national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

PUBLIC PROCUREMENT BILL [B 18B-2023]: REPORT ON ENGAGEMENTS BETWEEN NATIONAL TREASURY AND STAKEHOLDERS THAT SUBMITTED FURTHER COMMENT FOLLOWING INVITATION OF SELECT COMMITTEE ON FINANCE, NCOP ON 19 MARCH 2024

15 APRIL 2024

BACKGROUND

1.1 At the meeting of the Select Committee on Finance (SeCOF) of the National Council of Provinces of 19 March 2024, stakeholders were invited to submit further comments in respect of National Treasury's responses to date. SeCOF also directed the National Treasury (NT) to meet with stakeholders that submitted such further comment.

1.2 The following stakeholders submitted further comment and NT met with these stakeholders separately from 8 to 10 April 2024:

Joint Strategic Resource (JSR)
Procurement Reform Working Group (PRWG)
Public Service Accountability Monitor (PSAM)
National Research Foundation (NRF)
Willpower
South African Medical Technology Industry Association (SAMED)
Black Business Council (BBC)
Construction Sector Charter Council (CSCC)
Business Unity South Africa (BUSA)
Dr Ncedo Mkhondweni
Congress of South African Trade Unions (COSATU) & South African Clothing and Textile Workers' Union (SACTWU)
Institute of Race Relations (IRR) Legal NPC

1.3 Following a submission by MK Liberation War Veterans received by SeCOF on 5 April 2024, NT also met with the organisation.

1.4 During the meetings, where relevant, NT also requested stakeholders to submit proposed amendments, where these were not contained in their further submissions. Such proposed amendments were received from PSAM, JSR, PRWG, COSATU & SACTWU and MK Liberation War Veterans.

1.5 This report deals with the further submissions received, discussions held during meetings and the proposed amendments.

1.6 Comments by the stakeholders about the processing of the Bill by Parliament and its committees are not deal with in this report since these are outside NT's role. Once a Bill is introduced in Parliament, the relevant Minister and Department support Parliament in accordance with the directions of Parliament's structures.

STAKEHOLDERS' FURTHER SUBMISSIONS AND NT's RESPONSE

2.1 JOINT STRATEGIC RESOURCE (JSR)

1) *We do not feel that Treasury's responses to these submissions addresses the constitutional issues raised. In this Select Commitee process, for instance, Treasury makes use of the Mhlantla minority judgement in Minister of Finance v Afribusiness NPC [2022] ZACC 4. Mhlantla asserts that "The stand-alone reading of section 217(1), which ignores section 217(2), is not only a disservice to statutory interpreta6on, but also ignores the founding values of the Constitution." Treasury appears to believe that this assertion is sufficient to counter the concern that Chapter 4 of the Bill departs impermissibly from sec6on 217(1) of the Constitution. But in the same judgement Mhlantla also asserts that "that is not to say that the five important principles in section 217(1) become a nullity when section 217(2) is in play. The tenders in question must still be evaluated in a manner that gives effect to the purposes of section 217(1)." Chapter 4 gives precious little reason to believe that this is how tenders will be evaluated, valida6ng concerns that the Bill will unleash disruptive constitutional litigation.A further Constitutional question left open by the Treasury response is its continuing gap in clearly locating the power to develop preferential procurement policies. The Budlender SC opinion, on which Treasury extensively relies, asserts a distinction between the terms "develop" and "implement". Section 217(2) of the Constitution asserts that procuring institutions may "implement" a preferential procurement policy. Budlender SC takes this to mean that Parliament can choose whether to "develop" this policy in national legislation or to grant procuring institutions discretion to do so. The JSR have repeatedly raised the concern that the Bill, although it often gestures in this direction, nowhere clearly assigns the power to develop preferential procurement policies to procuring institutions. Treasury responds that it is merely following the language of the Constitution in asserting their power to "implement", but this merely reproduces the open-endedness that Budlender SC (we think correctly) perceives in the Constitution within the Bill itself.*

Responses and proposed amendments:

It should be noted that both the minority (first) judgment and the majority (second) judgment essentially agree on many issues, except on the issue of "necessary or expedient". In paragraph 96 of the judgment in the matter between Minister of Finance and Afribusiness (now Sakeliga), Justice Madlanga stated that, "In the main, our difference lies in how the first judgment reads the words "necessary or expedient" in section 5 of the Procurement Act. Therein lies the greatest problem." In paragraph 102, Justice Madlanga goes further to state that "The difference between the first judgment and mine lies in the interpretation of "necessary or expedient . . . in order to achieve the objects of [the Procurement Act]". I may be misunderstanding the first judgment, but I think where it is mistaken is exaggeratingly focusing on "in order to achieve the objects of [the Procurement Act]". The result is that it sees no impediment to the Minister being entitled – in terms of section 5(1) – to make the impugned regulations. As I explain presently, on a conjoined reading of the words "necessary or expedient" in section 5(1) and the power afforded organs of state by section 2(1) to determine their preferential procurement policy, the Minister's regulation making power is not as wide as the first judgment suggests."

It is proposed that in cl 16 before implement insert "develop and " and add at the end "and regulations made in terms of this Act". Similarly clauses 8 and 25 are proposed to be amended

to provide policy development by procuring institution in accordance with "this Act" which includes the regulations and instructions.

2) During JSR and NT's meeting on 8 April 2024, the focus of discussion was primarily on a range of constitutional issues relating to the Bill. As previously indicated in our NA & NCOP Submissions in some detail, the JSR is of the view that there are a number of material constitutional questions to be answered in finalising the Bill. The JSR remains of the view that these issues are of such a nature that they cannot be realistically resolved through brief, one-on-one meetings between specific stakeholders or quite possibly even during public hearings before Parliament, which are by their very nature limited. Whilst we appreciate the time constraints that NT and the Committee finds themselves in, a Bill of this magnitude requires further, considerable engagement. As a general point, the JSR thus discussed with NT and repeats here its proposal that in terms of the Committee's mandate, a one-day virtual workshop be held on the topic of constitutional principles and the Public Procurement Bill as soon as feasible. We propose the following:

a. That this workshop could possibly be organised and implemented by the Parliamentary Legal Advisor.

b. In order to make progress, this topic could be defined as limited to (a) legal opinions on constitutional issues thus far in the public realm and (b) the powers/objectives of the Bill (e.g. focus on current section 2).

c. Participants might include the social partners at NEDLAC.

JSR suggested that this proposal be included in NT's report to the Committee, together with NT's views on this proposal, if any.

Response: The Bill is before SeCOF, NCOP, and NT will act as directed by SeCOF.

3) As to specific constitutional issues discussed during our meeting, first and as one of the matters discussed, we confirmed our view that the five substantive principles of section 217(1) of the Constitution, which must be the basis for public procurement law in South Africa (as has been confirmed by the Courts many times, including the Constitutional Court) are not adequately reflected in the Bill. We agree with NT's assessment that these principles are of paramount importance. It is exactly for this reason that we are of the view that their interpretation and explication for implementation purposes cannot justifiably be left to delegated legislation. It is a fundamental matter for Parliament. We thus continue to propose explicit inclusion of the constitutional principles in the Bill itself.

As previously noted, the inclusion of these principles could, among others, be done by inserting a purposive interpretation clause (an example of such a clause is proposed).

Response: The principles of s217(1) should not be defined in the primary legislation as the principles will be contextualised when the system is prescribed. Many of the concepts used in the proposed clause in our submission will result in interpretation disputes.

4) Second, we also noted NT's intended reintroduction of the word "develop" in section 8(1)(b) of the Bill with the attempted purpose of clarifying the specific roles and powers of procuring institutions vis-à-vis other role players (such as the Minister and Public Procurement Office) in relation to the creation of the substantive content of procurement policies, including preferential procurement policies. At first glance, we see this as a move with unintended consequences of

potential constitutional concern. In our view, such a move, certainly without very careful attention to other sections of the Bill that grant powers to these other role players in relation to the very same procurement system, has real potential to recreate the problems currently experienced under the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) that resulted in the invalidation of the Preferential Procurement Regulations, 2017. Just like in the latter instance, the Bill would thus leave the door open to contradictory interpretations of who wields exactly what powers in relation to the "procurement system", with potentially disruptive results.

A list of provisions in the Bill is provided for interrogated in view of the proposed amendment to clause 8.

In our view, it is insufficient to simply state that these provisions mean that procuring institutions must "develop" their procurement systems within the parameters of the Bill. As with the PPPFA and Preferential Procurement Regulations, 2017, the question will inevitably arise where the line is between what the procuring institution should be able to do on the one hand and what the Minister/PPO should be able to do on the other. And this question will have a constitutional dimension. Granting multiple institutions ostensible power over the same subject matter, without a clear indication of hierarchy or overarching principles, is never a good idea in legislation and effectively sets the implementation of such a Bill up for implementation challenges.

Response: The legislative scheme of the Bill with the change to include development of preferential policies as function of procuring institutions is very different to that of the PPPFA which is limited in nature and minimal powers for the Minister to make regulations. The Bill is clear that the preferential procurement policy must comply with the framework of Ch 4 which includes matters to be prescribed by regulation. To make compliance with the regulations clearer it is proposed that it be included in cl 16. Furthermore Ch 4 and also other Chapters dealing the procurement system and policies and cl 64 (general regulation-making power) indicate what must and may be prescribed. The risk of a successful judgment on the same grounds as the Afribusiness case is minimal in our view. The determination of a procurement policy is directed and constrained by the provisions of the Act. More should not be read into the term "policy" in the context of the Bill than what the Bill permits the policy to do in its provisions and regulations and instructions made thereunder.

5) Furthermore, the JSR reiterates its calls for incentivised whistleblowing to be included in the Bill. Whilst we note NT's comments on the DOJ&CD process, we wish to note that there is more to be gained from the adequate protection and rewarding of whistleblowers in the long term in procurement processes. First, we note that South Africa already has a tradition of incentivised whistleblowing provisions in legislation dealing with specific sectoral matters, as seen in environmental legislation. Second, procurement handles large sums of money, which means that whistleblowing in this area can be incentivised without cost to the state. In order to do so, incentivised whistleblowing provisions must be carefully and specifically moulded to procurement operations. Third, the Protected Disclosures Act only applies to employees, but in procurement incentivised whistleblowing is often by persons who are not employees. The Protected Disclosures Act would therefore have to be radically reconceptualised to enable incentivised whistleblowing in procurement. We therefore recommend that NT includes an enabling provision for incentivised whistleblowing in the Bill even if details of that system and its safeguards are outlined in subsequent policy and regulations. This move would be in line with the Zondo Commission recommendations.

Response: NT's position remains that enhancement of whistleblower legislation, i.e. the Protected Disclosure Act, is a matter to be attended by the Justice Department and, as indicated, they already published a discussion paper in 2023 in this regard.

2.2 PROCUREMENT REFORM WORKING GROUP (PRWG)

1) The new Chapter 4:
- Restricts participation in procurement from the outset.
- Confuses even South Africa's leading procurement experts as to how the rules it seeks to establish might be meant to work in practice.
- It does not lay down any objective and measurable criteria for adjudication.
- It does not require restrictions on competition to be justified, and so opens the way to anti-competitive practices.
- It does not even mention price, which is highly unusual internationally.
These are all significant departures from the principles of fairness, equitability, transparency, competition, and cost-effectiveness. The framework introduced in Chapter 4 establishes little by way of guardrails for constraining these departures, or mechanisms for bringing those principles back into balance. This is constitutionally deficient. The Treasury's contentions that Chapter 4 only requires implementation when feasible, that it retains competition within what may be dramatically restricted supplier markets, that it must be read within the broader context of the Bill, and that guardrails will be raised in regulations; these contentions do not remedy the defects. There is little doubt that leaving the Bill as it will unleash a wave of often ill-conceived experimentation, litigation, and disruption across procuring institutions and their supplier markets. South Africa's strained fiscus, deteriorating state capacities, and stagnant economy will not easily bear this.

