

REPUBLIC OF SOUTH AFRICA

PUBLIC PROCUREMENT BILL

(As presented by the Standing Committee on Finance (the National Assembly))

(MINISTER OF FINANCE)

[B 18B—2023]

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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 WHILE RECOGNISING the need to increase the capacity of organs of state to provide goods and services they require, procurement of goods and services from persons outside the State, where necessary, must be regulated;

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 Parliament of the Republic of South Africa , as follows:—

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CHAPTER 1 DEFINITIONS, OBJECTS, APPLICATION AND ADMINISTRATION OF ACT 15

Definitions

1. (1) In this Act, unless the context indicates otherwise—
- “**acceptable bid**” means a bid which, in all respects, complies with the specifications and conditions of a bid set out in the invitation to bid;
- “**accounting authority**” means an accounting authority as defined in section 1 of the Public Finance Management Act; 20
- “**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 25
 - (c) in relation to a municipal entity, the official of the entity referred to in section 93 of the Municipal Finance Management Act;
- “**B-BBEE status level of contributor**” means the B-BBEE status of an entity in terms of a code of good practice on black economic empowerment issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); 30
- “**bid**” means a written offer, which is capable of acceptance and conversion into a contract, in the form determined by the procuring institution in line with its compliance requirements in response to an invitation for procurement through any prescribed procurement method; 35
- “**bid committee**” means persons appointed by the accounting officer or accounting authority to serve on a committee by performing functions in respect of different stages of considering bids;
- “**bidder**” means any person or an association of two or more persons that submit a bid; 40
- “**black people**” has the meaning assigned in section 1 of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);
- “**capital asset**” means an asset that is tangible or intangible which a procuring institution intends to use for more than 12 months;
- “**confidential information**” means— 45
- (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; 50
 - (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; 55
 - or
 - (f) information that is likely to prejudice national security;
- “**Constitution**” means the Constitution of the Republic of South Africa, 1996;
- “**co-operative**” has the meaning assigned in section 1 of the Co-operatives Act, 2005 (Act No. 14 of 2005);

- “**corruption**” means an offence envisaged in 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);
- “**economically active population**” means all persons, within the population of the Republic, who contribute to economic activity or are available to contribute to economic activity; 5
- “**emergency**” means an event which is unexpected and usually dangerous situation that poses an immediate risk to health, life, human rights, property, financial loss, livestock, environment, cybersecurity or the ability of the procuring institution to maintain critical business functions and requires immediate action; 10
- “**immediate family member**” means a spouse, civil partner, life partner, child, stepchild, parent or sibling;
- “**income-generating contract**” means an agreement between the procuring institution and a third party that produces revenue for the procuring institution, and includes, but is not limited to, leasing and disposal of assets and concession contracts, excluding direct sales and disposal of assets through public auctions; 15
- “**infrastructure**” means the physical facilities or structures and systems, including digital or analogue communications systems that are required to provide services to directly or indirectly the public; 20
- “**instruction**” means an instruction issued by the Public Procurement Office in terms of section 5(2) or a provincial treasury in terms of section 6(2);
- “**member of the Tribunal**” means a member of the Tribunal referred to in section 39;
- “**military veteran**” has the meaning assigned in section 1 of the Military Veterans Act, 2011 (Act No. 18 of 2011); 25
- “**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); 30
- “**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); 35
- “**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; 40
 - (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; 45
 - (h) cyber-attack;
 - (i) serious violence directed at overthrowing the constitutional order of the Republic; and
 - (j) 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 or 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; 50
- “**National Treasury**” means the National Treasury established by section 5 of the Public Finance Management Act; 55
- “**official**” means an employee of a procuring institution;
- “**open data**” means machine-readable data that is made available with the technical and legal characteristics necessary for it to be freely used, reused and redistributed without restrictions, based on a standard determined by an instruction; 60
- “**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 47;
- “**people with disabilities**” has the meaning assigned in section 1 of the Employment

Equity Act, 1998 (Act No. 55 of 1998);

“**prescribed**” means prescribed by regulation in terms of section 64;

“**procurement**” means—

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

by a procuring institution;

“**procurement system**” means a procurement system envisaged in section 25(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; or
- (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 or on an easily accessible central online portal that is publicly available;

“**regulation**” means a regulation made in terms of section 64;

“**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);

“**small enterprise**” has the meaning assigned in section 1 of the National Small Enterprise Act, 1996 (Act No. 102 of 1996);

“**standard bid documents**” means standard bid documents issued in terms of section 25(4);

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

“**this Act**” includes the regulations, codes of conduct, instructions and notices made or issued in terms of this Act;

“**transformation**” in relation to public procurement, means the process of change that seeks to—

- (a) redress the unfair discrimination of the past;
- (b) achieve representation of the economically active population of the Republic; and
- (c) achieve socio-economic objectives;

“**transversal term contract**” means a contract arranged by the relevant treasury or another procuring institution mandated in terms of legislation, 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 38;

“**Tribunal rules**” means rules made in terms of section 48; and

“**youth**” has the meaning assigned in section 1 of the National Youth Development Agency Act, 2008 (Act No. 54 of 2008).

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

5

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; and 10
- (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 objects referred to in subsection (1) must, among others— 15
 - (a) ensure efficient, effective and economic use of public resources 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; 20
 - (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; and
 - (iii) investment; 25
 - (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 innovation and sustainable development. 30

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; 35
- (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) Section 1, Chapter 4 and regulations made under section 64, applicable to Chapter 4, apply to Parliament and provincial legislatures. 40

(3) This Act applies to—

- (a) all procurement carried out by a procuring institution, including procurement through donor or grant funding;
- (b) any person who submits a bid or has been awarded a bid; and
- (c) all procurement carried out by any person on behalf of a procuring institution. 45

(4) In the event of a conflict between a provision of this Act and a provision of any other legislation, the provision of this Act prevails.

(5) The Minister is responsible for the administration of this Act.

