded partially or in full by donor or grant funding and such exemption will benefit the public in general or a section of the public.

(2) An exemption referred to in subsection (1) may apply to any

procuring institution to which this Act applies or a category of procuring institutions.

(3) For purposes of this section, this Act excludes a regulation made in terms of this Act or an instruction.

### Deviation

**57.** (1) The Public Procurement Office may, with or without conditions, authorise a deviation from a provision of a regulation or an instruction if—

- (a) it is impossible, impractical or uneconomical to comply with the regulation or instruction;
- (b) market conditions or behaviour do not allow effective application of the regulation or instruction;
- (c) a disaster is declared in terms of the Disaster Management Act, 2002 (Act No. 57 of 2002);
- (d) a state of emergency as envisaged in section 37 of the Constitution is declared; or
- (e) national security could reasonably be expected to be compromised.

(2) If a deviation is authorised in terms of subsection (1), the Public Procurement Office must, within 14 days, inform the Auditor-General and publish the deviation.

### Regulations

- 58.** (1) The Minister—
- (a) must make regulations regarding—
    - (i) any matter required by this Act to be prescribed;
    - (ii) competency requirements for officials involved in procurement;
    - (iii) the requirements for security vetting of—
      - (aa) officials employed by the Public Procurement Office, a provincial treasury and officials employed in a procurement unit of a procuring institution;
      - (bb) members of the Tribunal;
      - (cc) a bidder before the award of a bid;
    - (iv) the use of information and communications technology in procurement;
    - (v) procedures for bid specification, invitation, submission, opening, evaluation, adjudication and awarding of bids and cancellation of procurement processes;
    - (vi) the setting of market related price ceilings for procurement;
    - (vii) procurement funded partially or in full by donor or grant funding;
    - (viii) measures for the participation of a manufacturer of goods in a bid to supply the goods it manufactures;
    - (ix) circumstances and procedures for pre-qualification of bidders;
    - (x) the completion of the procurement process during the bid validity period and the extension of the period to prevent undue delays or unjustified cancellations;
    - (xi) emergency procurement, which may include—
      - (aa) the different types of emergency procurement that may be



- used and the circumstances under which the different types may be used;
- (bb) an outline of the planning efforts of the procuring institution to limit the need for emergency procurement and to improve responsiveness during an emergency;
  - (cc) the pre-requisites for awarding bids and administering contracts during emergencies;
  - (dd) options available to the procuring institution during an emergency and the preferred methods of procurement; and
  - (ee) procedures to be followed in respect of emergency procurement processes, including the recording of deliberations and the making of recommendations and awards;
- (xiii) percentages for contract variations or amendments;
  - (xiv) complaints by a member of the public regarding procurement in terms of this Act; and
  - (xii) fees for a review by the Tribunal;
- (b) may make regulations—
- (i) permitted by this Act to be prescribed;
  - (ii) regarding negotiations with a preferred bidder or bidders prior to the award of the bid;
  - (iii) regarding requirements for bidders to comply with specified legislation;
  - (iv) regarding lifestyle audits of persons automatically excluded in terms of section 13 and their immediate family members and related persons, if an immediate family member or a related person is awarded a bid or bids above a threshold stipulated in the regulations;
  - (v) regarding the retention of procurement data; and (vi) regarding any procedural or administrative matters that are necessary to implement this Act.

(2) The Minister must, before complying with subsection (3), consult with the relevant Minister on a draft regulation affecting the portfolio of that Minister.

- (3) Before making a regulation the Minister must publish—
- (a) a draft of the regulation;
  - (b) a statement explaining the need for and the intended operation of the regulation;
  - (c) a statement of the expected impact of the regulation; and
  - (d) a notice inviting submissions in relation to the regulation and stating where, how and by when submissions are to be made.

(4) The Minister must submit regulations to be made to Parliament for parliamentary scrutiny at least 30 days before their promulgation.

- (5) A regulation takes effect—
- (a) on the date that it is published in the *Gazette*; or
  - (b) if the regulation provides that it takes effect on a later date, on the later date.

(6) (a) With each regulation, the Minister must publish a consultation report.