Response: The regulations will detail of how the framework must be implemented. It is proposed that cl 25(1) be amended to contain a general requirement on bid evaluation as prescribed by regulation as part of the framework for an institution's procurement system.

2) *There are serious issues with how Chapter 4 aligns with the rest of the Bill. A central purpose of this legislation, expressed in the Bill's preamble, is to construct a single statutory framework for public procurement, replacing the PPPFA as the legislation of s 217(3). However, the Bill now establishes two frameworks, one in Chapter 4 and another in Chapter 5. These frameworks deal with overlapping subject matters, but the first is now largely built up in statute, and the second is deferred to regulations. There was a clear rationale for why the second deferred to regulations, to facilitate flexibility in evolving the procurement regime, especially with regard to procurement procedures and structures. But Chapter 4 now entrenches a series of procedural steps inappropriate to statute, and so at various points interferes with Chapter 5's objective of creating a flexible, strategic, and innovative procurement regime. Treasury's response that s217 of the Constitution is not inconsistent with itself does not address the evident fact that Chapter 4 and 5 of the Bill are.*

Response: Section 217(3) of the Constitution requires a framework for preferential procurement (section 217(2) and (3)). It is also the object of the Bill to outline the broader general procurement framework for purposes of section 217(1), as set out in cl 25. It is proposed that procedural

provisions in cl 17(5)(a) to (c) be omitted as well as all references to complementary goals in Ch 4. Institutions must apply the preferential procurement provided for in Ch 4 within its procurement system developed and implemented as determined by regulation under cl 25, read with cl 8, of the Bill.

3) The powers of the PPO and provincial treasuries to review the procurement policies of procuring institutions have been taken out of the Bill. We see this as a basic function of a strong, regulated, and coherent procurement regime, and believe that these powers should be reintroduced.

Response: The balance is that PPO may issue a model policy, which the procuring institution may customise according to its own institutional requirements. This is in line with the decision-making power of the AO/AA in cl 7 of the Bill.

As to the independence of PPO raised in the meeting, the need for the PPO being independent is unclear. The role of the PPO is to perform functions regarding government's requirements which could not be provided in-house, and not that of the private sector. The Bill also does not make the PPO the chief buyer on behalf of government. Section 216(2) of the Constitution requires NT to enforce compliance with, among others, uniform norms and standards regarding transparency and expenditure control. Expenditure control includes procurement rules, determined in primary and subordinate legislation. Therefore, having the Public Procurement Office (PPO) in National Treasury accords with section 216(2).

4) There are tensions between s30, which deals with ICT-based procurement, and s25 and s33, which provide for procurement methods and transparency respectively. s30 creates a parallel process for expanding procurement methods and transparency and should instead be more closely aligned with and refer to s25 and s33. We have legislative language ready to address this in our submissions.

Response: The ICT-based procurement system, envisaged in cl 30, is a tool to implement the procurement system, envisaged in cl 25. The ICT system may not entail procurement prescripts different to those envisaged in cl 25.

As to proposed amendments by PRWG to cl 30:

(a) the amendment to cl 30(2)(c) to refer to central procurement procedures and process as may be prescribed under section 25, except for the use of "central", is supported; and
(b) the insertion in cl 30(2)(e), before "marketplace" of the word "electronic" is supported.

5) s33(2)(iv) still needs to be aligned with the amendments to the Companies Act. It currently requires release of beneficial ownership information only under s56(7)(aA) of the Companies Act. s56(7)(aA) covers what are defined as "affected companies," which includes public companies, state-owned enterprises, and a small subset of private companies. Companies that don't fall under the definition of affected company, including many companies contracting with the state, are required to report their beneficial ownership information under s56(12). The lack of reference to s56(12) in the Bill means that many companies contracting with the state will not be caught within the beneficial ownership provisions of the Bill. Under s56(14), the CIPC is required to hold a register of the records of beneficial ownership reported under both s56(7)(aA) and s56(12). It may be sufficient for s33(2)(iv) of the Bill to refer to s56(14), rather than s56(7)(aA).

Response: The proposed amendment to cl 33(2)(a)(iv) to refer to s56(14) of the Companies Act is supported.

6) In South Africa's legislative landscape, the legitimate scope of confidentiality is established in the Promotion of Access to Information Act. The Protection of Personal Information Act addresses how institutions handle personal information. By including "personal information protected in terms of the Protection of Personal Information Act" in the Bill's definition of "confidentiality," this definition may be read too broadly to constrain release of all personal information. This undermines the Bill's objective of expanding transparency. s1 should only allow confidentiality where this is legitimate under the Promotion of Access to Information Act.

Response: The alternative proposal in PRWG proposed amendments, is supported, namely that the grounds for refusal in the Promotion of Access to Information Act be used for the definition of "confidential information" in all respects and not only in respect of personal information.

7) PRWG submitted proposed amendments to Ch 4 which are similar to those submitted by COSATU & SACTWU and are dealt with in more detail in response to their submission.

Response: The following proposed amendments are supported:
(a) The omissions of references to complementary goals in Ch 4, i.e. cl 17(5)(d), 18(8), 19(6) and 20(8).
(b) The inclusion in cl 18(1) (prequalification), that the prescribed thresholds and conditions must include a prescribed minimum of potentially qualifying suppliers to ensure competition.
(c) The omission of cl 21 (other preferences).

It is proposed that cl 17(5) be amended by omitting paragraph (a) to (c) and that it provides that a bid set-aside in terms of subsection (1) be evaluated in terms of the prescribed criteria.

2.3 PUBLIC SERVICE ACCOUNTABILITY MONITOR (PSAM)

General comment: We remain concerned with various aspects of the Bill, as per our previous submission and endorsement of the Public Procurement Reform Working Group (PRWG) input. We would like to take this opportunity to reiterate our concerns with the transparency provisions in the Bill. We believe that this Committee recognises the importance of disclosure of procurement information to prevent corruption but also to improve oversight and efficiency. We appreciate the response from National Treasury, and recognise that The Bill contains several transparency provisions, e.g. clauses 2(2)(b) (objects), 15(6) (debarment register), 30(2)(a) and (b) (access to procurement services and open data), 32 (access to procurement processes) and 33 (disclosure of information) and 64 and 65 (process to make regulations and instructions).

The revised Bill(B18B) before the NCOP, states that the Minister must prescribe the disclosure requirements via regulations ito s.33 and that s.64 details the obligations of the Minister when making regulations, which we believe is an improvement from the earlier Bill, in which the PPO

had the power to issue instructions for disclosure which arguably would have less likelihood of being adhered to.

Specific comments including proposing amendments to cl 31(1)(a), 31(2) and 33(2)(a) and (b) received after engagement:

1) We believe that the disclosure requirements should be fully contained within the Bill to avoid subsequent likely arguments over the adequacy of regulations and whether they go far enough, as well as to limit the potential for varied interpretation of regulations yet to be promulgated. We also believe this will increase adherence to mandatory disclosure requirements.

In the current framework, mandatory reporting prescribed by instructions has often been ignored, evident in the assessment of information currently available on the central portal. Without significant and certain legislative reform, we are not convinced that the current practices will change and transparency obligations advanced to support actual accountability.

Response: In our view, cl 33, obliging (not discretionary) the Minister to make regulations regarding the disclosure of procurement information and what these regulations must contain, as a minimum suffices. Cl 64(2) to (4) sets out a rigorous process for the development of regulations, which enables a transparent process.

2) Our concern is that the National Treasury appears to be of the view that the public already has access to adequate procurement information. In the feedback session, Mr Willie Mathebula referred to the publication of procurement plans as an example of existing transparency measures. We must reiterate our concerns with the adequacy of the existing system. The Methodology for Assessing Procurement Systems (MAPS) assessment team, in their preliminary findings on the South African procurement system found that only 12% of procuring entities registered on eTenders had published procurement plans.

Overall, preliminary findings stated that while the e-procurement system offers some access to procurement data they found strong limitations in access to e-procurement data for oversight purposes. Further gaps/findings include:

- Publication of mandatory and critical information such as contract award notice is extremely low (3% in FY 2023/2024).

- For publication of tenders, the data shows that 73% of organs of state have published tenders and only 3% published contract notices)

Given the various challenges with the procurement system, and unresolved challenges related to the Public Procurement Bill, we believe that the transparency provisions can and must be improved.

Response: Unlike in the current system where transparency was implemented through the use instructions concerning institutions under the scope of the PFMA, the Bill will if enacted, together with the regulations, provide for compulsory measures of transparency in the primary and subordinate legislation.

3) PSAM proposes that the words "to the extent possible" in cl 31(1)(a) be removed. The provision requires procuring institution to use ICT in the implementation of the Act.

Response: Some institutions, smaller and or under resourced, may only be able to do so over time and therefore the words "to the extent possible" should be retained.

4) Cl 31(2)(a) provides that the PPO must determine by instruction the requirements for digitisation, reporting and innovations that ICT may enable for procurement processes by procuring institutions. PSAM proposes the removal of the requirement for an instruction and that the PPO must ensure alignment with the national ICT and e-Government Strategy.

Response:
It is proposed that the requirement for an instruction in cl 31(2)(a) be replaced by a notice in the *Gazette* so that it may be easily adapted to prevailing ICT.

It is also proposed that cl 31(2)(a) be amended to provide that the PPO must ensure that the notice accords with the national e-strategy, envisaged in section 5 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002), and norms and standards for electronic government for the public service, envisaged in section 3(1)(g) of the Public Service Act, 1994 (Proclamation No. 103 of 1994).

5) PSAM proposes that in cl 33, instead of the Minister being required to make regulations on the disclosure of procurement information, the provision be amended -

- *to impose a direct obligation to disclosure procurement information;*
- *to include in the list of information, bid cancellation information;*
- *so that the listed information be made available within 14 days after the award of the contract;*
- *regarding the format that enables tracking includes specific information.*

Response: Cl 33(2) contains a list of information that the Minister must regulate. To enable adaption over time, it is submitted that the disclosure of information should be determined by regulations. The proposal by PSAM that bid cancellation information be included in the list in cl 33(2)(a) is supported. As to the date when such information should be made available, the current wording of "as quickly as possible" should be retained, to allow for instances where there is a reconsideration and review of the bid award decision. As to specific information proposed for tracking, cl 33(2)(b)(ii)(aa) which provides for information that relevant to the entire process of a specific procurement, suffices in our view.

2.4 NATIONAL RESEARCH FOUNDATION (NRF)

1) Funding the unfunded mandate: The SEIAS report is inadequate and naïve and characterised by fallacious premises. No costing is provided. Relevant organs of state need to be consulted regarding the cost implications. Accordingly a possible contravention of Section 35 of the PFMA. Furthermore, similar to National Treasury's VAT deregistration process of public entities, National Treasury should be providing the additional funding to fund the additional roles and responsibilities, failing which to place enactment and/or implementation on hold until National Treasury's fundraising efforts improve.

Response: Section 35 of the PFMA provides that draft national legislation that assigns an additional function or power to, or imposes any other obligation on, a provincial government, must, in a memorandum that must be introduced in Parliament with that legislation, give a projection of the financial implications of that function, power or obligation to the province.