CHAPTER 2 PUBLIC PROCUREMENT OFFICE, PROVINCIAL TREASURIES AND PROCURING INSTITUTIONS

Part 1

Public Procurement Office

5

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. 10

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; 15
- (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; and
 - (ii) ensure the professional development and training of officials involved in procurement; 20
- (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; 25
- (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. 30

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

- (a) issue binding instructions as provided for in this Act and on any other procurement matter for the effective implementation of this Act;
- (b) issue guidelines to assist procuring institutions with the implementation of this Act or any other procurement related matter; 35
- (c) after consultation with the relevant category of procuring institutions, determine a model procurement policy for different categories of procuring institutions and different categories of procurement; and
- (d) exercise other powers conferred by this Act.

(3) The Public Procurement Office may issue different instructions in terms of subsection (2) for— 40

- (a) different categories of procuring institutions; and
- (b) different categories of procurement.

Part 2

Provincial treasuries

45

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; 50
- (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; 5
 - (b) issue 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; and 10
 - (d) 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 15
 - (b) different categories of procurement.

Part 3 **Procuring institutions**

Decision-making for procuring institution

7. The accounting officer or accounting authority of a procuring institution is responsible for making decisions on behalf of the procuring institution in terms of this Act. 20

Duties of procuring institution

- 8. (1) A procuring institution must—
 - (a) conduct procurement in accordance with this Act; 25
 - (b) implement an effective and efficient procurement system as envisaged in section 25;
 - (c) define procurement needs by compiling a statement of requirements and the statement must be included in the invitation documents, evaluation process and contracts; 30
 - (d) provide procurement information as may be prescribed or as the Public Procurement Office or the relevant provincial treasury may require; and
 - (e) take steps to prevent non-compliance with this Act.
- (2) 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, error of fact or fraud. 35

CHAPTER 3 **PROCUREMENT INTEGRITY, PROHIBITION OF CERTAIN PRACTICES** **AND DEBARMENT**

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. 40
- (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. 45

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; 50

- (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) if a conflict of interest exists in a procurement matter, disclose such conflict and recuse himself or herself from participating in the process of that procurement matter.

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)(i).
- (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 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 submitting bid

- 13.** (1) The following persons may not submit a bid:
- (a) A public office bearer;
 - (b) an official or employee of Parliament or a provincial legislature;
 - (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; 5
 - (h) a bidder or supplier debarred in terms of section 15;
 - (i) an entity in which a bidder or supplier debarred in terms of section 15—
 - (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. 10
- (2) A non-executive member of a controlling body of a procuring institution may not submit a bid in that institution.

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 to do in terms of this Act, the affected person must not comply with the direction. 15
- (2) The affected person— 20
- (a) must inform the Public Procurement Office or relevant provincial treasury, in the prescribed manner, of the direction, the objection and the reason for the objection;
 - (b) may submit in writing to the person with authority, the objection, and the reason for the objection; 25
 - (c) may inform, in writing, his or her supervisor who must initiate an investigation into the allegation within a period prescribed in the procuring institution policies; and
 - (d) may report to the Public Service Commission or any other relevant body for investigation. 30
- (3) If the supervisor does not initiate an investigation, the Public Procurement Office or the relevant provincial treasury must initiate an investigation in the prescribed manner unless reported in terms of subsection (2)(d).
- (4) The affected person may not, despite any term of his or her employment, be subjected to occupational detriment as defined in section 1 of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), due to the non-compliance with the direction of the person with authority. 35

Debarment

15. (1) Before issuing a debarment order in terms of this section, a procuring institution must provide the bidder, supplier or any of the directors, members, trustees or partners of that bidder or supplier (herein called “the affected person”) with a notice of the intention to debar. 40
- (2) The notice must—
- (a) indicate the reason for the intended debarment; and
 - (b) invite the affected person to provide reasons why he or she must not be debarred. 45
- (3) A procuring institution 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; 50
 - (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 or breach of confidentiality relating to procurement by a procuring institution; 55
 - (e) has not performed a material contractual obligation not due to circumstances beyond the control of the supplier;

- (f) has been convicted of an offence relating to—
 - (i) obtaining or attempting to obtain a contract or subcontract; or
 - (ii) business or professional activities;
 - (g) attempted, or conspired with, aided, abetted, induced or incited another person to contravene a provision of this Act; or 5
 - (h) contravened a provision of this Act.
- (4) (a) The procuring institution must consider the reasons submitted in terms of subsection (2)(b) and decide whether to issue a debarment order.
- (b) The procuring institution must notify—
 - (i) the affected person; and 10
 - (ii) the Public Procurement Office,
 within five days from the date of the decision.
- (5) The procuring institution may, 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, error of law 15 or fraud.
- (6) The Public Procurement Office must—
- (a) establish and maintain a debarment register of persons debarred in terms of this section; and
 - (b) make the register publicly available. 20
- (7) The Public Procurement Office must immediately after being notified of the decision to debar in terms of subsection (4)(b) include the name of the affected person in the register referred to in subsection (6).
- (8) A debarment order takes effect on the date the name of the affected person appears in the register referred to in subsection (6). 25
- (9) A debarment order may not exceed the prescribed period and different periods may be prescribed for debarment in terms of subsection (3).
- (10) 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. 30
- (11)(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 35 the person debarred.

CHAPTER 4 PREFERENTIAL PROCUREMENT

Preferential framework and procurement policies

- 16.** A procuring institution must implement a procurement policy providing for— 40
- (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,
- envisaged in section 217(2) and (3) of the Constitution, in accordance with the objects of this Act and the framework in this Chapter. 45

Set-asides for preferential procurement

- 17.** (1) A procuring institution must set-aside a bid for a category of persons provided for in subsection (3) in accordance with the prescribed thresholds and conditions.
- (2)(a) The Minister must, subject to this subsection, prescribe targets for set-aside referred to in subsection (1). 50
- (b) The Minister must, within 30 days after the commencement of this section, consult the relevant Ministers for which categories of persons targets for set-aside must be prescribed.
 - (c) The Minister must, at least every two years after prescribing any target for set-aside as envisaged in terms of paragraph (b), consult as envisaged in paragraph (b), 55 on proposed amendments to any target so prescribed and prescribing new targets.

(d) If no target for set-aside for a category of persons is prescribed in terms of paragraph (a), a procuring institution is not precluded from setting aside a bid for that category.