- (b) A consultation report must include—
- (i) a general account of the issues raised in the submissions made during the consultation; and

- (ii) a response to the issues raised in the submissions.
  - (7) The Minister—
- (a) may make different regulations for—
  - (i) different categories of procuring institutions;
  - (ii) different categories of procurement; and
- (b) must make regulations regarding the procurement of—
  - (i) infrastructure and capital assets; and
  - (ii) goods or services related to infrastructure and capital assets.

### **Transitional measures**

**59.** A bid awarded or advertised before the commencement of this Act must be dealt with in terms of the law applicable at the time of the award or advertisement.

### **Amendment and repeal of legislation and saving**

- 60.** (1) Subject to subsection (2), the legislation mentioned in the Schedule are hereby amended or repealed as set out in that Schedule.
- (2) Anything done under any law repealed by subsection (1) and which could be done under a provision of this Act must be regarded as having been done under that provision.

### **Short title and commencement**

- 61.** (1) This Act is called the Public Procurement Act, 2023, and takes effect on a date determined by the Minister by notice in the *Gazette*.
- (2) Different dates may be determined by the Minister in respect of the effective date of—
- (a) different provisions of this Act;
  - (b) different provisions of this Act in respect of different categories of procuring institutions; and
  - (c) the repeal or amendment of different provisions of a law repealed or amended by this Act.

**SCHEDULE**  
**AMENDMENTS AND REPEALS**  
**(Section 60)**

<b>Act No. and year</b>	<b>Short title</b>	<b>Extent of repeal or amendment</b>
Act No. 86 of 1968	State Tender Board Act, 1968	1. The repeal of the whole.
No. 89 of 1970	National Supplies Procurement Act, 1970	2. The repeal of the whole.
Act No. 107 of 1997	Housing Act, 1997	3. The amendment of section 3 by the substitution in subsection (2) for paragraph (cA) of the following paragraph: "(cA) <b>[determine a procurement policy, by no later than April 2002, which is consistent with section 217 of the Constitution in relation to housing development]</b> <u>subject to the Public Procurement Act, 2023, review the procurement policy on housing development and determine a new policy by no later than a date set by the Minister;</u> ".
Act No. 36 of 1998	National Water Act, 1998	4. The amendment of section 26 by the substitution in subsection (1) for paragraph (n) of the following paragraph: "(n) <u>subject to the Public Procurement Act, 2023, prescribing procedures for the allocation of water by means of a bid [public tender] or auction;</u> ".  5. The amendment of section 45 by the substitution in subsection (2) for paragraph (f) of the following paragraph: "(f) allocated to every other applicant by <u>means of a bid [public tender] or auction;</u> ".
Act No. 88 of 1998	State Information Technology Agency Act, 1998	6. The amendment of section 7 by the insertion after subsection (7) of the following subsection: " <u>(7A) When information technology goods or services are procured through the Agency in terms of this section, the Agency must comply with the Public Procurement Act, 2023.</u> ".  7. The amendment of section 23 by the substitution in subsection (1) for paragraph (a) of the following: "must, <u>subject to the Public Procurement Act, 2023,</u>

Act No. and year	Short title	Extent of repeal or amendment
		make regulations regarding the manner in which procurement in terms of section 7(3) to (7) must take place, <u>with the concurrence [subject to the approval] of the Minister of Finance; and</u> ".
Act No. 111 of 1998	Correctional Services Act, 1998	8. The amendment of section 103 by the substitution for subsection (1) of the following subsection: "(1) The Minister may, <b>[subject to any law governing the award of contracts by the State]</b> <u>subject to the Public Procurement Act, 2023</u> , with the concurrence of the Minister of Finance and the Minister of Public Works, enter into a contract with any party to design, construct, finance and operate any correctional centre or part of a correctional centre established or to be established in terms of section 5."
Act No. 1 of 1999	Public Finance Management Act, 1999	9. The amendment of section 38— (a) by the deletion in subsection (1)(a) of subparagraph (iii); (b) by the substitution in subsection (1) for paragraph (g) of the following paragraph: "(g) on discovery of unauthorised, irregular or fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the <b>[relevant tender board]</b> <u>Public Procurement Office established by section 4 of the Public Procurement Act, 2023</u> ";  10. The amendment of section 51 by the deletion in subsection (1)(a) of subparagraph (iii).  11. The amendment of section 76- (a) by the substitution in subsection (1) for paragraph (k) of the following paragraph: "(k) the alienation[, ] <b>or letting [or other disposal]</b> of state assets;" and (b) by the deletion in subsection (4) of paragraph (c).
Act No. 20 of 1999	Road Traffic Management Corporation Act, 1999	12. The substitution for section 43 of the following section: <b>"Procurement</b>  <b>43.</b> Any procurement under this Act must be undertaken in <b>[terms of the prescribed procedures]</b> <u>accordance with the Public Procurement Act, 2023</u> ".

