PARI PUBLIC AFFAIRS RESEARCH INSTITUTE
shaping change

Public Procurement Bill 2023

Submission of Public Comment to the Eastern Cape Provincial Legislature

The Public Affairs Research Institute, University of Johannesburg

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Introduction

1. The Public Affairs Research Institute (PARI) welcomes the opportunity to contribute to the Eastern Cape Provincial Legislature's deliberations on the Public Procurement Bill.

2. PARI is an institute affiliated to the University of Johannesburg providing high quality social science and public administration research in South Africa, including support to government partners. Over the last decade it has developed a depth of expertise in public procurement.

3. In making this submission, we hope to promote the Constitution's s217 vision of a public procurement system that is fair, equitable, transparent, competitive and cost-effective. These principles already enable, and s217(2) reinforces, the constitutional imperative of using public procurement to advance racial transformation and economic development, both fundamental to the post-apartheid project. It is widely agreed that in relation to these principles and objectives, South Africa's existing procurement regime falls short. There is pressure to move quickly to address critical issues, by consolidating and cohering the public procurement legislative framework, introducing stronger differentiation between types of procurement and procuring institution, enabling a more strategic approach to procurement methodology across some of these types, enhancing integrity and transparency measures to address rampant corruption, and moving preferential procurement, Broad-Based Black Economic Empowerment (B-BBEE) and local content onto stronger legislative foundations.

4. There are legitimate questions, however, about whether the Bill now before the NCOP and Provincial Legislatures achieves these goals. Many of these questions were raised in submissions to the Standing Committee on Public Finance. The serious hazards projected by those submissions

were of such an extent and variety as to give anyone pause for thought, but we see no evidence that the Committee considered them. Apparently abrogating its responsibilities under the separation of powers, the National Assembly instead off-loaded this work onto the Office of the Chief Procurement Officer (OCPO), and the OCPO responded to only 36% of participants. The last-minute redrafting undertaken by the OCPO and the Standing Committee also introduced far-reaching changes to preferential procurement, which have not gone through rigorous consultation and participation processes.

5. These new provisions are problematic. They add to a series of deficiencies that we have addressed at length elsewhere. In earlier submissions and publications, we have raised concerns about the Bill's problematic grasp of constitutional requirements, its misalignment with legislative and operational contexts, its extensive and unnecessary recourse to subordinate law, and the vagueness and ambiguity of a number of crucial provisions.[1] In many instances we have suggested concrete fixes, including through our participation in drafting the so-called Joint Strategic Resource version of the Bill.[2]

6. In this submission, we focus on how changes introduced in the National Assembly reproduce existing fragmentation, ambiguity, and incoherence between and within preferential and broader procurement law. We hope, by making this argument, to move debate in this area beyond its currently polarised, overly simplistic, and ultimately unproductive terms. The Constitution and the future of our country require a conscientious, meticulous process of configuring preferential procurement in ways that optimally sustain, expand, and deracialise our economy and society, and this submission emphasises that challenge. We conclude with some continuing concerns around integrity, transparency, and public access to procurement processes.

Increasing fragmentation, ambiguity, and incoherence in the Bill

COMMENT ON CHAPTER 4 AND INTERACTING PROVISIONS:

7. It has been a quarter century since the promulgation of the Preferential Procurement Policy Framework Act (PPPFA). The PPPFA was passed in a rush in 2000, under pressure of a constitutional deadline. It is a relatively simple and plainly written statute, but it was drafted at a

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[1] Our earlier PARI and Joint Strategic Resource submissions are available here: https://pari.org.za/submissions-on-the-new-public-procurement-bill/ and Jonathan Klaaren, Ryan Brunette, Geo Quinot, and Ron Watermeyer. 2023. "A Strategic Public Procurement Paradigm for South Africa: Reflections on the Development of the Public Procurement Bill." A PARI Report. Johannesburg: Public Affairs Research Institute. https://pari.org.za/joint-strategic-resource-a-strategic-public-procurement-paradigm-for-south-africa/. See also See also, Jonathan Klaaren, Florencia Belvedere, and Ryan Brunette. 2021. *Reforming Public Administration in South Africa: A Path to Professionalisation*. Cape Town: SiberInk; and Ryan Brunette, Jonathan Klaaren, and Patronella Nqaba, 2019. "Reform in the Contract State: Embedded Directions in Public Procurement Regulation in South Africa," *Development Southern Africa (36)4*.