(3) Persons referred to in subsection (1) are limited to—

- (a) black people; 5
- (b) black women;
- (c) women;
- (d) black people with disabilities;
- (e) people with disabilities;
- (f) small enterprises owned by— 10
 - (i) black people;
 - (ii) black women;
 - (iii) women;
 - (iv) black people with disabilities;
 - (v) people with disabilities; 15
 - (vi) black people who are youth; or
 - (vii) youth;
- (g) small enterprises within a particular geographical area;
- (h) small enterprises;
- (i) co-operatives which consists of members who are black people; or 20
- (j) co-operatives.

(4)(a) Persons referred to in subsection (3)(a) to (f) must be owned by the relevant category in accordance with the prescribed percentages.

(b) Persons referred to in subsection (3)(a) to (h) must be owned by citizens of the Republic in accordance with the prescribed percentages. 25

(c) Persons referred to in subsection (3)(i) and (j) must have members of the relevant category and citizens of the Republic in accordance with the prescribed percentages.

(5) A bid set-aside in terms of subsection (1), must be evaluated as follows:

- (a) Assessment against terms and conditions as stated in the bid document;
- (b) if functionality is part of the bid, evaluation must be done in terms of 30
 - functionality and the minimum qualifying score;
- (c) a bid must be disqualified if it fails to meet the minimum threshold for functionality as per the bid invitation; and
- (d) qualifying bids must be evaluated further in terms of the prescribed criteria 35
 - which may include complementary goals.

(6) If the goods or services required cannot be procured in terms of this section, the procuring institution must—

- (a) procure in accordance with section 19; and
- (b) record the reasons and report to the Public Procurement Office and the 40
 - relevant treasury in the form determined by the Public Procurement Office.

(7) This section applies with the necessary changes and as prescribed to a bid for an income-generating contract.

Prequalification criteria for preferential procurement

18. (1) A procuring institution must, in accordance with the prescribed thresholds and conditions, apply prequalification criteria to promote preferences in the allocation of 45 contracts, by advertising a bid with a specific bid condition that only one or more of the following bidders may respond:

- (a) A bidder having a stipulated minimum B-BBEE status level of contributor;
- (b) persons referred to in section 18(3)(a), (b), (c), (d), (e) or (f); or
- (c) a bidder subcontracting a prescribed minimum percentage to— 50
 - (i) a small enterprise which is owned by black people;
 - (ii) a small enterprise which is owned by black people who are youth;
 - (iii) a small enterprise which is owned by black people who are women;
 - (iv) a small enterprise which is owned by black people with disabilities;
 - (v) a small enterprise which is owned by black people within a particular 55
 - geographical area;
 - (vi) a small enterprise which is owned by black people who are military veterans;
 - (vii) a small enterprise;
 - (viii) a co-operative which consists of members who are black people; or 60
 - (ix) a co-operative.

(2)(a) Persons referred to in subsection (1)(a), (b) and (c)(i) to (vii) must be owned by the relevant category in accordance with the prescribed percentages.

(b) Persons referred to in subsection (1)(a), (b) and (c)(i) to (vii) must be owned by citizens of the Republic in accordance with the prescribed percentages.

(c) Persons referred to in subsection (1)(c)(viii) and (ix) must have members of the relevant category and citizens of the Republic in accordance with the prescribed percentages. 5

(3) A procuring institution may only select one of the preferences identified in paragraph (c) of subsection (1).

(4) Procuring institutions must at the procurement and bid planning stage identify procurement opportunities to promote preferences in the allocation of contracts and apply any or more of the prequalification criteria referred to in subsection (1)(a) to (c). 10

(5) Procuring institutions must conduct market research and industry analysis to identify procurement opportunities, level of transformation in a particular sector or commodity, supply market, and availability of small enterprises or co-operatives or both and their B-BBEE status level that may be eligible to bid in order to identify sectors and industries that are not transformed where any of the prequalification criteria referred to in subsection (1)(a) to (c) could be applied to assist in transforming those sectors and industries. 15

(6) A procuring institution, subsequent to the research and analysis envisaged in subsection (5), may only select one or more prequalification criteria if there are a prescribed minimum number of bidders to ensure competition. 20

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

(8) A procuring institution must, in addition to the measures stipulated in subsection (1) to (7), evaluate the bid in terms of the prescribed criteria which may include complementary goals. 25

(9) This section applies with the necessary changes and as prescribed to a bid for an income-generating contract.

Subcontracting as condition of bid 30

19. (1) Where feasible, a procuring institution must subcontract a contract above a prescribed amount, to advance persons or categories of persons in subsection (2)(a) to (i).

(2) If a procuring institution applies subcontracting as envisaged in subsection (1), the procuring institution must advertise the bid with a specific bidding condition that the successful bidder must subcontract a prescribed minimum percentage of the value of the contract to— 35

(a) a small enterprise;

(b) a small enterprise which is owned by black people;

(c) a small enterprise which is owned by black people who are youth; 40

(d) a small enterprise which is owned by black people who are women;

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

(f) a small enterprise which is owned by black people living in a particular geographical area;

(g) a small enterprise which is owned by black people who are military veterans; 45

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

(i) a co-operative.

(3)(a) Persons referred to in subsection (2)(a) to (g) must be owned by the relevant category in accordance with the prescribed percentages.

(b) Persons referred to in subsection (2)(a) to (g) must be owned by citizens of the Republic in accordance with the prescribed percentages. 50

(c) Persons referred to in subsection (2)(h) and (i) must have members of the relevant category and citizens of the Republic in accordance with the prescribed percentages.

(4) Bidders must identify and select subcontractors as prescribed.

(5) A bidder that fails to meet any mandatory subcontracting criteria stipulated in the bid documents is an unacceptable bid and must be disqualified. 55

(6) A procuring institution must, in addition to the measures stipulated in subsections (1) to (5), evaluate the bid in terms of the prescribed criteria which may include complementary goals.