The elements of the procurement systems mentioned in cl 25, are existing elements which may have to be made part of the procurement system. As to expanding the scope of the procurement function in a procuring institution, and most of these are not new functions for institutions but are elevated to primary legislation. The enforcement function for provincial treasuries is not new – they already have an enforcement role in respect of provincial departments in s18(2)(b) of the PFMA. The enforcement role for provincial treasuries in respect of municipalities is proposed to be removed. Investigations about allegations in cl 27 and steps, are functions that are required in terms of the PFMA and MFMA and their respective prescripts.

As to possible costs resulting for the regulations and instructions, these will be considered and consulted on during their development.

Cl 68 of the Bill provides for the provisions of the Act to be brought into operation on different dates and also on different dates for different categories of institutions and different categories of procurement. Where applicable, the availability of funds will be considered in determining the effective date of provisions.

Costs of the Tribunal are to be carried through appropriations from the National Revenue Fund and will only be proposed through the normal budget process once the estimated costs have been determined and the required readiness for the Tribunal to commence its work exists.

Funding from the National Revenue Fund is provided for in the Division of Revenue and national Appropriation legislation, as passed by Parliament, and not National Treasury. Institutions must participate in the budget processes and finally Cabinet decides on the funding proposals for Parliament's consideration.

*2) **Developmental capacity building**: The country is not getting the basics of procurement right (Zondo Commission), and this is holding back service and infrastructure delivery in light of the failure of capacity building for procurement of complex and/or procurement of innovation. As such National Treasury to take ownership of capacity building (Zondo), to include:*

- *Competence Centre in line with international best practices*
- *Setting up best practices databases and initiatives to:*
  - *List best practices*
  - *Specification templates (e.g. USA)*
  - *Training material*
  - *Seminal guidelines*
  - *Accredited training*

Response: Cl 5(1)(c)(ii) provides that the PPO must guide and support officials and procuring institutions to ensure compliance with the Act, through ensuring professional development and training of officials involved in procurement. Relevant institutions are responsible for its sector specific capacity building.

*3) **Getting the basics right: Setting up a helpdesk**. Any hint of adding to a dysfunctional system by overburdening it with responsibilities for which neither the skills. training, funding and capacity exists to be removed, such as attempting to break the back of procurement by widening the scope of the procurement system to include both Contract Management and Asset Management (s25(3)). Therefore, remove s25(3).*

Response: The requirement in cl 5(1)(c)(i) to provide advice and assistance to procuring institutions addresses this. How this will be done is an operational matter that should not be legislated, further in the Bill, but may be considered for subordinate legislation, where necessary. A proposed amendment is that cl 28 be amended to refer to the responsibilities of the procuring institution as the procurement system and not a single unit must perform all the functions envisaged in cl 25(3). It is also proposed that asset management be removed from cl 25(2) because it is a function that is not directly linked to procurement. Contract management should be retained because the lack of proper contract management in many institutions justifies elevation and emphasis in primary legislation.

4) ***Innovation authority added****: Constitutional authority ito s217(2)(b) [to read 217(2)(a) as indicated in engagement] put in place similar to the Other Transaction Authority to promote innovation applied in the USA. Refer also Removing impediments to innovation section.*

Response: Innovation is recognised in the Bill in cl 2(3)(g) (objects) and in cl 23 which enables institutions, subject to prescribed conditions, when procuring to provide for measures to advance innovation. Innovation will also be enabled through unsolicited bids as one of the procurement methods to be prescribed.

5) ***Procuring through another organ of state proposed authority removed****: S26 in its current form is unconstitutional and thus unlawful (Prof.Quinot, APLU). A legal opinion should be commissioned by Parliament for details. Furthermore the proposed mechanism has the unintended consequence of permitting wholesale state capture through a weak link in the chain of organs of state; furthermore it creates unlawful cross-subsidisation/virement opportunities. of mandates. National Treasury's written clarification to the NRF is highlights that this mechanism is contrary to Section 217(1) of the Constitution, namely "… that this allows procurement between organs of state without having to comply with the requirements of section 217(1) of the Constitution". Remove s26.*

Response: There are institutions that are set up specifically in terms of legislation to serve a purpose for organs of state. Therefore before procurement is engaged in, then these organs of state should be considered within the parameters provided for in the regulations. For example, the National School of Government (NSG), Government Printing Works (GPW), Government Technical Advisory Centre (GTAC), Council for Scientific and Industrial Research (CSIR), etc. The MFMA in section 110(2) enables a municipality or municipal entity to contract with another organs of state without complying with SCM prescripts. Cl 26 should therefore be retained.

6) ***Promoting efficiency:*** *The proposed standstill period is guaranteed to delay service delivery, increase costs, and as such the standstill mechanism is inefficient and uneconomical and may thus out of line with the Constitution's requirements; as well as international best practices. The following is therefore proposed in order of preference:*

- ***One week standstill****: Delete this lengthy standstill mechanism and replace with the EU one week standstill merely to allow for bid objections once the proposed (and thus provisional) award is announced, and to provide a smarter dispute resolution mechanism, failing which*
- ***Risk-sharing mechanism****: Adopt the Kenyan model of insisting on a 10% deposit by the complainant, which deposit is lost on an adverse finding (Kenya, 2022). The number of standstills will be considerably reduced in such a scenario.*

Response: The proposal of one week for the standstill process may not be practical in all instances as the investigations that the organ of state may need to conduct to ensure that the concern is heard and addressed in a fair manner may take longer than a week.

The system must be fair to accord with s217(1) of the Constitution and to require a deposit may render the process unfair because the bidder may not have the required funds to pay it.

7) ***Removing impediments to innovation****: The following is proposed in order of preference:*
   - *Innovation authority (PPB): Refer Valid constitutional authorities' section above, failing which*
   - *Innovation authority (own Acts): Support of amendments to the Acts of entities engaged in large-scale innovation, failing which*
   - *Simultaneous Regulations: Regulations regarding innovation to be provided for consultation in parallel with the PPB in order to ensure world class allowance, failing which*

Removal of indirect impediments in the PPB: The current PPB adopts a harsh punitive paradigm and is unduly bureaucratic which is the antonym for a culture of innovation, failing which

- Removal of direct impediments in the PPB: National Treasury's historical and current trajectory continue to display a blind spot on the basics which gets worse when addressing more complex matters such as the procurement of innovation body of knowledge. As such its various prescripts unintentionally retard/prevent the procurement of innovation. Two examples in the PPB, both of which require correction are provided:

- *Preventing procurement of innovation: A key method promoting the procurement of innovation are unsolicited bids/proposals with an innovative component. It is a best practice to actively encourage such supply-side bids as occurs internationally, including the USA (particularly NASA). The PPB's definition of "bid" in s1(1) has the specific wording "in response to an invitation" namely a demand-side bid. By definition, an unsolicited bid/proposal is prevented from being considered which is clearly an unintended consequence.*
- *Preventing a basic committee, namely a specifications committee: Having established that an acceptable "bid" exists "in response to an invitation" we observe that the definition of a "bid committee" includes the term "bids", in the context of "considering bids". Contemporary and projected prescripts make provision for a Specification Committee (currently called a Bid Specification Committee). A Specification Committee is clearly a key committee and it is clearly envisaged that going forward a Specification Committee will exist. Yet by virtue of the definition of a "bid" being a "written offer" based on a "response to an invitation" this allows no scope for the specification stage and thus for the existence of a Specification Committee, an unintentional absurdity.*

Response: It is proposed that the definition of "bid" be amended to make it possible to consider unsolicited bids.

8) ***Specificity:*** *The current PPB lacks appropriate specificity in a few senses:*
   - *Powers are too general: Broad powers are requested and it is not clear in which direction such powers will be employed, whether for good or bad. Direction to be indicated failing which relevant regulations to be provided in parallel.*
   - *Undefined and unclear: Furthermore a number of terms/concepts are employed, some of which are unknown (such as "complementary goals" s17(5)(d)), some of which are foundational to Section 217 of the Constitution, such as fair, equity, cost-effective, competitive and transparent, framework and policy and generated considerable debate with the term "equitable" having different interpretations both nationally as well as*

internationally in the context of procurement regulations. All key terms/concepts to be defined.

Response: Cl 25(1) provides that the Minister must prescribe a framework within which procuring institutions must implement the procuring system, referred to in section 8(1)(b). It is within the context of this framework for the system that the Minister must prescribe that the five principles mentioned in s217 of the Constitution are envisaged to be expanded upon to provide clarity on their meaning and how these concepts may be balanced within the system that must be implemented. It is proposed that the provisions in Ch 4 providing for complementary goals be removed.

9) Independence and/or effectiveness of PPO: National Treasury's interpretation of s216 is fallacious (Prof. Quinot, parliamentary submission). The PPO should be outside National Treasury in terms of participants in the parliamentary consultation process. In the event that Parliament decides to keep National Treasury's role within the PPO, from both an internal control and perception perspective (avoidance of self-serving prescripts), the PPO will require radical enhancements both structurally and inclusions of responsibility mechanisms in the PPB. These may include appropriate accountability, responsibility, oversight, safeguards, and participatory governance mechanisms, significant upgrades to the basic competency levels, and a variety of processes to promote co-operative governance, participation and accountability which may include annual participation sessions (e.g. Kenya), co-operative governance concurrency processes (e.g. USA), turnaround times with defaults in the event of non-responsiveness, Ombudsman and/or expanded Tribunal (to address National Treasury malperformance), public binding interpretation/clarification mechanisms, detailed KPI performance plan published, transparent performance rating by an independent authority rated in terms of own and national effectiveness, efficiency and economy), executive level five year term contracts linked to specific performance objectives, enhanced regulations and transparency on cessation of transfer of funds role (s216 of Constitution), and specific inclusion of offences relative to National Treasury officials identified and included.

Response: Section 216(2) of the Constitution requires NT to enforce compliance with, among others, uniform norms and standards regarding transparency and expenditure control. Expenditure control includes procurement rules, determined in primary and subordinate legislation. Therefore, having the Public Procurement Office (PPO) in National Treasury accords with section 216(2).

The PPO proposed in the Bill is that it will not be a body distinct from NT, but located within NT. The Bill provides for original powers for the PPO and it will not be dependent on delegations from the Minister and the DG NT which provides for a separation from the other functions of NT. Further, the role of the PPO is to perform functions regarding government's requirements which could not be provided in-house, and not that of the private sector. It does not regulate procurement by the private sector for their needs. The Bill also does not make the PPO the chief buyer which, if the case, would have required a separation between chief procurement functions and regulatory functions.

The PPO and its officials will be subject to the Public Service Act and prescripts thereunder, which includes performance management and disciplinary matters. The offences in cl 61 of the Bill also applies to NT officials as well as officials of provincial treasuries that in some respects have functions similar than those of the PPO.

10) ***Targets for set-asides****: S17(2)(a) prescribes targets, something not contained in prior prescripts. In order to action this, the following are suggested:*

- ***Costing****: Sight of draft regulations and SEIAS updated report will be appreciated to determine that cost implications are correctly determined as part of the consultation process, noting the responsibility of National Treasury in terms of s216 of the Constitution to identify expenditure categories and put an accounting system in place. The cost of transformation and the cost of various initiatives is required.*
- ***Funded mandate****: Commitment from National Treasury to fund additional costs.*
- ***Reporting****: To prevent the increase in compliance costs, other mechanisms should be explored to work smarter by preventing manual reporting including the use of the envisaged (and controversial) ICT in s30 to automate such reporting.*
- ***Overlap****: It is unclear what relationship exists between set-asides and pre-qualification, and if such a relationship exists, to be clarified.*

Response: The draft regulations and a statement of need and expected impact, etc, will be subject to consultation as required by cl 64(3). As to possible costs resulting for the regulations and instructions, these will be considered and consulted on during their development. NT can't commit to fund additional costs. Funding from the National Revenue Fund is provided for in the Division of Revenue and national Appropriation legislation, as passed by Parliament, and not National Treasury. Institutions must participate in the budget processes and finally Cabinet decides on funding proposals for Parliament's consideration. The use of ICT to facilitate the implementation of the Act, including reporting, is provided for in cl 30(2), 31 and 33(2)(b) of the Bill.