[2] The Joint Strategic Resource version of the Bill, a work in progress, is available as an annexure to the NEDLAC report on the Public Procurement Bill here: https://nedlac.org.za/nedlac-reports-and-research/.

distance from broader public procurement law and practice. In consequence, it gave South Africa years of experience with the operational and legal effects of legislative fragmentation, ambiguity, and incoherence, which the new Public Procurement Bill does not sufficiently address.

8. There have been persistent issues with procuring institutions distorting the PPPFA's meaning and moving beyond its ambit. This has not been helped by such vague formulations as creating preferences around "specific goals," including "implementing the programmes of the Reconstruction and Development Programme," nor by the PPPFA's sometimes convoluted interactions with broader law.[3] In 2010, the High Court found that the PPPFA precluded the use of functionality as an adjudication criterion within the points system.[4] This undermined elementary practice across various types of procurement and procuring institutions. Together with problems of under-specification of product requirements, it facilitated a process of ruinous competition where prices have pushed below the costs of maintaining product quality. In 2021, the *Afribusiness* decision undercut the statutory foundations of long-standing preferential procurement practices, seriously threatening enterprises, employees, and other beneficiaries of B-BBEE and local content programmes.[5] A central reason for rushing this Bill through is to re-establish these programmes on sound statutory foundations. We agree that this is vital, but we worry that the Bill does not do this.

9. We begin to see how when we look at the regulatory architecture proposed by the Bill. s217 of the Constitution contains the critical concepts of procurement "framework," "policy," and "system":

> 217. Procurement
> (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a **system** which is fair, equitable, transparent, competitive and cost-effective.
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement **policy** providing for —
> > (a) categories of preference in the allocation of contracts; and
> > (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
>
> (3) National legislation must prescribe a **framework** within which the policy referred to in subsection (2) must be implemented.

10. A crucial task of the Bill is to develop a consolidated, clear, and coherent regulatory architecture, by establishing the scope of these concepts and allocating powers over their subject matters. If we have regard to the language of s217, existing law and practice, and the OCPO's expressed

[3] See, for instance, SMEC South Africa (Pty) Ltd v South African National Road Agency SOC Ltd (075024/2023) [2023] ZAGPPHC 1108 (29 August 2023)

[4] Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality and Others (2011 (4) SA 406 (KZP))

[5] Minister of Finance v Afribusiness NPC (CCT 279/20) [2022] ZACC 4

reform preferences, the Bill attempts to do so as follows: it seeks to construct a single national legislative framework, which includes the Act and subordinate law. This framework is to be administered and developed primarily by the Minister of Finance, the Public Procurement Office (PPO), and provincial treasuries. The framework, in turn, is meant to guide procuring institutions in the development of their own procurement policies, which serve to govern the operation of their procurement systems. This approximates to a consolidating, clear, and coherent application of the constitutional concepts of "framework," "policy," and "system."

11. In its preamble and its memorandum of the objects, the Bill sometimes appears to move in this direction. It purports to create "a single framework that regulates public procurement." The most important powers to develop this framework are accordingly provided to the Minister of Finance, the PPO, and provincial treasuries. The provisions of the Bill also repeatedly make reference to procuring institutions, "within this framework," implementing "their" procurement policies and systems.

12. But from this point, fragmentation, ambiguity, and incoherence creep in. s2 asserts that the objects of the Act are to (a) "introduce uniform treasury norms and standards for all procuring institutions to implement their procurement systems," and to (b) "determine a preferential procurement framework for all procuring institutions to implement their procurement policies." s25 continues that "The Minister must prescribe a framework within which procuring institutions must implement the procurement system." s16, entitled "Preferential framework and procurement policies," continues that "A procuring institution must implement a procurement policy… in accordance with the objects of this Act and the framework in this Chapter [4]." In these provisions, we can see that the "single framework" breaks into two. The first, what we call the "s25 framework," seeks to regulate the procurement functions, structures, and methods that constitute the "procurement systems" of procuring institutions. The second, the "s16 framework," seeks to regulate the preferential "procurement policies" of procuring institutions.