Act No. and year	Short title	Extent of repeal or amendment
Act No. 5 of 2000	Preferential Procurement Policy Framework Act, 2000	13. The repeal of the whole.
Act No. 32 of 2000	Local Government: Municipal Systems Act, 2000	14. The amendment of section 83 by the substitution in subsection (1) for paragraph (a) of the following paragraph: " <u>(a) comply with the Public Procurement Act, 2023;</u> ".
Act No. 38 of 2000	Construction Industry Development Board Act, 2000	15. The amendment of section 5— (a) by the substitution in subsection (3) for paragraph (c) of the following paragraph: " <u>(c) must, within the framework of the procurement policy of Government, and in consultation with the Public Procurement Office established by section 4 of the Public Procurement Act, 2023 [promote the standardisation of] standardise the procurement process with regard to the construction industry;</u> " (b) by the substitution in subsection (4) for paragraph (b) of the following paragraph: " <u>(b) may, after consultation with the Public Procurement Office established by section 4 of the Public Procurement Act, 2022, initiate, promote and implement national programmes and projects aimed at the standardisation of procurement documentation, practices and procedures.</u> " (c) by the addition of the following subsection after subsection (1): " <u>(1A) The Board must, in consultation with the Public Procurement Office, develop procurement policies that promote procurement reform envisaged in section 5(1)(a)(vii).</u> ".  16. The amendment of section 16 by substitution for subsection (3) of the following subsection: " <u>(3) The Minister must, with the concurrence of the Minister of Finance, prescribe the manner in which public sector construction contracts may be invited, awarded and managed within the framework of the register and [within the framework of the</u>

Act No. and year	Short title	Extent of repeal or amendment
		<p><b>policy on procurement] the Public Procurement Act, 2023.</b>"</p> <p>17. The amendment of section 33 by the substitution for subsection (1) of the following:</p> <p style="padding-left: 40px;">"(1)(a) The Minister may, by notice in the <i>Gazette</i>, make regulations not inconsistent with this Act with regard to any matter that is required or permitted to be prescribed in terms of this Act and any other matter for the better execution of this Act or in relation to any power granted or function or duty imposed by this Act.</p> <p style="padding-left: 40px;"><u>(b) The Minister may, with the concurrence of the Minister of Finance, make regulations regarding procurement in terms of this Act.</u>"</p>
Act No. 51 of 2003	Armaments Corporation of South Africa, Limited Act, 2003	<p>18. The amendment of section 2 by the substitution in subsection (4) for the words preceding paragraph (a) of the following words:</p> <p style="padding-left: 40px;">"(4) Subject to <b>[this Act] the Public Procurement Act, 2023</b>, the Corporation may—".</p>
Act No. 53 of 2003	Broad-Based Black Economic Empowerment Act, 2003	<p>19. The amendment of section 9-</p> <p>(a) by the substitution in subsection (1) for paragraph (b) of the following paragraph:</p> <p style="padding-left: 40px;">"(b) qualification criteria for <b>[preferential purposes for procurement and other]</b> economic activities;" and</p> <p>(b) by the substitution of subsection (5) for the following subsection:</p> <p style="padding-left: 40px;">"(6) If requested to do so, the Minister may by notice in the <i>Gazette</i> permit organs of state or public entities to specify qualification criteria for <b>[procurement and other]</b> economic activities which exceed those set by the Minister in terms of subsection (1)."</p> <p>20. The amendment of section 10 by the substitution in subsection (1) for paragraph (b) of the following paragraph:</p> <p style="padding-left: 40px;">"(b) developing and implementing a preferential procurement policy, subject to the <u>Public Procurement Act, 2023</u>;"</p> <p>21. The amendment of section 13P by the substitution for</p>