(7) This section applies with the necessary changes and as prescribed to a bid for an income-generating contract. 60

Designation of sectors for local production and content

20. (1) The Minister responsible for trade, industry and competition (herein called “the responsible Minister”) must, by notice in the *Gazette*—
- (a) designate a sector, sub-sector or industry or product in accordance with national development and industrial policies for local production and content, where only locally produced or manufactured goods meet the stipulated minimum threshold for local production and content, taking into account economic and other relevant factors; 5
 - (b) stipulate a minimum threshold for local production and content; and
 - (c) stipulate the period of the designation. 10
- (2) The designation and stipulation, as envisaged in subsection (1)(a) and (b), may only occur after the responsible Minister has—
- (a) published the proposed designation, including the proposed minimum thresholds, for public comment for thirty days in the *Gazette* and on the departmental website and has notified the Minister of such publication; 15
 - (b) reviewed all comments received and provided responses to the comments in a schedule setting out the comments and responses;
 - (c) updated the proposed designation after considering the comments and proposals made during the public comment stage; and
 - (d) submitted the updated proposed designation to the Minister and considered any comments made by the Minister. 20
- (3) In determining the threshold referred to subsection (1)(b), the responsible Minister must, in addition to considering the public comments and responses envisaged in subsection (2), consider—
- (a) whether there are sufficient local manufacturers in the country who are capable to compete for the provision of goods designated for local production and content by determining—
 - (i) the number of existing manufacturers available in the country;
 - (ii) security of supply or capability to supply for the period that the designation is to be in effect; 30
 - (iii) the contribution of other role-players in the supply chain of the commodity or product including distributors and product agents; and
 - (iv) the effect of local production and content on employment; and
 - (b) the economic impact on imported goods.
- (4) The sufficient local manufacturers referred to in subsection (3)(a) must be determined by the responsible Minister but may not be less than three local manufacturers. 35
- (5)(a) A procuring institution must, in the case of a designation in terms of subsection (1), advertise the invitation to bid with a specific condition that only locally produced goods or locally manufactured goods, meeting the stipulated minimum threshold for local production and content, will be considered. 40
- (b) A bid that fails to meet the minimum stipulated threshold for local production and content is an unacceptable bid and must be disqualified.
- (6)(a) If the required quantity of goods subject to a designation in terms of subsection (1), cannot be wholly sourced from local manufacturers or at the designated local content threshold for the period of the designation, or both, the procuring institution may submit a request for a waiver, in the form determined by the responsible Minister. 45
- (b) The responsible Minister may determine by notice in the *Gazette* and on its website that, until further notice, that procuring institutions are granted a waiver from procuring at the stipulated minimum thresholds for local production and content as envisaged in paragraph (a). 50
- (7) If the responsible Minister does not grant the waiver referred to in subsection (6), and the procuring institution has sufficient evidence that the quantity of goods required cannot be wholly sourced from local manufacturers or at the designated local content threshold for the period of the designation, or both, the procuring institution— 55
- (a) may advertise the invitation to bid without a specific condition that only locally produced goods or locally manufactured goods, meeting the stipulated minimum threshold for local production and content will be considered; and
 - (b) must within 14 days after the advertisement inform the responsible Minister accordingly and of the reasons. 60

(8) A procuring institution must, in addition to the measures stipulated in subsection (1) to (7), evaluate the bid in terms of the prescribed criteria which may include complementary goals.

Other preference measures

21. If sections 17, 18, 19 and 20 are not applicable, preferences must be allocated as prescribed. 5

Measures to advance sustainable development

22. A procuring institution may, in accordance with prescribed conditions, provide for measures to advance sustainable development in procurement.

Measures for beneficiation and innovation, advancing creation of jobs, intensification of labour absorption and development of small enterprises within particular geographical area 10

23. When procuring, a procuring institution may, in accordance with prescribed conditions, provide for measures to advance the creation of jobs, intensification of labour absorption, beneficiation, innovation and the development of small enterprises within a particular geographical area. 15

Contracting conditions

24. (1) A procuring institution may, as prescribed, provide for measures for preference as a condition of contract that the supplier must achieve at the end of the contract.

(2) Future deliverables must form part of the contract with set milestones to be achieved together with penalties to be imposed if the supplier fails to achieve them in accordance with conditions stipulated in the contract. 20

CHAPTER 5 GENERAL PROCUREMENT REQUIREMENTS

Part 1 Procurement system, methods and related matters 25

Procurement system and methods

25. (1) The Minister must prescribe a framework within which procuring institutions must implement the procuring system, referred to in section 8(1)(b), which includes—

- (a) a strategic approach to procurement— 30
 - (i) in other countries;
 - (ii) for infrastructure, capital assets and goods or services related to maintenance of infrastructure and capital assets;
 - (iii) for the disposal and letting of assets; and
 - (iv) to promote innovation; 35
- (b) types of procurement methods; and
- (c) the requirements and procedure to be followed for each prescribed method.

(2) The Minister may determine—

- (a) by notice in the *Gazette*, procurement thresholds; and
- (b) different thresholds for— 40
 - (i) different categories of procuring institutions; and
 - (ii) different categories of procurement.

(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; 45
- (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; 50
- (g) risk management;

- (h) logistics management;
- (i) asset management;
- (j) disposal management;
- (k) monitoring and assessment of procurement performance; and
- (l) reporting.

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

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

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

Use of another organ of state

26. 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.

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Measures to prevent abuse of procurement system

27. 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
- (e) 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.

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Establishment of procurement function

28. (1) Every procuring institution must establish a procurement function as part of its procurement system.

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

- (a) implementation of functions 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;

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- (d) provide strategic support to the procuring institution in the performance of its 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

- 29.** (1) The Minister must prescribe a bid committee system for procuring institutions.
- (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, 1994 (Proclamation No. 103 of 1994); and
 - (c) any person having a conflict of interest.

Part 2

Use of technology in procurement

Information and communication technology-based procurement system

- 30.** (1) The Public Procurement Office must develop an information and communication technology-based procurement system in order to enhance efficiency, effectiveness, transparency and integrity and to combat corruption.
- (2) After conducting an information and communication technology due diligence of the sector, to assist with the formulation of the design brief for the development of the procurement system, referred to in subsection (1), the system must, subject to the due diligence conducted, provide for the following components progressively:
- (a) A single platform that at least provides access for officials, bidders, suppliers and members of the public to all procurement related services;
 - (b) standardised and interoperable open data across the procurement cycle to be used by procuring institutions according to their readiness determined in accordance with an instruction;
 - (c) uniform procurement procedures and processes;
 - (d) reporting requirements on procurement;
 - (e) a marketplace to enable efficient procurement of common goods and services; and
 - (f) a suitable hosting option for procurement data to enable easy reporting, analysis, research and oversight of procurement transactions.