13. The basic problem is that these two frameworks reinscribe existing fragmentation between preferential and wider procurement law into the Bill itself. The distinguishing of procurement systems, which deal with procurement generally, and procurement policies, which are now seemingly confined to preferential procurement, replicates this fragmentation within procuring institutions. The consequent threat of ambiguity and incoherence between preferential and wider procurement law and practice is not merely theoretical, but is already apparent from the Bill:

    A. *There is, most significantly, an issue of constitutionality*. s217(1) of the Constitution asserts that public procurement in South Africa must proceed in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. s217(2) continues that these principles "do not prevent," indeed their plain meaning already enables preferential procurement. s217(3) then recognises, as our courts have often suggested,[6] that preferential

[6] Minister of Finance v Afribusiness NPC (CCT 279/20) [2022] ZACC 4

procurement must continue to strike a balance between the constitutional principles, which is why it requires national legislation to construct a framework to guide procuring institutions to within this balance. The Bill, in the process of separating its s25 and s16 frameworks, loses sight of this. In the existing South African procurement system, open competitive tenders evaluated on the basis of a combination of price and preference are the norm. This norm strikes a clear balance between the s217(1) principles and procuring institutions must justify departures from it. Chapter 4 of the Bill instead restricts competition from the outset with set-asides, where only persons or enterprises in specific categories can make bids. Departures from set-aside requirements must be justified, and procuring institutions must then revert to prequalifications, again restricting competition to persons or enterprises in specific categories, and so on. Price as a criterion of adjudication is at no point mentioned, which is a first in the world of procurement law. We have here a series of radical departures from the principles of fairness, equitability, transparency, competitiveness and cost-effectiveness and the reader struggles to discern any scheme for ultimately balancing or constraining them. This suggests clear grounds for a claim of unconstitutionality.

B. There is also a mismatch between how the s25 and s16 frameworks attempt to regulate procurement procedure and methodology. The OCPO has long argued that the fast-changing and differentiated nature of public procurement practice makes it difficult to detail procurement functions, structures, and methods in statute. It has for this reason written s25 and its accompanying Chapter 5 at a high level, which it says will enable more flexible, fleet-footed development in regulations and instructions. But this objective is now undercut by the new s16 framework and its accompanying Chapter 4, which elevates a great deal of detail about procurement procedures into statute. This detail overlaps with the subject matter of Chapter 5, and so militates against its concern with legislative flexibility. Instead, preferential procurement already frames the detailed construction of the procurement regime, and broader procurement operations become an afterthought.

C. We can see this at s17(5). s17(1) asserts that procuring institutions must set-aside bids for specific categories of persons, within prescribed thresholds and conditions. s17(5) continues to establish a procedure, asserting that where bids are set-aside they must: first, be assessed according to terms and conditions stated on bid documents; second, where functionality is part of the bid, they must be evaluated according to a minimum threshold for functionality; third, those bids that fail to meet a minimum qualifying score on functionality must be rejected; and, fourth, qualifying bids must be evaluated further in terms of prescribed criteria, which may include complementary goals. The problem is that these procedures are arguably inconsistent with various procurement methods, such as certain forms of strategic procurement, two-stage tendering, competitive negotiation, innovation partnership, and framework agreement. In the case of set-asides, it can be seen then that the s16 framework already interferes with the s25 framework, which the OCPO has hoped would facilitate more flexibility, and which actually already makes reference to "strategic" procurement, "innovation"

methods, and the construction of an "electronic marketplace" presumably through framework agreements.

D. Relatedly, we noted at paragraph 5 above that an important objective of procurement law reform has been to enable the inclusion of functionality alongside price and preference within points system adjudication. But s17(5) now appears to require that functionality be considered prior to the assessment of other criteria, potentially blocking its consideration alongside price and preference in the points system. These implications of s17 are not peripheral to procurement operations, because s17 also appears to establish set-asides as a new norm across those operations. This suggests that the procedural rigidities of s17 will apply very broadly across procurement expenditure.

14. These are early signs of what is likely to become a pervasive problem. The Bill doesn't create a single framework, but two. These two frameworks have already been drafted inconsistently. They respond to potentially divergent sets of operational imperatives and political interests, and insufficient attention has been given to how these imperatives and interests can be optimised and accommodated within a single coherent statute. The process for drafting statutes is relatively rigorous, so this incoherence is likely to persist and proliferate in subordinate law and across the procurement systems and policies of procuring institutions. This does not augur well for the Bill's central objective, which has been to consolidate, clarify, and cohere the public procurement legislative landscape. It heralds persistent tension between preferential and broader public procurement law and practice.