Act No. and year	Short title	Extent of repeal or amendment
		<p>subsection (1) of the following subsection:</p> <p>"(1) Any person convicted of an offence in terms of this Act may not, for a period of 10 years from the date of conviction, contract or transact any business with any organ of state or public institution and must for that purpose be entered into the register of <b>[tender] bid defaulters [which the National Treasury may maintain]</b> <u>established and maintained by the Public Procurement Office in terms of the Public Procurement Act, 2023</u>, for that purpose."</p>
Act No. 56 of 2003	Local Government: Municipal Finance Management Act, 2003	<p>22. The amendment of section 1 by the substitution for paragraph (d) of the definition of 'irregular expenditure' of the following paragraph:</p> <p>"(d) expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, <u>the Public Procurement Act, 2023</u>, a requirement of the <b>[supply chain management policy] procurement system</b> of the municipality or entity or any of the municipality's by-laws giving effect to such policy, and which has not been condoned in terms of such policy or by-law,".</p> <p>23. The amendment of section 2 by the deletion of paragraph (f).</p> <p>24. The amendment of section 14 by the substitution for subsection (5) of the following subsection:</p> <p>"(5) Any transfer of ownership of a capital asset in terms of subsection (2) or (4) must be fair, equitable, transparent, competitive and consistent with the <b>[supply chain management] procurement policy</b> which the municipality must have and maintain in terms of <b>[section 111] the Public Procurement Act, 2023</b>."</p> <p>25. The amendment of section 33 by the deletion of subsection (4).</p> <p>26. The amendment of section 65 by the substitution in subsection (2) for paragraph (i) of the following paragraph:</p> <p>"(i) that the municipality's <b>[supply chain management policy referred to in section 111] procurement system</b> <u>complies with the Public</u></p>

Act No. and year	Short title	Extent of repeal or amendment
		<p><u>Procurement Act, 2023</u> [is implemented in a way that is fair, equitable, transparent, competitive and cost-effective]; and".</p> <p>27. The amendment of section 75 by the deletion of subsection 1(j).</p> <p>28. The amendment of section 81 by the substitution for paragraph (e) of subsection (1) of the following paragraph:  "(e) must perform such budgeting, accounting, analysis, financial reporting, cash management, debt management, <b>[supply chain] procurement</b> management, financial management, review and other duties as may in terms of section 79 <u>or other legislation</u> be delegated by the accounting officer to the chief financial officer."</p> <p>29. The amendment of section 90 by the substitution for subsection (5) of the following subsection:  "(5) Any transfer of ownership of a capital asset in terms of subsection (2) or (4) must be fair, equitable, transparent and competitive and consistent with the <b>[supply chain management] procurement</b> policy which the municipal entity must have and maintain in terms of <b>[section 111]</b> <u>the Public Procurement Act, 2023</u>."</p> <p>30. The amendment of section 99 by the deletion of subsection 2(h).</p> <p>31. The repeal of Chapter 11.</p> <p>32. The amendment of section 173 by the deletion in subsection 1(a) of sub-paragraph (ii).</p>
Act No. 4 of 2006	Electricity Regulations Act, 2006	<p>33. The amendment of section 34 by the substitution in section (1)(e) for subparagraph (i) of the following subparagraph:  "(e) <u>subject to the Public Procurement Act, 2023</u>, be established through a <b>[tendering] bid</b> procedure which is fair, equitable, transparent, competitive and cost-effective;"</p>
Act No. 23 of	Infrastructure Development Act,	<p>34. The amendment of section 8 by the substitution of subsection (2) for the following:</p>