Use of technology by procuring institutions

- 31.** (1) Procuring institutions must—
- (a) to the extent possible, use technology in the implementation of this Act; and
 - (b) when available, use the different components of the procurement system, referred to in section 30(1).
- (2) (a) During the development of the procurement system, referred to in section 30(1), 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) readiness assessments for procurement technology.

Part 3

Access to procurement processes and information

Access to procurement processes

- 32.** (1) The Minister must prescribe measures for the public, civil society and the media to access, scrutinise and monitor procurement processes.
- (2) The regulation envisaged in subsection (1)—

- (a) may introduce 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; 5
- (b) may be limited to certain categories of procurement or procurement above a specified threshold; and
- (c) must exclude confidential information.

Disclosure of procurement information

33. (1) The Minister must prescribe requirements to disclose information regarding procurement. 10

(2) The regulation 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 bid process; 15
 - (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; 20
 - (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(7)(aA) of the Companies Act, 2008 (Act No. 71 of 2008); and
 - (v) contracts entered into with a supplier and invoices submitted by the supplier; and 25
- (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; and 30
 - (ii) in a format that—
 - (aa) enables tracking of information relevant to the entire process of a specific procurement;
 - (bb) is electronic and interoperable; and
 - (cc) if it contains confidential information, only that information is severed. 35

Documents to be made available

34. 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, 40

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

Access by certain authorities to information held by Public Procurement Office and provincial treasuries 45

35. (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; 50
- (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 55
- (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 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 National intelligence Structure, as defined in section 1 of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994), if the Public Procurement Office or the relevant provincial treasury reasonably believes that the information relates to any potential threat or threat to the national security.

Protection of information

36. (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

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

(2)(a) Subject to paragraph (c), the Tribunal or a court may not review a decision to award a bid unless the bidder has exhausted the internal remedy envisaged in subsection (1).

(b) Subject to paragraph (c), the Tribunal or a court must, if it is not satisfied that the internal remedy has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in the Tribunal for a review in terms of this Act or a court for judicial review.

(c) The Tribunal or a court may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust the internal remedy if the Tribunal or the court considers it in the interest of justice.

(3) An application referred to 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.

(4) 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. 5

(5) Despite the period stated in subsection (4), a bidder may request the procuring institution to consider an application for reconsideration filed after the expiry of the period mentioned in subsection (3), on the ground that the application raises public interest considerations. 10

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

- (a) immediately institute an investigation; and
- (b) make a decision and inform the bidder within 30 days.

(7) A decision referred to in subsection (6)(b)— 15

- (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.

(8) If the decision of the procuring institution in terms of subsection (6)(b) results in the withdrawal of the original award, the awarded bidder if not satisfied with the decision of the procuring institution, may file an application for review with the Tribunal in terms of section 49(1). 20

Part 2

Public Procurement Tribunal

Establishment of Tribunal 25

38. (1) The Public Procurement Tribunal is hereby established to review decisions taken by—

- (a) a procuring institution in terms of section 37; and
- (b) a procuring institution to debar a bidder or supplier in terms of section 15.

(2) The Tribunal— 30

- (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. 35

Composition of Tribunal

39. (1) The Tribunal consists of as many members as the Minister appoints with due regard to section 40.

(2) The members of the Tribunal must include—

- (a) one person who is a retired judge who must be the Chairperson; 40
- (b) a sufficient number of persons with 10 years' experience in law; and
- (c) a sufficient number of persons with 10 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. 45

Qualification of members of Tribunal

40. (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. 50

(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

- 41.** (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— 5
- (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

- 42.** (1) Subject to subsection (2), a member of the Tribunal may not participate in the 10
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 15
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 20
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 25
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 30
Tribunal is not invalid.

Term of office, re-appointment, termination and conditions of service of members of Tribunal

- 43.** (1) A member of the Tribunal holds office for a period of five years, or the shorter 35
period that the Minister determines.
- (2) A member of the Tribunal may be re-appointed at the expiry of a term for a further 35
term not exceeding three years.
- (3) A member of the Tribunal may resign by giving at least three-months' notice to the
Minister, or the shorter period as the Minister approves.
- (4) The Minister may terminate the appointment of a member of the Tribunal if— 40
- (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 42(2); or
 - (c) an independent inquiry by the Minister has found that the member has— 45
 - (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 45
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 50
service for members of the Tribunal.

Finances of Tribunal

- 44.** The Tribunal is financed from—
- (a) money that is appropriated by Parliament; and
 - (b) prescribed fees for the Tribunal.

Resources of Tribunal

45. 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

46. A member of the Tribunal or a person referred to in section 45(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

47. (1) The Chairperson must constitute a panel for each application envisaged in section 49 or 50.

(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 49 or 50, 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 39(2)(b);
- (c) a member of the Tribunal referred to in section 39(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

48. (1) The Tribunal must make rules regarding proceedings for applications, envisaged in sections 49 and 50, 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, are available.

Part 3 Review process

Review of decision of procuring institution

49. (1) If a bidder is not satisfied by a decision made by a procuring institution in terms of section 37, 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

50. (1) A person debarred in terms of section 15(3) may, within 10 days of being informed of the decision to debar, submit an application for review to the Tribunal. 5

(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. 10

Fee

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

Review proceedings 15

52. (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 20
- (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. 25

(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 30
- (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; 35
- (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 40 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. 45

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

Tribunal orders 50

53. (1) In review proceedings envisaged in section 49, the panel may, by order—

- (a) confirm a decision made in terms of section 37;
- (b) set aside a decision made under section 37 and refer the matter back to the relevant procuring institution for further consideration;

- (c) direct a procuring institution not to make an award or cancel an award made for the procurement under review;
 - (d) direct 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 section 50, the panel may, by order—
- (a) confirm the debarment order of the procuring institution;
 - (b) substitute the debarment order for its own order;
 - (c) set aside the debarment order of the procuring institution; or
 - (d) dismiss the application.
- (3) (a) The decision of the majority of the members of the panel constitutes a decision of the panel.
- (b) The chairperson of the panel has a casting vote in the event of an equality of votes.
- (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

- 54.** (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 53(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

- 55.** (1) If a procurement process is subject to—
- (a) a reconsideration in accordance with section 37, 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 49, a procuring institution may not conclude a contract with the successful bidder prior to completion of the review process.
- (2) If an emergency requires procurement for a matter that is the subject of a reconsideration or a review as envisaged in subsection (1), emergency procurement may take place as envisaged in section 64(1)(a)(xi).