The new Chapter 4 raises a series of further issues, which we now address in sequence:

15. The above discussion assumes that procuring institutions will be empowered to develop "their" procurement systems and policies, but actually the Bill never clearly assigns them this power. The Minister must prescribe a framework for procurement systems, which must include procurement policies. Procuring institutions are never empowered to formulate these procurement systems and policies, with s2, s8, s16, and s25 only granting the power to "implement" them. This leaves open the question of which public agencies will be responsible for the development of procurement policies and systems.

16. The term "set-aside" is introduced in s17(1), and the term "prequalification" is introduced in s18(1). These terms are never defined in the Bill and, to the extent that they refer to the restriction of procurement processes to certain categories of suppliers, they mean the same thing. This departs from standard procurement terminology, where a set-aside refers to the restriction of procurement awards to disadvantaged persons, and prequalification involves screening suppliers according to minimum regulatory and functional criteria, including such matters as tax clearance, legal certification, professional qualifications, demonstrated capabilities, and financial stability. Generally, the purpose of prequalification is to provide a once-off procedure for populating databases of potential bidders and, thereby, to reduce the administrative burden of repeated

screenings. The Bill confuses this terminology and so may undermine operational coordination and legal certainty in procurement.

17. s18(1) requires ("must") procuring institutions, in accordance with the prescribed thresholds and conditions, to apply prequalification criteria, which, as noted above, operate as set-asides for a list of categories of bidders. There is no equivalent to s17(6), which in the case of set-asides allows procuring institutions to depart from the rule and to report their reasons. s18(4), (5), and (6) instead require procuring institutions to proactively identify opportunities for applying prequalification, using market research and industry analysis to determine whether there are a prescribed number of bidders necessary to ensure competition. Procuring institutions are in most cases unlikely to have the capacity to conduct this research and analysis across their procurement systems. There is also no clear requirement that this research and analysis should determine that these bidders are actually capable of performing the work. It follows that procuring institutions are likely to rely heavily on prospective bidders self-reporting their intention to bid, that these reports will often be from bidders that are not capable, but they will still be accepted as sufficient evidence that the prescribed minimum number of bidders has been met. This risks pre-disqualifying all capable bidders from many procurement processes. It will wreak havoc in procurement operations and the requirement of market research and industry analysis is likely to be a persistent source of further, disruptive litigation.

18. s19(1) requires procuring institutions, "where feasible," to subcontract contracts above a prescribed amount. The word "feasible" is amorphous. It is likely to generate similar problems to those discussed under prequalification in paragraph 16 above, in which evidence for feasibility is insufficient, or the standard of feasibility is set too low, and this results in operational disruption and litigation.

19. s17, s18, and s19 tend to marginalise the B-BBEE Act. In the B-BBEE Act, preferences in public procurement are a significant incentive promoting not only black ownership, but also management control, employment equity, skills development, supplier development, and socio-economic development. These goals are mostly not provided for within the Bill and so the marginalisation of the B-BBEE Act may threaten the opportunities and existing livelihoods of especially broad-based beneficiaries. We are concerned that the scale of potential harm has not been studied, nor has any effort been made to consult with beneficiaries who stand to lose.

20. s17, s18, and s19 all refer to final adjudication of bids being made in terms of "prescribed criteria," which may include "complementary goals." The concept of "prescribed criteria" is arguably too open-ended for this constitutionally-required framework, which is meant to guide regulatory agencies and procuring institutions to within the bounds of the s217(1) principles. The concept of a "complementary goal" is a novelty with no clear meaning in the context of the Bill.