Act No. and year	Short title	Extent of repeal or amendment
2014	2014	<p>"(2) If the Commission designates a strategic integrated project which must be implemented, it must determine whether the state has the capacity to implement the project or whether the whole or part of the project must be <b>[put out to tender or]</b> procured <b>[through another form of procurement allowed by the Public Finance Management Act, 1999 (Act No. 1 of 1999)]</b> <u>in terms of the Public Procurement Act, 2023.</u>".</p> <p>35. The amendment of section 12 by the substitution of subsection (4) for the following:</p> <p>"(4) The Director-General or accounting authority of a public entity responsible for an aspect of infrastructure remains the accounting officer or accounting authority in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999) [<b>, the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000),</b>] or the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003).".</p>

Draft Bill - Subject to Office of Chief Justice's Certification

## **MEMORANDUM ON OBJECTS OF PUBLIC PROCUREMENT BILL, 2023**

### **1. PURPOSE OF BILL**

The aim of the Bill is to regulate public procurement and to prescribe a framework within which preferential procurement must be implemented.

### **2. BACKGROUND**

2.1 Section 195 of the Constitution of the Republic of South Africa (“the Constitution”) requires that national legislation must, among others, ensure the promotion in public administration of the following principles:

- (a) A high standard of professional ethics;
- (b) efficient, economic and effective use of resources; and
- (c) development-oriented, accountability and transparency.

2.2 In terms of section 216(1) of the Constitution, national legislation must prescribe measures to ensure both transparency and expenditure control in each sphere of government by introducing, among others, uniform treasury norms and standards.

2.3 Section 217(1) of the Constitution stipulates that, procurement by organs of state and identified institutions, must occur in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

2.4 The Constitution in section 217(2) allows for organs of state to implement a procurement policy providing for categories of preference in the allocation of contracts and the protection or advancement of persons disadvantaged by unfair discrimination. Section 217(3) of the Constitution requires national legislation to prescribe a framework within which the procurement policy must be implemented. The Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000), was enacted for this purpose.

2.5 The public procurement regime in South Africa is currently fragmented as there are a number of laws which regulate procurement across the public administration. This fragmentation results in confusion as different procurement rules apply. Some of these laws pre-date the constitutional order brought about in 1994.

2.6 It is important and necessary, considering the history of South Africa and the developments since the coming into operation of the Constitution, to have legislation which creates a single framework regulating procurement, in line with all applicable stipulations of the Constitution and which contributes to address the economic and social challenges of South Africa.

### **3. OVERVIEW OF BILL**

The Bill aims to create a single regulatory framework for public procurement and eliminate fragmentation in laws which deal with procurement in the public sector and, among others, provide for—

- the establishment of a Public Procurement Office within the National Treasury and its functions;
- the functions of provincial treasuries;
- the functions of procuring institutions; measures pertaining to the integrity of the procurement process;
- preferential procurement framework;
- general procurement requirements;
- enabling regulations on a procurement system including different methods of procurement and different regulations for different types of procurement;
- the use of information and communications technology in procurement;
- dispute resolution mechanisms; and
- the repeal and amendment of certain laws.

#### **4. CONTENT OF BILL**

##### **4.1 Chapter 1 - Definitions, objects, application and administration of Act (clauses 1-3)**

4.1.1 Clause 1 contains various definitions for purposes of the interpretation of the Bill, including the terms “accounting authority”, “accounting officer”, “bid”, “emergency”, “public office-bearer”, “public-private partnership”, “procuring institution”, “related persons” and “transversal term contract”.

4.1.2 Clause 2 provides for the objects of the Bill which are to—

- (a) introduce uniform treasury norms and standards for all procuring institutions to implement their procurement systems as envisaged in section 217(1), read with section 216(1), of the Constitution; and
- (b) determine a preferential procurement framework for all procuring institutions within which to implement their procurement policies as envisaged in section 217(2) and (3) of the Constitution.

4.1.3 Clause 3 sets out the application of the Bill and it applies to—

- (a) a department as defined in section 1 of the Public Finance Management Act;
- (b) a constitutional institution listed in Schedule 1 to the Public Finance Management Act;
- (c) a municipality or a municipal entity; and
- (d) a public entity listed in Schedule 2 or 3 to the Public Finance Management Act.

4.1.4 Clause 3 also provides for the application of Chapter 4 (preferential procurement) to Parliament and provincial legislatures.