CHAPTER 7 **GENERAL PROVISIONS**

Investigation by Public Procurement Office

- 56.** (1) The Public Procurement Office may, if requested by the relevant treasury, a procuring institution, a member of the public 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 61.

(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; and
- (b) an alleged commission of an offence, referred to in section 61, 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

57. (1) The Public Procurement Office may, for purposes of section 56, 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, bidder or supplier, as the case may be; 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 the relevant 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. 5

(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; 10
- (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; 15
- (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— 20
 - (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 25
- (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 control of the premises a reasonable opportunity to make copies of any document or item before it is taken as mentioned in paragraph (a)(vii). 30

(c) The authorised person must give the person apparently in control 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— 35

- (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. 40

(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. 45

(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. 50

(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. 55

(b) The authorised person must inform the person of the right to object in terms of this section at the commencement of the investigation. 60

(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 61(1)(a) based on the false or misleading nature of the answer. 5

Warrants

58. (1)(a) A judge or magistrate who has jurisdiction may issue a warrant for the purposes of section 57(2)(b) on application by a person authorised in terms of section 57(1). 10

(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 57(1) setting out under oath or affirmation why it is necessary to enter and search the premises; 15
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 20

(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 57(1) who enters premises under the authority of a warrant must— 25

(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. 30

(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 57(1) may perform an entry, search or seizure.

(5) A warrant is valid only until—

(a) the warrant is executed; 35

(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. 40

Delegation

59. (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. 45

(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). 50

(2)(a) The Minister responsible for trade, industry and competition may—

(i) delegate to the Director-General responsible for trade, industry and competition a power conferred in terms of section 20; or

(ii) authorise the Director-General responsible for trade, industry and competition to perform any duty imposed on the Minister by section 20; 55

(b) The Director-General responsible for trade, industry and competition may—

(i) delegate to any official of the department for trade, industry and competition 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).
- (3) 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 5
 - (b) authorise that official to perform any duty imposed on the accounting officer or accounting authority by this Act.
- (4) The Public Procurement Office may—
 - (a) delegate to a provincial treasury any power conferred on the Public Procurement Office by this Act; or 10
 - (b) authorise a provincial treasury to perform any duty imposed on the Public Procurement Office by this Act.
- (5) A provincial treasury may—
 - (a) delegate to any of its officials any power conferred on the provincial treasury by this Act; or 15
 - (b) authorise any of its officials to perform any duty imposed on the provincial treasury by this Act.
- (6) 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. 20
- (7) 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 25
 - (c) may at any time be withdrawn in writing by that person.

Limitation of liability

60. No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act. 30

Offences

- 61.** (1) A person who—
- (a) knowingly gives false or misleading information under this Act; 35
 - (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; 40
 - (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 15(11)(a); or 45
 - (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. 50
- (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; 55
 - (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 52(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. 5

(4) A member of the Tribunal who fails to disclose an interest in terms of section 42(2) commits an offence and is liable on conviction to a fine or to imprisonment for a term not exceeding three years or both. 10

Exemption

62. (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;
- (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; 15
- (c) a disaster is declared in terms of the Disaster Management Act, 2002 (Act No. 57 of 2002); or
- (d) a state of emergency as envisaged in section 37 of the Constitution is declared. 20

(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 an instruction.

Departures

63. (1) The Public Procurement Office may, with or without conditions, authorise a departure from a provision of an instruction, issued in terms of section 5(2) if— 25

- (a) it is impossible, impractical or uneconomical to comply with the instruction;
- (b) market conditions or behaviour do not allow effective application of the instruction; or
- (c) national security could reasonably be expected to be compromised. 30

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

(3) Subsections (1) and (2) apply with the necessary changes to an instruction issued by a provincial treasury in terms of section 6(2).

Regulations 35

64. (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— 40
 - (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; and
 - (cc) a bidder before the award of a bid; 45
 - (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; 50
 - (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; 55

- (xi) transversal term contracts and public private partnerships;
- (xii) 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; 5
 - (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 10
 - (ee) procedures to be followed in respect of emergency procurement processes, including the recording of deliberations and the making of recommendations and awards; 15
- (xiii) percentages for contract variations or amendments; 15
- (xiv) complaints by a member of the public regarding procurement in terms of this Act; and
- (xv) fees for a review by the Tribunal;
- (b) may make regulations—
 - (i) permitted by this Act to be prescribed; 20
 - (ii) regarding negotiations with a preferred bidder or bidders before 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; 25
 - (v) regarding the retention of procurement data; and
 - (vi) regarding any procedural or administrative matters that are necessary to implement this Act. 30
- (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; 35
 - (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. 40
- (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. 45
 - (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. 50
- (7) The Minister— 50
 - (a) may make different regulations for—
 - (i) different categories of procuring institutions; and
 - (ii) different categories of procurement; and
 - (b) must make regulations regarding the procurement of—
 - (i) infrastructure and capital assets; and 55
 - (ii) goods or services related to infrastructure and capital assets.

Instructions

- 65.** (1) The Public Procurement Office or a provincial treasury must, before making an instruction, publish—
- (a) a draft of the instruction; 60

- (b) a statement explaining the need for and the intended operation of the instruction;
 - (c) a statement of the expected impact of the instruction; and
 - (d) a notice inviting submissions in relation to the instruction and stating the form and manner in which the submissions are to be made. 5
- (2)(a) With each instruction, the Public Procurement Office or a provincial treasury must publish a consultation report.
- (b) A consultation report referred to in paragraph (a) must include—
 - (i) a general account of the issues raised in the submissions made during the consultation; and 10
 - (ii) a response to the issues raised in the submissions.

Transitional measures

66. 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 15

67. (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 20

68. (1) This Act is called the Public Procurement Act, 2023, and takes effect on a date determined by the President by proclamation in the *Gazette*.