11) ***Emergencies****: The definition of emergency in s1(1) as well as s64(1)(a)(xiii) introduces bureaucracy into a situation which requires the opposite, namely a catalytic approach. Furthermore, an amateurish regulatory approach may expose Parliament and/or National Treasury to damages should the prescripts contribute to the harm caused by the emergency. The best practice appears to be that of China, namely, to exclude emergency procurement from the scope of prescripts, and through other contexts to focus on how to effectively address emergencies. It is therefore proposed that emergency procurement is excluded from the scope of the prescript.*

Response: Excluding emergency procurement from the prescripts will not accord with section 217(1) of the Constitution. The definition of "emergency procurement" in cl 1 is appropriate and regulations must ensure that serves the intended purpose.

12) ***Framework****: The concept of a framework is used frequently in the PPB and is used to incorporate detailed selection, rules and procedures, for example s25(1)(c). Conceptually, linguistically, and legally, a framework is a frame, a skeleton, a structure, an outline. It is not n the content and clearly not the entire content (Quinot, 2024; available upon request). Furthermore, the narrow focus of the rules/procedures are disabling, when development (enablement) is required for a country the Constitution calls developing. Recommendations:*

- ***Framework concept****: Do not employ the term "framework" inappropriately.*
- ***Framework approach****: The prescript should be at a framework level, not disabling detailed rules and procedures.*
- ***Enablement****: The focus should be on how to enable. The primary role of the PPO should be to take responsibility for capacity development, to act as an enabler, a catalyst.*

Response: The Bill uses the term framework in accordance with s217(3) of the Constitution which uses this term. Ch 4 of the tabled Bill was expatiated during the National Assembly process in view of stakeholder comments that it does not constitute a framework. The senior counsel opinion that NT obtained advised that it is for Parliament to decide how tight or loose this framework should be.

The only other context in which the concept is used is in cl 25(1). It provides that the Minister must prescribe a framework within which procuring institution must implement the procuring system, referred to in cl 8(1)(b). It is envisaged that the regulations will set a framework providing as a minimum for the aspects mentioned in cl 25(1)(a) to (c) and 25(3).

*13) **Depth and breadth**: The lack of a democratic and co-operative governance process of consultation has been flawed from the commencement commencing with the failure to encourage public participation in policy making processes as required by the Constitution. National Treasury have failed to leverage the remarkable diversity, depth and breadth in the country and to reflect the aspirations and ideas of a diverse constitutional democracy. This may account for why the PPB is so controversial and attracts such criticism. For example the NRF has previously provided about 300 items requiring attention, and this three-pager is too brief to have captured a fraction of the major concerns. To honour the aspirations of an emergent democracy, the following options are provided in order of preference:*

- ***Start again**: Hit the restart button: Start from the beginning, failing which*
- ***Enablement focus**: Remove all disabling items and replace with enabling items, failing which*
- ***Adequate engagement**: Insist that National Treasury engage as previously required by this parliamentary committee, and provides proof as requested. To this end the NRF offers its facilities for such dialogue. Furthermore, the NRF will make its SCM staff available for detailed engagement with whoever Parliament designates (e.g. National Treasury), on a line by line basis in terms of prior submissions, as well as other challenging parts of the PPB, for a period of up to three weeks. A brief note on the NRF's unique SCM contribution is attached as **Annexure B**) failing which*
- ***Parallel regulations**: Regulations are simultaneously incorporated to provide detail of the direction that the requested powers will entail, failing which*
- ***Enhancement**: The Committee enhances employing parliamentary discretion*

Response: Once a Bill is introduced in Parliament, the relevant department acts under the direction of Parliament's structures.

2.5 WILLPOWER

1) s3(2) provides for the application but only the preferential procurement provisions to Parliament and Provincial Legislatures and not the rest of the Act. The effect will be continued fragmentation of the procurement system if procurement by provincial legislatures is largely not governed under this Act, but still under the Financial Management of Parliament and Provincial Legislatures Act, 2009. This undermines one of the core objectives of the Act.

Response: The reason for providing in cl 3(2) that Chapter 4 and related provisions apply to Parliament and provincial legislatures is that the PPPFA applies to these legislatures and, if it is repealed by the Bill (when enacted), there will be no national legislation setting a framework for these legislatures, as required by s217(3) of the Constitution, to implement preferential policy envisaged in section 217(2) of the Constitution. Parliament and provincial legislatures were

removed from the PFMA in view of their constitutional status and regulated in the Financial Management of Parliament and Provincial Legislatures Act, 2009, as amended ("the 2009 Act") – see the Preamble of this Act. Chapter 6 of the 2009 Act deals with supply chain management. The constitutional principle of separation of powers, one of the cornerstones of our constitutional democracy, requires that Parliament and the provincial legislatures remain responsible for the sound financial management of their respective institutions. Therefore, proposing that the entire Bill applies to Parliament and provincial legislatures and the repeal of the provisions of the 2009 Act dealing with procurement related matters in the Bill, has constitutional implications which was referred to the Parliamentary legal adviser to advise SeCOF.

2) s3(3)(a) that donor funding must adhere to the Act unless exempted (s62). Multiple parties have said there is a financial impact risk on provinces and municipalities as international donors may opt not to adhere to the NT requirements. Requesting an exemption may result in delays. In NT's "not supported" response requires engagement. Multiple parties have said there is a risk. A similar delay clause may be needed as per CIDB agreed change (16).

Response: NT's view is that procurement through donor funding should be subject to the Bill. Provision for exemption is made in cl 621(1)(b) and cl 64(1)(a)(viii) required that regulations must be made regarding procurement funded partially or in full by donor or grant funding.

3) s17(5)(d) "complementary goals" is a material aspect of the bill. Chapter 4 is not a framework as per 217(3) unless this term is defined.

Response: It proposed that term "complementary goals" be removed from cl 17(5)(d), 18(8), 19(6) and 20(8) since the criteria for evaluation would be prescribed. With the proposed removals, the clauses would still be complete, for example cl 17(5) will read "Qualifying bids must be evaluated further in terms of the prescribed criteria. (It is proposed elsewhere that cl 17(5)(a) to (d) be omitted and only read as stated above.)

4) s 18(1) lists the designated groups but s 18(3) limits selection to only one "(3) A procuring institution may only select one of the preferences identified in paragraph (c) of subsection (1)." NT's response that this may be looked at later requires engagement given the immediate limitations:

i. unable to subcontract black women in a specific geographical area;
ii. unable to subcontract to black youth in a geographic area;
iii. unable to subcontract to cooperatives in the geographical area;
iv. unable to subcontract to enterprises in a geographic area;
v. these limitations will further aggravate construction mafia and business forums.

Response: Cl 18(1) provides for one or more bases for prequalification, but cl 8(3) deliberately confines the subcontracting provisions to one category of persons. In NT's view it will not retard transformation (including local transformation). Clauses on set-asides, prequalification criteria and subcontracting as a condition of contract, all make reference to local geographic considerations, which would result in the stimulation of local economic development. These provisions should be read in the context of the entire Chapter 4, which provides for incremental and progressive preference measures on the protection and advancement of persons or categories of persons historically disadvantaged by unfair discrimination.

5) On the issue of premiums, we recommended that a framework for setting parameters for a premium must be included in the Bill, which may include minimum and maximum determinations

and calculation methods. Draft regulations must be made available alongside the Bill in order to be able to quantify the premium and hence engage meaningfully on the cost implications of the Bill. NT's response that "Government is acknowledged that there is a premium to be paid. Determining thresholds are not practical" requires engagement. If there are financial impacts this must be managed (PFMA s35 on unfunded mandates). This cannot be enacted if they are unsubstantiated and without a rational basis.

Response: Regulations are to follow their own process in terms of cl 64, and that clause provides for a rigorous process for their development.

6) The change of pre-qualification clause 18(1)(b) to refer to clause 17(3) (instead of the clause that does not exist) is very important. This is a critical and material amendment to the clause. Supported if the context remains "one or more of the persons referred to in 17(3)".

Related proposed amendments:
(a) In 18(1)(b), the reference to "section 18(3) …" is a typographical error and should read "section 17(3)…"

(b) In addition, in cl 18(4), replace 'any or more' with 'one or more'.

7) There are no definitions for the following terms 'types of procurement methods' (s 25(1)(b)); 'requirements and procedure' (s 25(1)(c)) and 'categories of procurement' (s 5(3)(b) & 25(2)(b)(ii)). NT's "ordinary dictionary definitions" response requires further engagement. There are no ordinary dictionary definitions. Recommend UNCITRAL definitions be considered.

Response: The words "types", "procurement" and "methods", etc are defined in the dictionary, and those concepts are not different from their ordinary meanings. Defining the terms may restrict their application and not allow the regulations to be aligned to current methods and amending these as new or different methods arise.

8) Chapter 4 includes a range of procedural measures that do not belong at primary law and will become limiting: s17(5)(b), 18(5)(c) limits selection to one option (minimum functional threshold). International research points to significant weaknesses in this procedure. Local experience shows this to be limiting and is impacting service delivery. The World Bank recognises at least five alternatives to this one option. At least four other options are in use in South Africa. NT's response "Parliament may decide how tight to loose the framework in s217(3) may be" requires further engagement. NT must explain the rationale to parliament and what this entails. It will also become a complication when the "complementary goals" term is defined.

An additional submission, proposes the omission of cl 17(5)(b) and (c), including a detail relational for this.

Response and proposed amendments: The omission of functionality provisions in cl 17(5)(c) and (d) of the Bill is supported. Functionality should be provided for in the regulations.

9) s 30(2) says a "single platform" with "uniform procurement procedures and processes" and "single marketplace" must be developed and implemented. There will undoubtedly be financial implications to this provision. These will not be restricted to costs for the PPO, but also potentially significant cost implications for provinces and municipalities that have invested in systems currently in use and that will, in terms of s 31(1) be forced to abandon such systems and

only use the new PPO system. Our recommendation to remove the obligation in s 30(1) to create a single ICT system and replace it with an empowering provision that creates discretion in how a future ICT procurement system must be approached. The detail, currently set out in s 30(2) and s 31(2) should be moved to Regulations. If the obligation to implement a single ICT procurement system is retained, the cost implications must be quantified as considered in the processing. NT's response that "The aim is to ensure interoperability of system. Cl 31 requires institutions to use technology and not undue investments in systems" is not what s 30(2) says. This requires further engagement.

Response: The components of the ICT procurement system will be developed over time (cl 30(2) – progressively) and require due diligence of its design brief which will take into consideration the cost implications for PPO and procuring institutions. The importance of having such a system to assist procuring institutions, bidders, suppliers and the public are apparent. It will be a critical tool in enhancing efficiency and transparency. The provisions of clauses 30 and 31(1)(b) could be brought into operation according to the readiness of the PPO and procuring institutions – the financial implications will be a key consideration in this regard.