##### **4.2 Chapter 2 - Public Procurement Office, provincial treasuries and procuring institutions (clauses 4-8)**

4.2.1 Clause 4 provides for the establishment of a Public Procurement Office within the National Treasury and provides for its functions which, among others, include—

- (a) promoting compliance with the Bill by procuring institutions;
- (b) promoting and taking reasonable measures to maintain the integrity of procurement;
- (c) guiding and supporting officials and procuring institutions to ensure compliance with the Bill;
- (d) promote the use of technology and innovation and learning towards modernisation of the public procurement system; and
- (e) developing and implementing measures to ensure transparency in procurement;
- (f) monitor and oversee the implementation of the Bill; and
- (g) issuing binding instructions on procurement.

4.2.2 Clause 6 deals the functions of provincial treasuries.

4.2.3 Clause 7 indicates the functionary responsible for making decisions on behalf of a procuring institution which is aligned to the Public Finance Management Act, 1999 and the Local Government: Municipal Finance Management Act, 2003.

4.2.4 Clause 8 deals with the duties of procuring institutions.

### **4.3 Chapter 3 - Procurement integrity, debarment and declaring prohibited practices (clauses 9-16)**

4.3.1 Chapter 3 provides for measures to protect the integrity of the procurement process. Officials, bidders, suppliers, members of the Tribunal and any other person involved in a procurement process are required to comply with the applicable codes of conduct prescribed by regulation (clause 9). In addition, clause 10 sets requirements for the conduct of persons involved in procurement and clause 11 provision is made for a declaration of interest by these persons.

4.3.2 Clause 11 requires procuring institutions to take steps to identify automatically excluded persons as envisaged in section 13 and their immediate family members as well as related persons as envisaged in section 11(3). The Bill also requires persons involved in procurement or a person related to the official or that other person to disclose a direct or indirect personal interest in a procurement.

4.3.3 Clause 12 prohibits any person from unduly influencing a procurement process.

4.3.4 Clause 13 lists persons prohibited from submitting a bid.

4.3.5 Clause 14 provides for the issuing of a debarment order to bidders or suppliers or any of the directors, members, trustees or partners of that bidder or supplier by the Public Procurement Office under specified circumstances. A debarment order prohibits the debarred person, for the period specified in the order, from participating in procurement generally or in circumstances specified in the order. The Public

Procurement Office is required to publish the names of debarred persons and make such names available to procuring institutions upon request.

4.3.6 Clause 16 enables the Public Procurement Office to prohibit certain procurement practices.

4.3.7 Clause 17 provides protection for employees who refuse to take directions inconsistent with the Bill.

#### **4.4 Chapter 4 - Preferential procurement (clause 17)**

4.4.1 Chapter 4 regulates preferential procurement and in clause 17(1) requires that when a procuring institution implements 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,

it must do so in accordance with the objects in clause 2, Chapter 4 and section 10(1)(b) of the Broad-Based Black Economic Empowerment Act, 2003.

4.4.2 Clause 17(2) also sets out the minimum requirements for the content of the procurement policy of a procuring institution. Clause 17(4) and (5) specifies preferences like small enterprises, enterprises in townships, rural or underdeveloped areas, black people, women, persons with disabilities and the youth.

4.4.3 Clause 17(3) requires the regulations to be made on one or more preference point systems and thresholds as well as goods that are produced in the Republic and services provided in the Republic. This clause also enables regulations on any other provision of this Chapter. The Minister of Finance is to consult affected Ministers on regulations under this Chapter and for such Ministers to request the Minister of Finance to make regulations in their area.

#### **4.5 Chapter 5 - Procurement system and methods and related matters (clauses 18-30)**

4.5.1 Clause 18 provides that the Minister of Finance prescribe by regulation—

- (a) a procurement system for—
  - (i) procurement and strategic sourcing of goods or services;
  - (ii) procurement and strategic sourcing of infrastructure and capital assets and goods or services related to infrastructure and capital assets; and
  - (iii) the disposal and letting of assets of a procuring institution;
- (b) types of procurement methods including but not limited to public-private partnerships and transversal term contracting;
- (c) methods for disposal and letting of assets by a procuring institution; and
- (d) the requirements and procedure to be followed for each prescribed method.