21. s20 establishes comprehensive procedures for research, consultation, and designation of sectors for local production and content by the Minister of Trade and Industry. The provision allows

procuring institutions to seek a waiver where the required quantity of goods can't be sourced locally, with the waiver then applying generally across procuring institutions for an appropriate period of time. Should the waiver not be forthcoming, a procuring institution may still depart from local content requirements, if it has sufficient evidence that the required quantity of goods cannot be sourced and it reports accordingly. This second measure for flexibility may be excessive, but s20 laudably recognises the significance of smooth public procurement operations to state performance and economic development. Therefore, it seeks carefully to avoid disruptions associated with imprudent and inflexible application of local content measures. The same awareness is seemingly absent from provisions for ministerial prescription of other policy goals under Chapter 4, which if prescribed imprudently and inflexibly may cause significant disruption to state operations and damage to the economy. We believe that Chapter 4 should in its entirety proceed in a spirit of scientific and strategic industrial policy, with statutory provision being made for careful research and consultation by a highly capacitated central authority as part of the process for developing preferential procurement rules.

PROPOSAL ON CHAPTER 4 AND THE BILL:

22. In summary, the Bill exhibits continuing fragmentation, ambiguity, and incoherence. These issues have been greatly amplified by the late introduction of new and far-reaching preferential procurement provisions, which themselves create two frameworks that are poorly aligned within the broader Bill. This problem eludes easy rewriting and would ideally be addressed through rigorous optimisation of potentially competing operational imperatives, consultation between and accommodation of divergent interests, the formulation of a clear policy direction, and careful redrafting.

23. The NEDLAC Act asserts at s5(1)(d) that NEDLAC shall "consider all significant changes to social and economic policy before it is implemented or introduced in Parliament." NEDLAC was instrumental in addressing a range of issues in the Bill before it was introduced into the National Assembly, it has not considered the new preferential procurement provisions, and, given their wide-ranging implications for the state, business, labour, and the economy, it would be the appropriate forum for fine-tuning those provisions. We propose on these grounds that the Committee refer Chapter 4 back to NEDLAC for proper consultation. This should be done before passage of the Bill into law.

Concerns around integrity and transparency

COMMENT ON SECTION 5:

24. The Bill introduced into the National Assembly provided the PPO, if the procurement policies of procuring institutions did not comply with the Act, with the power to review those procurement policies and advise on appropriate amendments. The OCPO and the Standing Committee subsequently removed these provisions, essentially on the view that the PPO would not have the

capacity to review and advise across what is envisaged to be an appropriately differentiated procurement regime. We believe that the power of review is an essential regulatory power for an effective PPO, and if applied prudently to procurement policies that clearly transgress the Act, that this is a power that will not require exceptional capacity.

PROPOSAL ON SECTION 5:

25. We accordingly make the following proposal, which revives the power with appropriate adjustments. Note that the inclusion of both "procurement policy" and "system" reflects the use of these terms in the Bill passed by the National Assembly. In the following, _____ indicates an addition and **[ ]** indicates an omission from the Bill:

> 5. Functions of Public Procurement Office (partially reproduced)
> (2) The Public Procurement Office may, in accordance with this Act–
> (a) issue binding instructions as provided for in this Act and on any other procurement matter for the effective implementation of this Act;
> (b) issue guidelines to assist procuring institutions with the implementation of this Act or any other procurement related matter;
> (c) after consultation with the relevant category of procuring institutions, determine a model procurement policy for different categories of procuring institutions and different categories of procurement;
> (d) if the procurement policy or procurement system applied by a procuring institution does not comply with a provision of this Act, review such policy or system and advise the institution on amendments and operational changes; and
> (e) exercise other powers conferred by this Act.

COMMENT ON SECTION 6:

26. The same argument made regarding s5 is relevant to s6.

PROPOSAL ON SECTION 6:

27. We therefore propose as follows:

> 6. Functions of provincial treasuries (partially reproduced)
> (2) A provincial treasury, within its province, may–
> (a) issue binding provincial instructions on procurement matters for the effective implementation of this Act and not inconsistent with an instruction issued by the Public Procurement Office;
> (b) issue guidelines to assist procuring institutions with the implementation of this Act or any other procurement related matter;
> (c) assist procuring institutions in building their capacity for efficient, effective and transparent procurement management;
> (d) if the procurement policy or procurement system applied by a procuring institution does not comply with a provision of this Act, review such policy or system and advise the institution on amendments and changes; and
> (e) exercise other powers conferred by this Act.