(2) Different dates may be determined by the President in respect of the effective date of—

- (a) different provisions of this Act; 25
- (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 OF LEGISLATION

(Section 67)

Item No.	No. and year of law	Short title	Extent of repeal or amendment	
1.	Act No. 86 of 1968	State Tender Board Act, 1968	1. The repeal of the whole.	5 10
2.	No. 89 of 1970	National Supplies Procurement Act, 1970	2. The repeal of the whole.	
3.	Act No. 107 of 1997	Housing Act, 1997	3. The substitution in section 3 (2) for paragraph (cA) of the following paragraph: “(cA) [determine a procurement policy, by no later than April 2002, which is consistent with section 217 of the Constitution in relation to housing development] 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;”.	15 20 25
4.	Act No. 36 of 1998	National Water Act, 1998	4. The substitution in section 26 (1) for paragraph (n) of the following paragraph: “(n) subject to the Public Procurement Act, 2023, prescribing procedures for the allocation of water by means of a bid [public tender] or auction;”. 5. The substitution in section 45 (2) for paragraph (f) of the following paragraph: “(f) allocated to every other applicant by means of a bid [public tender] or auction;”.	30 35
5.	Act No. 88 of 1998	State Information Technology Agency Act, 1998	6. The insertion after section 7(7) of the following subsection: “(7A) When information technology goods or services are procured through the Agency in terms of this section, the Agency must comply with the <u>Public Procurement Act, 2023.</u> ”. 7. The substitution in section 23 (1) for paragraph (a) of the following paragraph: “(a) must, subject to the Public Procurement Act, 2023, make regulations regarding the manner in which procurement in terms of section 7(3) to (7) must take place, with the concurrence [subject to the approval] of the Minister of Finance; and”.	40 45 50
6.	Act No. 111 of 1998	Correctional Services Act, 1998	8. The substitution in section 103 for subsection (1) of the following subsection: “(1) The Minister may, [subject to any law governing the award of contracts by the State] subject to the Public Procurement Act, 2023, 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.”.	55 60 65
7.	Act No. 1 of 1999	Public Finance Management Act, 1999	9. The deletion of section 38(1)(a) (iii) . 10. The substitution in section 38(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 [relevant tender board] Public Procurement Office established by section 4 of the <u>Public Procurement Act, 2023;</u> ”.	70 75 80

Item No.	No. and year of law	Short title	Extent of repeal or amendment	
			11. The deletion of section 51(1)(a) (iii). 12. The substitution in section 76(1) for paragraph (k) of the following paragraph: “(k) the alienation[,] or letting [for other disposal] of state assets;” and 13. The deletion of section 76(4)(c)	5
8.	Act No. 20 of 1999	Road Traffic Management Corporation Act, 1999	14. The substitution for section 43 of the following section: “Procurement 43. Any procurement under this Act must be undertaken in [terms of the prescribed procedures] accordance with the Public Procurement Act, 2023.”.	10 15
9.	Act No. 5 of 2000	Preferential Procurement Policy Framework Act, 2000	15. The repeal of the whole.	20
10.	Act No. 32 of 2000	Local Government: Municipal Systems Act, 2000	16. The substitution in section 83(1) for paragraph (a) of the following paragraph: “(a) comply with the Public Procurement Act, 2023;”.	25
11.	Act No. 38 of 2000	Construction Industry Development Board Act, 2000	17. The insertion after section 5 (1) of the following subsection: “(1A) The Board must, in consultation with the <u>Public Procurement Office, develop procurement policies that promote procurement reform envisaged in section 5(1)(a)(vii).</u>”. 18. The substitution in section 5 (3) for paragraph (c) of the following paragraph: “(c) must, within the framework of the procurement policy of Government, and in consultation with the <u>Public Procurement Office established by section 4 of the Public Procurement Act, 2023</u> [promote the standardisation of] standardise the procurement process with regard to the construction industry;” 19. The substitution in section 5 for subsection (4) of the following subsection: “(4) To promote uniform and ethical standards within the construction industry, the Board— (a) must, in consultation with the <u>Public Procurement Office</u>, publish a code of conduct for all public sector construction-related procurement and all participants involved in public sector procurement process; and (b) may, after consultation with the <u>Public Procurement Office</u>, initiate, promote and implement national programmes and projects aimed at the standardisation of procurement documentation, practices, and procedures.”; 20. The substitution in section 16 for subsection (3) of the following subsection: “(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 policy on procurement] the <u>Public Procurement Act, 2023.</u>”. 21. The substitution in section 33 for subsection (1) of the following subsection: “(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.	30 35 40 45 50 55 60 65 70 75 80

Item No.	No. and year of law	Short title	Extent of repeal or amendment	
			<i>(b)</i> The Minister may, with the concurrence of the Minister of Finance, make regulations regarding procurement in terms of this Act.”.	5
12.	Act No. 51 of 2003	Armaments Corporation of South Africa, Limited Act, 2003	22. The substitution in section 2 (4) for the words preceding paragraph (a) of the following words: “(4) Subject to [this Act] the Public Procurement Act, 2023, the Corporation may—”.	10
13.	Act No. 53 of 2003	Broad-Based Black Economic Empowerment Act, 2003	23. The substitution in section 9(1) for paragraph (b) of the following paragraph: “(b) qualification criteria for [preferential purposes for procurement and other] economic activities ”; and by the substitution in section 9 for subsection (5) of the following subsection: “(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 [procurement and other] economic activities which exceed those set by the Minister in terms of subsection (1).”.	15 20 25
			24. The substitution in section 10 (1) for paragraph (b) of the following paragraph: “(b) developing and implementing a preferential procurement policy, subject to the <u>Public Procurement Act, 2023;</u> ”.	30
			25. The substitution in section 13P for subsection (1) of the following subsection: “(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 [tender] bid defaulters [which the National Treasury may maintain] established and maintained by the Public Procurement Office in terms of the <u>Public Procurement Act, 2023,</u> for that purpose.”.	35 40 45
14.	Act No. 56 of 2003	Local Government: Municipal Finance Management Act, 2003	26. The substitution in section 1 for paragraph (d) of the definition of ‘irregular expenditure’ of the following paragraph: “(d) expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, the Public Procurement Act, 2023, a requirement of the [supply chain management policy] procurement system 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,”.	50 55 60
			27. The deletion of section 2(f).	
			28. The substitution in section 14 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, competitive and consistent with the [supply chain management] procurement policy which the municipality must have and maintain in terms of [section 111] the <u>Public Procurement Act, 2023.</u> ”.	65 70
			29. The deletion of section 33 (4).	
			30. The substitution in section 65 (2) for paragraph (i) of the following paragraph: “(i) that the municipality s [supply chain management policy referred to in section 111] procurement system complies with the Public Procurement Act, 2023 [is implemented in a way that is fair, equitable, transparent, competitive and cost-effective] and”.	75 80