4.5.2 According to clause 18(3), a procurement system envisaged in the Bill must provide for a range of matters including a procurement policy, demand management and procurement planning and budgeting.

4.5.3 Clause 19 regulates the use of another organ of state by a procuring institution to obtain goods and services.

4.5.4 Clause 20 determines that the Bill must be complied with whether a procuring institution transfer funds to a private person to perform a function on behalf of procuring institution.

4.5.5 Clause 21 sets out steps accounting officers and accounting authorities must take to prevent abuse of the procurement system.

4.5.6 Clause 22 requires procuring institution to establish a procurement unit as part of its procurement system, which is to be responsible for, among others—

- (a) implementation of functions allocated to the unit in terms of this Bill and the supply chain management system of the procuring institution; and
- (b) maintenance of the supply chain management system to ensure its effectiveness and efficiency.

4.5.7 Clause 23 provides for a bid committee system to be prescribed by regulation. It further prohibits the following persons from serving as members of a bid committee:

- (a) A public office bearer;
- (b) a person appointed in terms of section 12A of the Public Service Act; and
- (c) any person having a conflict of interest.

4.5.8 Clause 24 requires the Public Procurement Office to progressively develop an information and communication technology-based procurement system for all procurement to enhance efficiencies, effectiveness, transparency and integrity and to combat corruption. Clause 25 requires procuring institutions to use components of this system as they become operative and to use technology in the implementation of the Bill.

4.5.9 Clause 26(1) requires the Public Procurement Office to determine by instruction measures for the public, civil society and the media to—

- (a) access procurement processes;
- (b) scrutinise procurement;
- (c) monitor high-value or complex procurement that entail significant risks of mismanagement and corruption.

Clause 26(2) provides for measures to ensure candid deliberations and protecting officials from undue influence and threats.

4.5.10 Clause 27 requires the Public Procurement Office to determine by instruction the requirements for disclosure of procurement information,

4.5.11 Clause 28 deals with legislative instruments that must be available automatically.

4.5.12 Clause 29 provides for access by certain authorities to information held by Public Procurement Office and provincial treasuries.

4.5.13 Clause 30 deals with the protection of confidential information and personal information held by or obtained from the Public Procurement Office or a provincial treasury.

#### **4.6 Chapter 6 - Dispute resolution (clauses 31-49)**

4.6.1 Clause 31 provides for a right of the bidder to seek a reconsideration by a procuring institution of its decision to award a bid.

4.6.2 Clause 32 establishes the Public Procurement Tribunal to review of (i) a reconsideration of a decision taken by a procuring institution to award a bid or (ii) a decision to debar a person in terms of section 16.

4.6.3 Clause 33 to 40 provides for the appointment of members of the Tribunal and other related matters to the functioning of the Tribunal.

4.6.4 Clause 42 provides for a panel of the Tribunal to hear a matter and clause 43 for rules of the Tribunal to regulate proceedings.

4.6.3 The right of review by the Tribunal of a reconsideration of decision taken by a procuring institution to award a bid is provided for in clause 44 while the decision to debar a person is dealt with in clause 45.

4.6.4 The review proceeding requirements are set out in clause 46.

4.6.5 Clause 47 lists the orders that the Tribunal may make.

4.6.6 Clause 48 deals with the right of any party dissatisfied with an order of the Tribunal to institute judicial review in terms of Promotion of Administrative Justice Act, 2000.

4.6.7 Clause 49 provides for the standstill while a decision is under reconsideration by the procuring institution or a review by the Tribunal. It enables emergency procurement during this period if justified.

#### **4.7 Chapter 7 - General provisions (clauses 50-61)**

4.7.1 Clause 50 for a power for the Public Procurement Office to investigate any alleged non-compliance with the Act, if requested by the relevant treasury or a procuring institution or on its own initiative. For this purpose, clause 51 also authorises the Public Procurement Office to enter and search premises of a procuring institution, an official of a procuring institution or a bidder or supplier to whom a bid has been

awarded, for purposes of investigating a procurement related matter. For certain entries and searches, a warrant is required in terms of clause 52.