10) Provinces and Local government do not have insight into about 36 matters that still need to be regulated via s 64. NT's response misses the point. The concern is – how do we enact a law without understanding a significant portion of its impact, which will be enacted through a sub-ordinate law process? This requires further engagement.

Response: The making of regulations will follow a consultation process set out in cl 64(2) to (4). In addition, NT proposed in its comment matrix of 18 March 2024 that consultation with organised local government be included in cl 64. The matters that have been identified in the Bill to be prescribed by regulation and in clause 64 were carefully considered for regulations since it is NT's view that these should not be included in primary legislation.

11) s 25(3)(i) requires that asset management must be in the scope of the procurement system is impractical. NT have agreed to a material change in the description of construction within the definition of procurement: "Amend clause 1(b) to acquisition of goods and services for construction, repair or maintenance of infrastructure or capital assets." Asset management is a completely different management discipline and must not be included in the scope of procurement, in a rationale to the change in definition.

Response and proposed amendment: The omission of cl 25(3)(i) providing for assessment management as part of the procurement system is supported.

12) For a similar reason, contract management cannot be included in the scope of procurement (s 25(3)(i)). It is outside the definition of procurement in 217(1) "…the contracting of …" is not "…the contract management of…" and also falls under a different legislative regime (contract law).

Response and proposed amendment: The removal of contract management as part of the procurement system is not supported since it is a critical element. It is acknowledged that this may be performed in different units in institutions. To address this, it is proposed to amend cl 28 to not provide for the establishment of a procurement function in an institution but provide for its functions as those of the institution. The institution can then decide which unit must perform which function.

13) The Tribunal Panels is a significant emphasis and should not only be included in the Tribunal Rules, but made explicitly in the Act. In the engagement, the stakeholder requested for provision in the Bill for panels in provinces.

Response and proposed amendment: Cl 47 already provides for panels. It proposed that instead of enabling it in the Tribunal rules, provision be made for panels in provinces in cl 47.

14) s 55 that during a review process, NO contract may be concluded, except for an emergency (still to be prescribed). Provinces and especially municipalities may lose their grant funding/donor funding if there is a protracted review process which may severely impact service delivery. Significant delays may also result in the need for more costly solutions. Recommended that the Bill must be augmented to provide for: Other situations, not only emergencies, to continue with awards; Cancellation and embarking on alternative procurement methods to expedite service delivery; Corrective (consequence) actions rather than preventative actions in certain instances. e.g., it may be considerably less costly to pay damages/compensation to an aggrieved bidder if later found that the contract was erroneously awarded than to stop the procurement and related service delivery while the review is processed or alternative arrangements must be made for continued service delivery.

Response: Cl 62(1)(b) provides for exemptions for donor/grant funding and cl 64(1)(a)(vii) also provides for regulations for procurement funded partially or in full by donor or grant funding. The proposed alternatives are not practical and will expose the State to fruitless and wasteful expenditure and unnecessary litigation.

2.6 SAMED

1) Unique Medical Device nuances and Regulatory Frameworks
Medical Devices pose unique challenges when it comes to procurement and a 'one-size-fits-all' procurement system could raise significant issues to patient care. Medical devices are not like toilet paper or desks. They are highly sophisticated and regulated items that if a company does not have the ability to store, maintain, train, service, transport, in-theatre support, calibrate, sterilize, autoclave etc then the safety, quality and effectiveness of the product is put at huge risk. This comes at a significant cost to a medical device company to ensure they have all these necessary requirements in place. When making a procurement decision in relation to medical devices, getting the specifications right is paramount. Patients differ, disease profiles differ, user (HCPs) experience differs and as such the types of medical devices required differ.

Response: Cl 64(7) enables different regulations for different categories of procurement and different categories of procuring institutions.

2) The Bill talks to subcontracting, however in the medical device sector you can only be licenced as one of three types of companies i.e. manufacturer, distributor and wholesaler and each type of company has certain quality management system and regulatory requirements specific to its activities and types of products and has to list (and in time register) its products with SAHPRA. It becomes very difficult for these entities to then sub-contract to others as there are specific regulatory, post vigilance and other requirements that they are responsible for and these cannot be passed on to another entity (sub-contractor). Rather than add value, sub-contracting

may in fact result in gaps in regulatory standards and put quality and effectiveness of products at risk which will impact user and patient safety and quality of care. Companies that are not genuine medical device establishments may well be created just to become sub-contractors and get business.

Response: Cl 19(1) that provides for subcontracting as a preference tool stipulates "where feasible" and addresses the concern.

3) How will the revised Bill ensure specific medical device procurement nuances are addressed sufficiently to ensure appropriate and adequate medical devices are procured? The concepts of value-based procurement and bid specification committees (as were in the previous version of the bill) at least gave the impression that procurement would cater for nuances and provided some safeguard for ensuring 'fit for purpose' procurement).

Response: Clause 64(7) enables different regulations for different categories of procurement and different categories of procuring institutions.

4) How does the procurement Bill / National Treasury envisage sub-contracting to work in such an environment? What checks and balances are in place in terms of the Bill to ensure that SAHPRA regulatory requirements, safety, quality and effectiveness are considered and adhered to in terms of sub-contracting requirements?

Response: Firstly, sub-contracting under cl 19 may only occur "where feasible". Secondly, the sub-contractor will be bound by the specifications as per the bid.

5) What will happen in a case where there are no suitably qualified sub-contractors in the medical device industry?

Response: Then it is not feasible, and subcontracting is not required.

6) How will the Bill prevent fly by night, unqualified or unsuitably regulated companies from setting up as sub-contractors? A perfect example is what happened during Covid, when every Tom, Dick and Harry became 'sub-contractors' and suddenly started selling PPE and masks. This caused over pricing and encouraged corruption.

Response: The regulation of the establishment of new enterprises should not be a function of this Bill. The main contractor is required that to ensure that sub-contractor is suitability qualified.

7) *Sub-contractors will have to purchase the product / service from the manufacturer or distributor and on-sell it to the end user (healthcare facility). The sub-contractor has to make a profit in order to be sustainable and as such will put a mark-up on the price of the product / service that they procured from the manufacturer or distributor. This will eat into an already shrinking health budget and rather than reduce the cost of healthcare, increase it. In any event as in accordance with the Medicines Act and Medical Device Regulations, subcontractors would be required to meet the same requirements as companies licenced to sell medical devices which would increase their cost of compliance and doing business and increase prices of devices.*

Response: The price for the goods or services are per as agreed between the institution and the main contractor. What the subcontract is paid is as agreed to between the main contractor and the subcontractor.

8) How will sub-contracting under the Bill ensure economies of scale and cost effectiveness when it comes to procurement of medical devices?

Response: See response in par. 7

9) The NHI bill proposes a procurement system which runs parallel to the procurement bill. NHI proposes a centralised procurement system, which in SAMED's view does not sufficiently cater for the nuances required in the procurement of Medical Devices.

Response: Cl 38 of the NHI Bill provides for the Health Products Procurement unit within the NHI Fund. Cl 38(7) of the NHI Bill stipulates that the provisions of this section are subject to public procurement laws and policies of the Republic that give effect to the provisions of section 217 of the Constitution, including the Preferential Procurement Policy Framework Act, 2000 and the Broad-Based Black Economic Empowerment Act, 2003. Furthermore, in the NHI Bill, the Fund is categorised as a Schedule 3A public entity, meaning that the provisions of the Public Procurement Bill would apply to the Fund when it procures.

Cl 3(3) of the NHI Bill states that if any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law, except the Constitution and the Public Finance Management Act or any Act expressly amending this Act, the provisions of this Act prevail. However, because the NHI Bill has not been signed into law yet, the PPB cannot amend the NHI Bill as it is not an Act of Parliament. According to statutory interpretation rules, a later Act trumps an earlier Act, and as it stands, since the NHI Bill is awaiting the President's decision on assent, the NHI Bill might be law before the Public Procurement Bill.

Though a conflict is not foreseen, cl 3(4) of the Public Procurement Bill provides that 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.

2.7 BLACK BUSINESS COUNCIL (BBC)

1) Propose the removal in cl 17(3), 18(1) and 19(1) of categories that are not black people or owned by black people. In cl 8(1), small enterprises within a geographical area is retained.

Response: The removal of "women", "people with disabilities", "youth", "small enterprises" and "co-operatives", who are not limited to black people or black-owned is not supported. The categories of persons referred to in these provisions accord with s217(2)(a) and (b) of the Constitution in that persons who were previously disadvantaged by unfair discrimination included all women, not just black women, as an example. Furthermore, s217(2)(a) allows for categories of preference in the allocation of contracts. Therefore, the framework in Ch 4 may provide for preferences for other vulnerable categories of persons, such as "small enterprises".

2) To promote innovation, a procuring institution may consider single-source procurement subject to the prescribed procedures as detailed in the procurement policy of the procuring institution, provided that the procurement will meet predetermined targets for the category or categories of preference as contemplated in subsection.

Response: To be considered during development of the regulations. Single-source procurement is one of the procurement methods.

3) It is proposed that the "Minister must consult with the Minister responsible for women, youth, people with disabilities, small businesses, trade, industry, competition or public works and infrastructure and any other relevant Minister whose portfolio is affected by the draft regulation".

Response: This is already provided for in cl 64(2). It requires the Minister of Finance to consult the relevant Minister on a draft regulation affecting the portfolio of that Minister.

4) It is proposed that any "Minister, referred to in subsection (12), may submit a request to the Minister of Finance to make regulations under this Chapter regarding a matter pertaining to the portfolio of the relevant Minister".

Response: It is not necessary to provide for this in the Bill since any Minister may make such a request to the Minister of Finance.

2.8 BUSINESS UNITY SOUTH ARFICA (BUSA)

1) We would like to state for the record that we are not satisfied with the response from National Treasury, especially where we have made similar comments as those contained in the submission from Labour as below. NT used a copy and paste argument that is contained in other responses in respect of Chapter 4, explaining the coupling of Sections 217(1), (2) & (3), which we at no time question as we fully understood that these prescripts have a bearing on procurement and should be applied simultaneously. We questioned whether they had ensured constitutionality, so that we do not find ourselves stalled by such an issue once promulgated and they simply offered a long explanation without confirming that indeed they had referenced this through the State Law Advisor, whereas also the Labour response is met with a "comment noted". I am not sure if this is to be deemed even more dismissive or whether this will be given more thought.

Furthermore, we made a similar call in respect of the NEDLAC Consultative process, which was met with an almost dismissive response on role that NEDLAC plays in this process, with Government, Business and Labour jointly going through a process of review of such legislation before these are tabled through parliament, exactly so as not to waste the valuable time of Parliamentary Committees. We also accept and understand that it is the prerogative of Parliament to proceed without taking into account concerns raised by parties. The NT response to COSATU in this respect was much more cordial and less dismissive, yet we presented similar perspectives.

Response: If the essence of the comment or proposal is the same, and the NT has a position on the matter, then the response will not differ as the response will be consistent with NT's position, irrespective of which stakeholder raises the matter. The Bill as certified by the State Law Advisers was introduced in Parliament. At the meeting of 19 March, Chairperson of SeCOF asked the Committee's Legal Adviser to advise on constitutional matters raised. Whether the Bill is to be referred to Nedlac before further processing, is a decision of Parliament.