COMMENT ON SECTION 11:

28. The following comment was included in our submission to the Standing Committee on Public Finance, but does not appear to have received consideration. It is our view that the Bill could do more to align with burgeoning regulation of prominent influential persons under recent amendments to the Financial Intelligence Centre Act, No. 38 of 2001 (FICA). A number of procuring institutions, often because they issue debt on the Johannesburg Stock Exchange, are classified as accountable institutions under FICA. Many have already embarked on the regulation of prominent influential persons (PIPs), family, and known close associates, including in their procurement operations. At least in their formal policies, these institutions conduct enhanced due diligence when entering into relationships with such persons, they reserve the right to exclude them from business where the risks exceed their tolerance, and they require business partners to disclose the roles of PIPs, family, and known close associates in their operations. When contracting, they also establish consent to publish the names of PIPs who are disclosed by suppliers.

29. These measures are provided for in various ways under the Bill, but the Bill would be enhanced if it were to also facilitate the publication of the names of automatically excluded persons, family, and related persons who conduct business with the state. Any associated limitation of rights is justified by the public purpose of uncovering and regulating conflicts of interest and corruption in state contracting.

PROPOSAL ON SECTION 11:

30. This could be achieved through a minimal rewrite of s11, which already provides for the identification of such persons:

> 11. Due diligence and declaration of interest regarding persons involved in procurement
>
> (1) A procuring institution must take steps in accordance with prescribed procedures to identify—
>
> (a) automatically excluded persons as envisaged in section 13 and their immediate family members; and
>
> (b) related persons as envisaged in subsection (3).
>
> (2) (a) The steps envisaged in subsection (1) include the prescribed declaration of interest to be made by—
>
> (i) all bidders, in the case of bids; and
>
> (ii) all applicants, in the case of applications for registration on a database created by the Public Procurement Office in terms of section 5(1)(i).
>
> (b) A failure to submit a declaration or submitting a false declaration renders a bid invalid.
>
> (3) If a person related to an accounting officer or other official or a member of an accounting authority, a bid committee or the Tribunal involved in procurement in terms of this Act, has, or intends to acquire, a direct or indirect personal interest in a procurement matter, the accounting officer or other official or a member of an accounting authority, a bid committee or the Tribunal—
>
> (a) must disclose such interest, immediately after receiving the agenda of the meeting of a bid committee of the procuring institution regarding a procurement, or on notification of a matter

being brought to the attention of the bid committee or at any time during the consideration of the bid when the official or other person becomes aware of the interest; and

(b) may not be present at or participate in the deliberations or decision-making process of the procuring institution in relation to the agenda item or the matter in question.

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

<u>(5) The Public Procurement Office must maintain and publish a register of all automatically excluded persons, immediate family members and related persons who contract as suppliers, including the procuring institutions with which they are contracted.</u>

COMMENT ON SECTION 30:

31. We have noticed that s30 appears to create a regulatory regime parallel to those established under s25 and s33, but, rather than through ministerial regulations, this parallel regime follows a design and instruction process of the PPO. We think it vital to align s30 with those sections. It is also important that design of the information and communication technology-based procurement system envisaged in s30 be responsive to the concerns of procuring institutions and the public, so we propose that due diligence be followed by consultation with procuring institutions and comments by the public. Moreover, we suggest that what is envisaged in s33 is an "electronic marketplace" and that it provides for the procurement of both "commercially available off-the-shelf" and "transversal" goods and services. Commercially available off-the-shelf goods and services are those that are standard, sold commercially in broader marketplaces, are not tailored specifically to government, and so are appropriately included in an electronic marketplace, but that may not be used transversally.

PROPOSAL ON SECTION 30:

32. These suggestions are provided for in the following, where we have also rearranged the provisions under subsection (2) so as to facilitate interpretation:

30. Information and communication technology based procurement

(1) The Public Procurement Office must develop an information and communication technology-based procurement system in order to enhance efficiency, effectiveness, transparency and integrity, and to combat corruption.