4.7.2 Clause 53 enables the Minister, the Director-General: National Treasury, the accounting officer or accounting authority of a procuring institution and the Public Procurement Office to delegate functions conferred by the Bill.

4.7.3 Clause 54 exempt a person from liability from any action taken in good faith.

4.7.4 Clause 55 provides for the criminalisation of the conduct of any person who—

- (a) knowingly gives false or misleading information or evidence under this Bill;
- (b) interferes with or exerts undue influence on any official of a procuring institution or a member of the Tribunal in the performance of his or her functions or in the exercise of his or her power under this Bill;
- (c) without authorisation opens any sealed bid;
- (d) connives or colludes to commit a corrupt, fraudulent, collusive or coercive or obstructive act related to procurement under this Bill; and
- (e) causes loss of public assets or funds as a result of negligence in the implementation of this Bill.

4.7.5 Clause 56 provides for exemption to be granted by the Minister, to a procuring institution from any provision of this Bill when undertaking national security-related procurement or for procurement partially or fully funded by donor or grant funding.

4.7.6 Clause 57 enables the Public Procurement Office to approve deviations from a provision of a regulation or an instruction under specified circumstances.

4.7.7 Clause 58(1) enables the Minister of Finance to make regulations regarding, among others, all matters specified for regulations elsewhere in the Bill such as a preferential procurement matters, a procurement system, procurement methods including public-private partnership and transversal term contracting, use of another organ of state to obtain goods and services and codes of conduct. It also provides for regulations on variation of contracts, procedure for lodging procurement complaints by public, procurement using donor or grant funding and negotiations with preferred bidders. Clause 58(3) and (4) sets out a public consultation process as well as Parliamentary scrutiny of draft regulations. Clause 58(7) provides that the Minister may make regulations for different categories of procurement institutions and different categories of procurement. It is required that specific regulations must be made for infrastructure and capital assets, and goods or services related to infrastructure and capital assets.

4.7.8 Clause 59 deals with transitional measures about bids awarded or advertised before the commencement of the legislation.

4.7.9 Clause 60 proposes amendments and the repeal of certain laws which are contained in the Schedule to the Bill. It includes the repeal of the Preferential Procurement Policy Framework Act, 2000.



4.7.10 Clause 61 provides for the provisions of the Bill to be brought into operation on different dates and also on different dates for different categories of procuring institutions or different categories of procurement.

## 5. FINANCIAL IMPLICATIONS FOR STATE

No substantial financial implications for the State are envisaged.

## 6. CONSULTATION

The development of the draft Bill included consultation with—

- (a) various national and provincial departments, municipalities and public institutions;
- (b) the relevant Directors-General's Clusters and the Forum of South African Directors-General;
- (c) the public through publication for comment from 19 February 2020 until 30 June 2020; and
- (d) the National Economic Development and Labour Council.

## 7. PARLIAMENTARY PROCEDURE

7.1 The State Law Advisers and the National Treasury are of the opinion that this Bill must be dealt with in accordance with the procedure established under section 76 of the Constitution, since it contains provisions to which the procedure set out in section 76(4)(b) of the Constitution applies.

7.2 Chapter 4 of the Constitution provides for the procedures that Bills must follow in Parliament. Section 76 of the Constitution provides for parliamentary procedure for ordinary Bills affecting the provinces. In terms of section 76(3) a Bill must be dealt with in accordance with the procedure established by either subsection 76(1) or subsection 76(2) if it falls within a functional area listed in Schedule 4.

7.3 In *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*, 2010 (8) BCLR 741 (CC) at paragraphs 70 and 72, the Constitutional Court stated that the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence. Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3), and second, by whether the provisions of a Bill in substantial measure fall within a concurrent legislative competence.

7.4 This test compels us to consider the substance, purpose and effect of the subject matter of the proposed Bill.

7.5 The State Law Advisers and the National Treasury are of the opinion that it is not necessary to refer the Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions pertaining to customary law or customs of traditional communities.

Draft Bill - Subject to Office of Chief State Law Adviser's certification