2) From the Onset – we are aligned with the motive for such all encompassing legislation to govern procurement as our systems have been fragmented and frankly we have not been able to adequately meet the prescripts of Our Constitution, in all of its sub-sections 217(1), (2) or (3);

Least cost decisions are not of necessity cost effective. Excessively under-pricing and being overly competitive, may be argued to be competitive, but the risks inherent in such a process, have not been adequately factored. Excessive pricing is no more acceptable either. Effective decision making in this respect can only be premised on the decision makers being adequately informed on "what should such goods or services, whether infrastructure related or commodity based, reasonably cost". The key question is whether we are getting value for money in our public spend, especially in a Country with the many competing demands on our constrained fiscus.
On the questions of fairness and transparency, there is sufficient evidence of how this has been flouted and allowed for corruption to be pervasive. The Zondo Commission reports have highlighted much of this; This current version still ignores the need for incentivised whistleblowing. The standalone PPPFA, which has never been founded on a sturdy and legally sound Framework, was never going to adequately facilitate the aspirations of Section 217 (2) either, which is why we now have such a vacuous similar Regulation which is currently being wilfully misinterpreted by some as a licence to deconstruct the BBBEE Act and its Sector Codes and gravitate to the old narrow based BEE and even illegally redefining Black by using pre-selection criteria from the pre-democracy, tri-cameral government era, both being illegal. We need to get a Framework in place that can stand the test of time and achieve the objectives perceived in our Constitution at the dawn of our democracy, whilst at the same time ensuring no compromise to Section 217(1). A balancing act as a necessity for a future we would all want to see. Getting this primary legislation wrong, is not an option as it will simply stymy our aspirations as envisaged in the Constitution and fall short of meeting the Objects of this Bill. Hurriedly getting such groundbreaking primary legislation, as flawed as what the contents and the process has been argued to be, from many quarters would simply be irresponsible.

Response: Cl 2(2)(a) provides that one of the objects of the Bill is to ensure, efficient, effective and economic use of public resources (which is one of the principles of public administration in s195(1)(b) of the Constitution) through, among others, the assessment of costs, benefits and risks.

2) What We are Advocating For?
- *Public Procurement Bill be referred back to the NEDLAC Process to strengthen the basis for getting such legislation eventually signed into law. Promulgation of poorly conceived legislation, will result in the need for frequently reviewing of sub-ordinate legislation akin to trying to convert a donkey into a prizewinning racehorse.*
- *As the NEDLAC Report will reflect – BUSINESS and LABOUR had contended from the time of concluding the NEDLAC Process, that there were too many areas of disagreement between Government and its Social Partners, the latter mostly being aligned on many of the issues raised, whereas Government seemed to be working towards a deadline regardless of the*

quality of the end product and whether it would achieve the objects for which the Bill was established;

- *Public Procurement legislation which would consolidate the current fragmented public procurement system based on sound legal principles which can stand up to scrutiny and allow for adequate context for the subsidiary legislation which would need to crafted, especially since the latter are not of necessity subjected to the NEDLAC Process.*
- *Efforts to rescue a legislative process in which up to now, inputs by Business, Experts in procurement law and global best practice in procurement, Construction Industry and even public sector entities, have been largely dismissed, so that we do not find ourselves in a "stagnant" situation should this Bill be adopted in its current form;*

Reasons for the above:
Why are we doing so (1) ?

- *Bill was not explicit enough on the principles espoused in the Constitution and the need for the concept of Value for Money, whether tangible or intangible.*
- *National Treasury, over-reliant on subsidiary legislation tried to confine substance of Bill to principles, ignoring aspects of where more explicit detail+D96 could have been incorporated in primary legislation;*
- *The NEDLAC Process was rushed through a six-month process, whereas National Treasury had been sitting with the 2022 version for social partners to consider since 2020;*
- *Urgency seemed largely premised on closing the gap, left by the Constitutional Court ruling in respect of the Preferential Procurement Regulations of 2017, which is a component that would be addressed in the new Bill, but took very little cognisance of the how in the process of closing that gap, cost effectiveness and other prescripts of Section 217 (1) could be deliberately driven at a primary legislation level, without prescribing processes which belong in Regulations;*
- *Evidence suggests that of the public comment received following the August 2023 invitation by the National Assembly Standing Committee on Finance, only 36% of these were considered with 64% not having been processed at all; This shortcoming will likely be legally challenged based on the precedent set by the Constitutional Court Ruling in May 2023 which invalidated the Traditional and Khoi-San Leadership Act 3 of 2019, which had been passed by Parliament and even signed off by the President;*

Why are we doing so (2) ?

- *The inclusion of the current version of Chapter 4 of the Bill is problematic from a drafting point of view. Section 217 of the Constitution envisages that national legislation will prescribe a framework which enables organs of state to depart from the prescribed system requirements relating to the contracting for goods and services to implement a preferential procurement policy. The Bill as it stands has introduced a welter of possible exclusions from tendering, resulting in the potential of any organ of state to limit the individuals and institutions that are eligible to tender for any particular tender. It does not provide a framework for implementation with principles and checks and balances. It is therefore very likely that a court challenge to the drafting will be raised as was done recently in invalidating the Preferential Procurement Regulations of 2017;*
- *Sections in the current version of Chapter 4 overlap with and marginalise the B-BBEE Act. The consequence of this risks threatening the livelihoods of beneficiaries of such broad basing, particularly in the skills development and enterprise development prescripts of the Act;*
- *Chapter 4 loosely mentions a BBBEE Level and then pre-qualification, set asides and sub-contracting based on Black Ownership, which essentially dismisses the balance of elements and targets contained in the B-BBEE Sector Scorecards; More investigation and consequence management should be applied to companies and rating agencies, fraudulently involved in presenting questionable scorecards, rather than dispensing of the holistic perspective in which*

this Act has been crafted to meet the prescripts of Section 217 (2) through which many more people benefited compared to the previous narrow based Ownership alone model;

Why are we doing so (3) ?

- *Such significant and ground breaking legislation we contend could have been better informed by legal and procurement expertise, coupled with global best practice lessons This is true for not only Chapter 4 but other sections of the Bill when for example dealing with the recommendations of the Zondo Commission in respect of lessons learnt from the State Capture era.*
- *Incentivised whistle blowing especially in the case of procurement where immense savings may be derived, should be contained in this Bill and not left to be only incorporated in general whistle blowing legislation. The precedent for doing so already exists even in Environmental Legislation and the urgency for being able to identify, investigate and act against such malfeasance is all the more important when one considers the risk faced by such whistleblowers and the opportunities to evade prosecution are increased for offenders, when there are delays in such disclosures;*
- *Contrary to the presentation by National Treasury, claiming that Chapter 4 is an expatiated version of the one tabled at NEDLAC, we contend that this indeed is a revised version, evidenced on comparing the Dec 2022 Post NEDLAC version and the current B 18B-2023 version, as well as cross referencing the basis of the representations made by other parties on this matter. It is possibly a moot point as to what extent expatiating may be done, before the substance of a Chapter such as this is considered to be new. The fact of the matter is that this has not been tested by a NEDLAC review process.*
- *The aforementioned may of course be academic as even the current version as we have asserted, does not pass muster to be considered a framework so it is likely that we should go back to the drawing board.*

Why are we doing so (4)?

- *There remains a need for expanding on the principles that would clarify the distinctions to be made between general and strategic procurement processes. The latter key issue is mentioned in only two, almost one liners in the Bill, making only cursory mention of this important distinction and leaves the rationale and interpretation thereof open ended to any lay procurement person hoping to understand what exactly this means and what would be its benefits in a public procurement environment;*
- *2022 GDP = R 4.5 trillion, GFCF (infrastructure Assets) over a 20 year average of 16.6% = 750bn; NDP envisaged this to be 30% by 2030; Expenditure significant enough to justify better specific emphasis in primary legislation to enable optimal infrastructure investment with the resultant quality of social and economic infrastructure, that we so desperately need; On the contrary the definitions and mention thereof in this version conflates administrative roles in contract management with that of development and total cost of ownership precepts in infrastructure development procurement decision making;*
- *For Legislation which is procurement related, it is very scant on principles to be espoused to optimise procurement outcomes and is too broadly over reliant on 217(1) whereas it would have been better to be more specific; For example – Is Cost Effective synonymous to Value for Money? When is Competitive acceptable and when is it not ?*

Why are we doing so (5)?

- *Urgency seemed largely premised on closing the gap, left by the Constitutional Court ruling in respect of the Preferential Procurement Regulations of 2017, which is a component that would be addressed in the new Bill, but took very little cognisance of the how in the process of closing that gap, cost effectiveness and other prescripts of Section 217 (1) should also be*

deliberately driven at a primary legislation level, without prescribing processes which belong in Regulations;

- *If Procurement principles are not well enough defined, for procurement outcomes to be optimised, it is uncertain how much success would be realised in using this as a mechanism for redress as envisaged in Section 217 (2);*
- *It is counter-intuitive to hope that accelerating a flawed piece of legislation will produce the expected results sooner, when in reality, the legislation will not be able to be effected immediately, exactly because its implementation will be delayed by likely legal challenge;*

CONCLUSION

- *There will no doubt be many presentations and representations you would be considering;*
- *It remains our hope that you will heed the constructive input and make a decision premised not only on doing the right thing, but also on doing things right, so that we will achieve not only the financial aspirations, "get better bang for our buck", especially considering the financial position our Country finds itself in for various reasons but that we will also be able to use this opportunity to without risk of legal challenge, build a growing and inclusive economy that enables the cohesive society that was envisaged when our Constitution was crafted at the dawn of our democracy;*

Response: This is now a Parliamentary process, and only Parliament can direct that the Bill be referred to NEDLAC. In the event of such referral to NEDLAC, consideration of other stakeholders not represented at NEDLAC should be kept in mind.

Various provisions in the Bill deal with the five principles and will be augmented by the regulations. Encapsulating all these principles in the Bill through balancing them or choosing one over the other, is nor feasible neither appropriate. Importantly, the principles in s217(1) must also be adhered to together with other provisions of the Constitution, which includes s217(2) and (3), and s195(1)(b) and s216. These provisions are referred to in the Preamble and the objects (clause 2). The Bill, read together with regulations, will direct procuring institutions on how to give effect to these principles in their procurement systems which includes their policies. All subsections of 217 of the Constitution are anticipated to coexist within the procurement system envisaged in s217(1). The preferential procurement framework in Chapter 4 should be understood within the context of the procurement system envisaged in s217(1) of the Constitution. Ch 4 is also linked to Ch 5, which provides for the framework for the system to be prescribed by the Minister within which procuring institutions must implement their policies, and take into account the different nuances within the sectors and industries within which the respective procuring institutions operate. It is within this context that the trade-off between these competing objectives and principles is maximised and balanced.

The B-BBEE Act and its sector codes are not only given effect to through public procurement.

To delineate a clear distinction between set-asides in cl 17 and pre-qualification for preferential procurement in cl 18, it is proposed that-

(a) cl 18(1)(b) be omitted; and

(b) cl 18(1)(a) should read as follows: A bidder having a prescribed minimum percentage of preferential procurement from enterprises that are owned or managed by black people in terms of the applicable 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);

(c) the definition of "B-BBEE status level of contributor" in cl 1 be omitted; and
(d) the references in cl 18(2)(a) to paragraphs (a) and (b) be omitted.

The review of the Protected Disclosures Act is underway, including a detailed discussion document published for public comment in 2023, and managed by the Justice Department. Whistle-blowing should therefore not be dealt with in this Bill.

The expatiation is based on provisions that were already in the Bill when it was tabled in the National Assembly on 30 June 2023, and through comments received from stakeholders during the SCOF processes, the provisions were expatiated on.

It should be noted that PPR, 2022 remedied any flaws that were identified by the Constitutional Court in its majority judgement in the matter between the *Minister of Finance v Afribusiness* (now Sakeliga). Therefore, it is not correct that Chapter 4 is premised on closing a gap left by the Constitutional Court ruling in respect of PPR, 2017.