Item No.	No. and year of law	Short title	Extent of repeal or amendment	
			31. The deletion of section 75(1) (<i>j</i>). 32. The substitution in section 81(1) for paragraph (<i>e</i>) of the following paragraph: “(e) must perform such budgeting, accounting, analysis, financial reporting, cash management, debt management, [supply chain] procurement management, financial management, review and other duties as may in terms of section 79 or other legislation be delegated by the accounting officer to the chief financial officer.”. 33. The substitution in section 90 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 [supply chain management] procurement policy which the municipal entity must have and maintain in terms of [section 111] the Public Procurement Act, 2023.”. 34. The deletion of section 99(2) (<i>h</i>). 35. The repeal of Chapter 11. 36. The deletion of section 173(1)(a) (ii).	5 10 15 20 25
15.	Act No. 4 of 2006	Electricity Regulations Act, 2006	37. The substitution in section 34(1)(e) for subparagraph (i) of the following subparagraph: “(e) subject to the Public Procurement Act, 2023, be established through a [tendering] bid procedure which is fair, equitable, transparent, competitive and cost-effective;”.	30
16.	Act No. 23 of 2014	Infrastructure Development Act, 2014	38. The substitution in section 8 for subsection (2) of the following subsection: “(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 [put out to tender or] procured [through another form of procurement allowed by the Public Finance Management Act, 1999 (Act No. 1 of 1999)] in terms of the Public Procurement Act, 2023.”. 39. The substitution in section 12 for subsection (4) of the following subsection: “(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) [, the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000),] or the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003).”.	35 40 45 50 55

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, 1996 (“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; 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”, “transformation” 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 section 1, Chapter 4 and any regulations made for the purposes 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. Clause 5 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 and debarment (clauses 9-15)

- 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 clause 13 and their immediate family members as well as related persons as envisaged in clause 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 automatically excluded from submitting a bid.
- 4.3.5 Clause 14 provides for the process to be followed when directions which are inconsistent with the Act are issued.
- 4.3.6 Clause 15 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 a procuring institution 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 must keep a register of debarred persons.

4.4 Chapter 4—Preferential procurement (clauses 16–24)

- 4.4.1 Chapter 4 regulates preferential procurement and in clause 16 requires that 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, as envisaged in section 217(2) and (3) of the Constitution, objects in clause 2 and the framework in Chapter 4.
- 4.4.2 Clause 17 provides for set-asides for preferential procurement. Clause 18 deals with prequalification criteria for preferential procurement. Subcontracting as condition of bid is provided for clause 19 while clause 20 enables the Minister responsible for trade, industry and competition to designate sectors for local production and content. Preferences not provided for in clauses 17 to 20, are enabled in clause 21. Provision is made for measures to advance sustainable development and matters such as beneficiation and innovation. Contracting conditions related to preference are dealt with in clause 24.

4.5 Chapter 5—General Procurement Requirements (clauses 25-36)

- 4.5.1 Clause 25 provides that the Minister of Finance prescribe by regulation a framework within which procuring institutions must implement a procuring system. Regulations are also to provide for types of procurement methods. The thresholds for procurement methods will be determined by the Minister by notice in the *Gazette*.

- 4.5.2 Clause 26 regulates the use of another organ of state by a procuring institution to obtain goods and services.
 - 4.5.3 Clause 27 sets out steps accounting officers and accounting authorities must take to prevent abuse of the procurement system.
 - 4.5.4 Clause 28 requires procuring institution to establish a procurement function as part of its procurement system, which is to be responsible for, among others—
 - (a) implementation of functions 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 itseffectiveness and efficiency.
 - 4.5.5 Clause 29 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.
 - 4.5.6 Clause 30 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 31 requires procuring institutions to use components of this system as they become operative and to use technology in the implementation of the Bill.
 - 4.5.7 Clause 32 requires regulations to provide for the public, civil society and the media to access, scrutinise and monitor procurement processes.
 - 4.5.8 Clause 33 requires that regulations determine the requirements for disclosure of procurement information,
 - 4.5.9 Clause 34 deals with legislative instruments that must be available automatically.
 - 4.5.10 Clause 35 provides for access by certain authorities to information held by Public Procurement Office and provincial treasuries.
 - 4.5.11 Clause 36 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 37-55)**
- 4.6.1 Clause 37 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 38 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 clause 15.
 - 4.6.3 Clause 39 to 46 provides for the appointment of members of the Tribunal and other related matters to the functioning of the Tribunal.
 - 4.6.4 Clause 47 provides for a panel of the Tribunal to hear a matter and clause 48 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 49 while the decision to debar a person is dealt with in clause 50. Clause 51 provides for the fee payable for a review.
- 4.6.4 The review proceeding requirements are set out in clause 52.
- 4.6.5 Clause 53 lists the orders that the Tribunal may make.
- 4.6.6 Clause 54 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 55 provides a standstill process i.e. 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 56-68)

- 4.7.1 Clause 56 provides for the investigation process by the Public Procurement Office, i.e., 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 57 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 58.
- 4.7.2 Clause 59 enables the Minister for finance and the Minister responsible for trade, industry and competition, 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 60 exempt a person from civil or criminal liability from any action taken in good faith.
- 4.7.4 Clause 61 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 62 provides for exemption to be granted by the Minister, to a procuring institution from any provision of this Bill, including regulation, when undertaking national security-related procurement or for procurement partially or fully funded by donor or grant funding.
- 4.7.6 Clause 63 enables the Public Procurement Office or a provincial treasury to approve departures from a provision of their instructions under specified circumstances.

- 4.7.7 Clause 64 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 64(3) and (4) sets out a public consultation process as well as Parliamentary scrutiny of draft regulations. Clause 64(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 65 provides for consultation process before instructions are issued.
- 4.7.9 Clause 66 deals with transitional measures about bids awarded or advertised before the commencement of the legislation.
- 4.7.10 Clause 67 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 short title. Provision is made for 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.