2.9 COSATU AND SACTWU

1) *COSATU is concerned about many aspects of the Public Procurement Bill: its legal robustness; its appropriateness given the reality of our highly problematic public procurement landscape. However, we are also mindful of the request from the NCOP to focus on major critical concerns with a view to finding alignment with National Treasury. For these reasons, we have identified the following focused steps to address a shortlist of critical interventions in the Bill.*

Steps to address concerns re Chapter 4:

2) *First, address constitutional problems by correcting the absence in the Bill of a default for open competition that is adjudicated according to a points system which includes price and preference, and may also include quality/functionality. It is not strictly necessary to pin-down the proportions of the points system in the Bill. This can be flexibly done in Regulations. But it is necessary to embed the principle and framework in the Bill.*

Response*:* It is proposed that a provision to clearly indicate the layered application of clauses 17, 18 and 19 be included in the beginning of Ch 4 which will each be determined by a prescribed threshold. The starting point is set-asides (cl 17), if not applicable, then pre-qualification (cl 18) and thereafter sub-contracting (where feasible) (cl 19).

3) Second remove from Chapter 4 some of the procurement procedures which will interfere with Chapter 5 and undermine delivery. This occurs for instance at the current Bill's section 17(5). This clause seems to require that functionality be treated early in the process, preventing its inclusion within the points system. These sorts of procedures could interfere with the more advanced procurement methods enabled by the current Chapter 5. Chapter 4 should be analysed to strip-out all of these sorts of purchasing procedures.

Response: It is proposed that cl 17(5) be amended to only provide that bids must be evaluated as prescribed, and the content of the current 17(5)(a) to (c) will be dealt with in the regulations.

4) *Third, as is already demanded for local content designations, all regulations regarding preference should be preceded by market research and policy analysis. This would help to avoid chaotic and unconstitutional implementation of preferences. This research and analysis should be published and provide a reasonable opportunity for public comment.*

Response: Cl 18 (prequalification) provides for market research and industry analysis. The development of the regulations will be subject to the processes outlined in cl 64(2) to (4) which includes a statement explaining the need for and intended operation, and the expected impact of the draft regulations.

5) *Fourth, while we understand that designation and local content will apply across all tenders requiring designated products or services, care should be taken to avoid excessive layering of other preferential procedures and preferences (such as simultaneously requiring set-asides, prequalification, designation and sub-contracting). Avoiding such would reduce complexity and irrationality in procurement processes, as well as the risk that tenders becoming commercially unviable.*

Response*:* It is proposed that a provision to clearly indicate the layered application of clauses 17, 18 and 19 be included in the beginning of Ch 4 which will each be determined by a prescribed threshold. The starting point is set asides (cl 17), if not applicable, then pre-qualification (cl 18) and thereafter sub-contracting (where feasible) (cl 19). If a local content designation is made in terms of cl 20, it will apply to any applicable procurement.

6) *Fifth, ensure that designation for local content is understood to be an obligation when sectors or products are designated. At the moment, it is not clear that the Bill necessarily gives designation this legal power.*

Response: Clause 20(5) makes this clear through placing an obligation on the procuring institution and providing for the disqualification of a bid not meeting the minimum threshold for local production and content.

7) *Sixth, clarify, or alternatively remove, the requirement for prequalification: it is not clear at this stage what prequalification will mean in practice. In the Bill it seems to mean the same thing as set-asides but that it is layered alongside set asides creating new complexities for implementation. The need for an additional layer of set-asides, relabelled as prequalification, is unclear and the relationship between this and the set-aside provision should at least be clarified.*

Response: It is a layered approach, first set-aside (cl 17) and then pre-qualification (cl 18), both according to the prescribed thresholds. For set-asides, must be set as provided for in cl 17(2).

8) *The proposed clauses which give effect to these proposals are contained in Annexure A.*

Response: The following proposed amendments in Annexure A are supported:
(a) The omissions of references to complementary goals in Ch 4, i.e. cl 17(5)(d), 18(8), 19(6) and 20(8).

(b) The inclusion in cl 18(1) (prequalification), that the prescribed thresholds and conditions must include a prescribed minimum of potentially qualifying suppliers to ensure competition.
(c) The omission of cl 21 (other preferences).

The explanation for not supporting other amendments is indicated above.

Steps to address concerns re Transparency and Anti-Corruption Measures:

9) *First ensure the definition of confidentiality doesn't block legitimate access to information. This can be done by aligning S1 with PAIA and not POPIA. Practical experience by civil society tells us that POPIA is often abused to attempt to prevent disclosure of everything. This trend would very likely be extended into the State through the current Bill, and it would end up undermining transparency. PAIA is the Bill that addresses confidentiality within South Africa's legislative landscape. The definition of confidentiality should be aligned with PAIA and not P*OPIA.

Response: The alternative proposal in Annexure B that the PAIA used for confidentiality (not only in relation to personal information) is supported and amended definition will be proposed.

10) Second, the Bill must retain access to the record of beneficial ownership of suppliers contracting with the State, as agreed at Nedlac. There is simply not the investigative sophistication amongst the broad South African citizenry to "connect the dots" to uncover potentially corrupt and related interests and parties through detailed CIPC searches. The Bill must enable such disclosure. It must also be properly aligned with the Companies Act, which establishes the full register of beneficial ownership under section 56(14).

Response: The proposed amendment in Annexure B to clause 33(2)(a)(v) to include the correct provision of the Companies Act regarding beneficial ownership of the successful bidder is supported.

11) Third, in order to advance transparency, there needs to be a national register of excluded persons, their family, and known close associates that are contracting with the State, held at the level of, and published by, the PPO. This is intended to make it easier for citizens to identify these persons and take actions to protect the integrity of the procurement system where appropriate.

Response: Creating and maintaining such a register is complex and not feasible. Automatically excluded persons listed in cl 13 may not contract with the State. If a bid above a prescribed value is awarded to the family (a spouse, child or parent), or a known close associate, of an automatically excluded person, disclosure of such information could be included in the list in cl 33(2).

12) The proposed clauses which give effect to these proposals are contained in Annexure B.

Steps to strengthen the Bill further:

13) First, ensure the Bill is brought back to Nedlac within the short term (e.g. 18 months) to assess the strengths/ weaknesses of its operationalisation and fix challenges, as well as engage on outstanding critical matters which have not been addressed during this process due to time.

Response: Parliament may recommend that the Executive after stipulated period following the enactment of the Bill be referred to Nedlac for a review.

14) Second, bring the Regulations to Nedlac for engagement with stakeholders to make sure they are aligned with the concerns and discussions at Nedlac, and to make sure they are as robust as possible.

Response: The draft regulations must, according to cl 64(3), be subjected to public consultation allowing all stakeholders to submit comment. It will also be subject to Parliamentary scrutiny according to cl 64(4).

2.10 DR NCEDO MKONDWENI

Dr Mkondweni's comment:
The revised Bill covers most of the items that have been submitted and I commend National Treasury and the Parliament for that.

- *Section 17(2) (a) The policy envisage in subsection (1) must include one or more preference point systems and thresholds. The proposal is that the Preferential Points weighting MUST be greater than the weighting for Price and Quality or Functionality Combined. This must be included in the Bill to avoid back and forth with the courts during the writing of regulations, standards and norms etc.*
- *In the past we had 80/20 and 90/10 in favour of Price over Preference.*
- *The submission is to consider 60/40 where 60 will be for Preference and 40 will be for Price and Quality/Functionality combined.*

Contracting Methods
• The Bill is silent on the Contracting Methods.

Additional matters raised during consultation:
Procuring institutions and service providers use standard contracts which does not comply with legislation.

NT's responses and proposals:
It is proposed that cl 17(5) be amended to only provide that a bid be evaluated according to the criteria to be prescribed by regulations and that other elements stipulated in clause 17(5) be omitted (e.g. functionality and minimum qualify score). This will ensure that the required balance between among others preference, price (cost-effectiveness) and functionality or quality be struck. The development of these regulations will be subject to the rigorous process set out in cl 64(2) to (4). Cl 17(5) proposed to provide:
A bid set aside in terms of subsection (1) must be evaluated in terms of the prescribed criteria.

As to contracting methods, it is proposed that cl 64 be amended to enable regulations on contracting methods for any category of procurement.

As to procuring institutions and service providers using standard contracts which does not comply with legislation, such contracts will be invalid to the extent that they are contrary to legislation. To reinforce this for public procurement, it is proposed that the following clause be included in the Bill: If a provision of a contract concluded by a procuring institution and the successful bidder is contrary to a provision of this Act, that provision is null and void.

2.11 CONSTRUCTION SECTOR CHARTER COUNCIL (CSCC)

1) Major concern over the trumping of B-BBEE Act: NT indicated that the Bill refers to relevant or appropriate legislation and that "these are proposed to be amended to align with the Bill and scrutinised further in light of stakeholders' input to limit reliance on the trumping clause in cl 3(4) of the ill. No sound reasoning for trumping as the Constitution does not give priority to subsections (1), (2) and (3) of section 217, CSCC accepted that all subsections in s217 have equal weighting.

The B-BBEE Act and sector codes indicate how public spend is best used to address previous inequality and fact-track the participation of all designated groups. It is standardised measure of targets and performance that allow private companies to align their business operations to effect real and measurable transformation.

The trumping provision will result in the demise of B-BBEE in all its dimensions. In particular, but not only, the impact on skills development and enterprise developmental benefits which have made great impact via B-BBEE Act and its sector specific codes. The trumping clause in cl 3(4) of the Bill arguably emphasises a narrow ownership focus; and ignores the broader aspects of the five tiers of economic empowerment, that is already aligned to designated groups.

Crafters of Ch 4 seem unaware of how B-BBEE levels work. It is not possible to dictate a certain B-BBEE level as prequalification criteria on a project and then allow procurement policies to apply on a project. Section 10(1)(b) of the B-BBEE Act, as amended provides that every organ of state to apply any relevant Code of Good Practice issued under the B-BBEE Act in developing and implementing a preferential procurement policy.

Unless a B-BBEE code is specified and implemented in state contracts, a B-BBEE level (prescribed as proposed in pre-qualification criteria, set-asides and sub-contracting) will immediately drop.

Proposal is that the trumping clause be removed.

Response: The aim of the trumping clause in cl 3(4) of the Bill is that public procurement is regulated through the Bill. Removing merely because of the B-BBEE Act concern, may give rise to conflict with other legislation.

The B-BBEE Act and its sector codes are not only given effect to through public procurement.

To delineate a clear distinction between set-asides in cl 17 and pre-qualification for preferential procurement in cl 18, it is proposed that-

(a) cl 18(1)(b) be omitted; and

(b) cl 18(1)(a) should read as follows: A bidder having a prescribed minimum percentage of preferential procurement from enterprises that are owned or managed by black people in terms of the applicable 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);
(c) the definition of "B-BBEE status level of contributor" in cl 1 be omitted; and
(d) the references in cl 18(2)(a) to paragraphs (a) and (b) be omitted.

2) Concern about the cost implications of Ch 4 have not been specified and therefore cannot be sanctioned without regulations that specify this.

Response: The cost implications of the regulation required for Ch 4 of the Bill will be part of the process of developing the draft regulations and public consultation thereon. Please refer to cl 64(3).

2.12 SA INSTITUTE OF RACE RELATIONS (IRR) LEGAL NPC

1) How, generally, are BEE 'premiums' to be calculated under the Bill? Treasury has repeatedly failed to address this issue clearly. If Treasury does not answer this question, then it effectively tells the public that it will ensure that 'premiums' are paid under the Bill without any transparency about the amount or expenditure control over that amount.

Response: The Bill, in Chapter 4, seeks to address these fundamental constitutional provisions in section 217(2) and (3), and makes provisions for regulations to be drafted with the necessary conditions, thresholds, parameters to ensure that these preference measures are implemented in a responsible manner. This would also look at provisions that address negotiations with bidders, which is envisaged would include, amongst others, the negotiation of a fair market price to prevent government paying exorbitant prices for contracts awarded.

2) How, specifically, is the rejected 'maximum value-for-money' option in any tender process to be recorded, if there is a 'premium' winner, under the Bill? A 'premium' calculation requires two elements: 1) the cost that the procuring institution would have paid in a particular contract absent 'preference', referred to in the Zondo Report as 'maximum value-for-money'. 2) the price of the winning contract. The Bill makes it impossible for Treasury to record element 1) due to 'set-asides' and 'prequalification criteria' which ensure, in all cases where these provisions are directly effective, that the 'maximum value-for-money' bid is not allowed to be made. As Treasury has not provided any alternative process to calculate the first element it is safe to say that Treasury has no plan to ensure transparency and expenditure control over BEE 'premiums' paid under the Bill.

Response: The Bill, in Chapter 4, seeks to address these fundamental constitutional provisions in section 217(2) and (3), and makes provisions for regulations to be drafted with the necessary conditions, thresholds, parameters to ensure that these preference measures are implemented in a responsible manner. This would also look at provisions that address negotiations with bidders, which is envisaged would include, amongst others, the negotiation of a fair market price to prevent government paying exorbitant prices for contracts awarded.

3) How will technology / regulations / instructions create 'premium' transparency? Alternatively, Treasury plans to record the element 1), as above, without divulging that plan. For example, Section 30 of the Bill under 'use of technology in procurement' states that 'an information and communication technology procurement system' must 'enhance…transparency', which Treasury noted in response to IRR Legal. But how? There is no indication of how technology records 'premiums' under the Bill. The same, mutatis mutandis, applies to 'regulations' and 'instructions' that the Bill provides to serve transparency without a 'how' regarding 'premiums'. Treasury submitted that 'no new staff' or 'units' in provincial governments would need to be created as a result of powers or duties assigned by the Bill adding to the mystery of how.

Response: The regulations for purposes of cl 30 (ICT procurement system) and 33 (disclosure of procurement information) and other matters listed in cl 64(1) will be the subject of public consultation and Parliamentary scrutiny as required by cl 64(3) to (4).

4) What is an 'excessive premium'? In response to IRR Legal Treasury said it would prevent 'excessive premiums'. What is that? IRR Legal's pro-poor position is any BEE premium above R0 is 'excessive', since Section 217(1) of the constitution requires maximum 'value-for-money'. Treasury's contrasting position is that there is a 'trade-off' between 217(1) requirements and 217(2) requirements based on a misreading of case law. Supposing, however, that Treasury were right, 'excessive premium' becomes even more mysterious. Unlike education, grants, etc. the public cannot play a role in determining what counts as an 'excessive premium', because the Bill prevents all BEE premiums from being recorded and reported to the public.

Response: Section 217(2) of the Constitution states that section 217(1) "does not prevent" … It therefore does qualify section 217(1).

5) Whence the 'trade-off' between 'transparency' and 'premiums'? 216(1) of the constitution requires 'transparency and cost control'. Treasury responded to IRR Legal's submission that this includes transparency and cost control over BEE procurement premiums by claiming: 'However, it is submitted that sections 216(1) and 217(1) of the Constitution are qualified by section 217(2) and (3) of the Constitution to address the imbalances of the past' [emphasis added]. This indicates Treasury's position is that there is the same kind of 'trade-off' between 'transparency' and 217(2) as there is, in its view, between 'cost effectiveness' and 217(2). It is not stated where Treasury got that mistaken constitutional theory, or if it has been checked by relevant legal teams.

Response: The trade-off is not in relation to the transparency element, i.e. it is not the view that transparency as envisaged in sections 216(1) (and 217(1)) of the Constitution is qualified by section 217(2) of the Constitution. The view is that the expenditure control might be tempered by preferential measures introduced in accordance with section 217(2) and (3) of the Constitution.

6) 'May' vs 'must' – why does Treasury promote 'uneconomical' discretionary power? Treasury responded to IRR Legal's submission that 'must' be used instead of 'may' when referring to exemptions and deviations from provisions under the Bill when the alternative is 'impossible, impractical, or uneconomical' procurement with the recommendation to use 'must' with 'impossible, impractical' and 'may' with 'uneconomical'. Treasury clearly shows that it intends for the Bill to allow for 'uneconomical' discretionary decisions in the executive.

Response: NT's view that the Minister should have a discretion (use of "may") in considering an exemption request in terms of cl 62 based on the concept of uneconomical is because not granting of an exemption if it is uneconomical will not be justified in all instances. For example,

local content/designations (protecting the local (South African) manufacturing base versus foreign imports which may be cheaper.

It is proposed that in the case of departures (cl 62), if compliance with an instruction is uneconomical, then it must be granted.

7) *Have 'black owned' businesses been paid more than all other private companies? IRR Legal computed from Treasury data shared with the Committee that R588 bn was paid to 'black owned' companies, 48% of the sample, and 60%+ of the sample excluding payments made by the state to SOEs. Treasury denied these two claims by wrongly suggesting that IRR Legal confused 'black owned' with BEE, and by ignoring the distinct point on payments to private companies. BEE Level 1 companies were paid R584 bn. IRR Legal noted that if Treasury's data was 'representative' then 'black owned' companies received R3 trillion+ since 2017 and BEE 1 – 4 companies received R4 trillion+. BEE 1 – 4 companies received 69% of recorded JSE turnover in Treasury's data. Treasury did not acknowledge the latter facts. These facts refute its pretext for removing 'premium' caps.*

Response: The statistics provided herein above, needs further interrogation and verification against all reports submitted to SeCOF. The reality is that the statistics may be misleading in that measurement for B-BBEE is based on the broad-based nature of the Act itself. For example, it is possible for any company to attain status level 1 of B-BBEE without black ownership.

8) Unfunded Mandates – How much will this effect provincial budgets? Treasury's legal advisor told the Committee there are 'no new powers' and then said 'maybe there are new powers' under the Bill. The 'powers' of 'set-asides' are clearly new and will reside, in part, in provincial government, and are designed, on Treasury's own submissions, to have financial implications, since Treasury says it tabled the Bill due to complaints that the current system does not 'go far enough' in its premium provisions. But these 'unfunded mandates' have not been projected in a memorandum as per Section 35 of the PFMA.

Response: Treasury did not state that it tabled the Bill due to complaints that the current system does not go far enough in its premium provisions. Our statement was about preference measures not going far enough. Under the current legal framework, provincial institutions under the PPPFA and regulations must have its own preferential procurement policies and implement these policies. The financial implications of Ch 4 of the Bill will be an important consideration in the development of the applicable regulations, and for institutions when determining their own preferential procurement policies. At this stage, it is not possible to project the associated financial implications for provinces.

As to financial implications, please also refer NT's report to SeCOF on 19 March 2024: The elements of the procurement systems mentioned in cl 25, are existing elements which may only have to be made part of the procurement system. As to expanding the scope of procurement function in a procuring institution, and most of these are not new functions for institutions but are elevated to primary legislation. Shifting functions within the institutions should result in minimal costs. The enforcement function for provincial treasuries is not new – they already have an enforcement role in respect of provincial departments in section 18(2)(b) of the PFMA. The enforcement role for provincial treasuries in respect of municipalities is proposed to be removed.

Investigations about allegations in cl 27 and steps, are functions that are required in terms of the PFMA and MFMA and their respective prescripts.

A proposal is made elsewhere in this report that cl 28 be amended to not stipulate that the implementation of the proposed procurement system in cl 25(3) must be implemented by the procurement function but it provides that the procuring institution must ensure its implementation without stating that a function (unit) should be established to do so. For example, procurement could be a SCM unit function while risk management is a function of another unit.

9) How will race be tested? Treasury increases incentives for individuals to identify as black to receive 'premiums' without explaining how disputes about racial classification are to be adjudicated.

Response: Black people is defined in cl 1 of the Bill to have the meaning assigned in section 1 of BBBEEA, 2003. Black people have been disadvantaged by unfair discrimination and their protection or advancement is provided for in section 217(1) of the Constitution. If a person falsely claim to be black and is the successful bidders, other bidders may request a reconsideration by the procuring institution and, if not resolved, a review by the Tribunal. Giving false or misleading information under the Bill (Act) will be a criminal offence under cl 61(1)(a).

10) no 'tiebreak'? Treasury rejects the option of race as a tiebreaker by seeming to falsely claim that 217(2) requires that a procurement framework must trade-off cost effectiveness.

Response: That 217(2) be used as a tiebreaker is not supported. Section 217(2) of the Constitution states that section 217(1) does not prevent organs of state from implementing a procurement policy that provides for preferences in the allocation of contracts and protection or advancement of persons previously disadvantaged by unfair discrimination.

2.13 MK LIBERATION WAR VETERANS

1) Proposes that military veterans be included in the category of persons in cl 17 that provides for set asides.

Response - the following amendments are proposed:

- The definition of "military veterans" in clause 1 be replaced with the following definition: "**military veteran"** means any South African citizen who rendered military service to any of the non-statutory military organisations which were involved in South Africa's Liberation War from 1960 to 1994;
- The inclusion of military veterans in cl 17(3) as paragraph (f) (standalone category) and the current paragraph (f) becoming category (g) (small enterprises with subcategories)
- The inclusion of military veterans in cl 17(3)(f) (to become (g)) as one of the subcategories of small enterprises.

2) Cl 18(1), read with 18(3), may result in military veterans be left out.

Response: Proposed inclusion in cl 17 will mean that military veterans will be qualify for set asides.

3) Proposes that in the Bill certain industries be earmarked for empowerment of military veterans particularly the defence and security industries.

Response: Having specific earmarking for one category for specific sectors is not advisable.

4) Exclude foreign companies in being a majority bidder in all security sensitive industries.

Response: It is submitted that this is not a matter to be regulated by this Bill. The Private Security Industry Regulation Amendment Act, 2014 (Act No. 18 of 2014)**,** imposes restrictions on foreign ownership of private security companies. This Amendment Act has not come into operation yet.

5) Exclude non-citizens from Finance and SCM roles linked to public tenders

Response: If a person qualifies for employment in the public sector in terms of the applicable legislation in finance or SCM position dealing with tenders, imposing such limitation on the mere basis that they are non-citizens will likely constitute an unfair labour practice. Whether they could perform such functions should be the subject of security vetting. There is also a Constitutional Court judgment that permanent residents qualify for permanent employment in the public service.

6) Local economic stimulation – the Bill must go beyond set asides, and prescribe local economic activation.

Response: Cl 20 provides for designation for local production and content. Clauses on set-asides, prequalification criteria and subcontracting as a condition of contract, all make reference to local geographic considerations, which would result in the stimulation of local economic development.

7) In clause 38 include South Africans who specialise on development of emerging business to serve on the Tribunal.

Response: Cl 39(2) provides that the Tribunal must include a retired judge as Chairperson and persons with 10 years' experience in law and persons with 10 years' experience in law. These are minimum and essential expertise required for panels to be constituted in terms of cl 47 to consider review applications. The Minister may appoint other members should it be considered advisable.