(2) After conducting an information and communication technology due diligence of the sector<u>,</u> <u>consulting with procuring institutions, and seeking comment from the public</u>, to assist with the formulation of the design brief for the development of the procurement system, referred to in subsection (1), the system must**[, subject to the due diligence conducted,]** provide for the following components progressively–

(a) A single platform that at least provides access for officials, bidders, suppliers and members of the public to all procurement related services;

(b) **[standardised and interoperable open data across the procurement cycle to be used by procuring institutions according to their readiness determined in accordance with an instruction]** <u>an electronic marketplace to enable efficient procurement of commercially available off-the-shelf and common goods and services</u>;

(c) **[uniform procurement procedures and processes]** central procurement procedures and processes as may be prescribed under section 25;

(d) **[reporting requirements on procurement]** a suitable hosting option for procurement data to enable easy reporting, analysis, research, transparency and oversight of procurement transactions and systems; and

(e) **[a marketplace to enable efficient procurement of common goods and services]** disclosure of standardised and interoperable open data across the procurement cycle as required under section 33.**[; and**

(f) a suitable hosting option for procurement data to enable easy reporting, analysis, research and oversight of procurement transactions.]

COMMENT ON SECTION 33:

33. The provision for the publication of beneficial ownership information contained in s33 was negotiated in Nedlac on the basis of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill, which was subsequently passed as an Act. The contents of the proposed amendment of s56(12) of the Companies Act, No. 71 of 2008, was ultimately separated in the amendment act into both s56(7)(aA) and (12). We noted in our submission to the Standing Committee on Public Finance that the Bill should be corrected accordingly. The OCPO and the Standing Committee appear to have agreed, but instead of including both s56(7)(aA) and (12), they swapped s56(12) for s56(7)(aA).

PROPOSAL ON SECTION 33:

34. We propose that the Bill be amended as follows:

33. Disclosure of procurement information (partially reproduced)

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

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

(a) the categories of information to be disclosed to enable effective monitoring of procurement, which includes among others—

(i) the reasons for the decision, where a decision is made to not follow an open competitive tender process;

(ii) all information regarding a bid;

(iii) the identity of each entity which submits a bid, including information relevant to that entity contained in the companies register established under section 187(4) of the Companies Act, 2008 (Act No. 71 of 2008), if applicable;

(iv) the date, reasons for and value of an award to a bidder, including the record of the beneficial ownership of that bidder required under section 56(7)(aA) and (12) of the Companies Act, 2008 (Act No. 71 of 2008); and

(v) contracts entered into with a supplier and invoices submitted by the supplier; …

COMMENT ON SECTION 34:

35. The following comment and proposal, made in our submission to the Standing Committee on Public Finance, also appears not to have been considered. The Bill makes provision for

procurement policies. In current practice, these policies are often treated as law, but these instruments are often not published, thereby falling short of the definition of law contained in the Constitution and the Interpretation Act, No. 33 of 1957. Even if policies do not have the status of law, they have considerable implications for transparency, accountability, and rights and so should be published.

PROPOSAL ON SECTION 34:

36. We argue that this situation be remedied as follows:

> 34. Documents to be made available
> The Public Procurement Office must ensure that copies of—
> (a) this Act and any regulations made thereunder; and
> (b) all instructions, guidelines,**[and]** codes of conduct and procurement policies that are issued in terms of this Act, are accessible at the offices of the Public Procurement Office and National Treasury website.

COMMENT ON SECTION 1:

37. We recognise the need for some confidentiality in procurement, but we are concerned that the definition of confidential information contained in s1 exhibits a flaw. In South African law, confidentiality is provided for under the Promotion of Access to Information Act, and the Protection of Personal Information Act is largely concerned with establishing procedures for the handling of personal information by responsible institutions. The definition of confidential information in the Bill, however, includes "personal information protected in terms of the Protection of Personal Information Act," which could be read so broadly as to include all personal information. The scope of confidentiality should instead hinge on the Promotion of Access to Information Act.

PROPOSALS ON SECTION 1:

38. There are two ways to address this, either by hinging the personal information clause on the Promotion of Access to Information Act, or by hinging the whole definition of confidential information on the Promotion of Access to Information Act. The first solution might proceed as follows:

> 1. Definitions (partially reproduced)
> "**confidential information**" means -
> (a) personal information **[protected]** legitimately confidential in terms of the **[Protection of Personal Information Act, 2013 (Act No. 4 of 2013)]** Promotion of Access to Information Act, 2000 (Act No. 2 of 2000);
> (b) commercial information, the disclosure of which is likely to damage a commercial interest of a bidder;
> (c) information that is likely to endanger the life or safety of a person;
> (d) information that is likely to prejudice or impair the security of a building, structure or critical system, including but not limited to, a computer system, a communication system and a transportation system;
> (e) information that is likely to prejudice law enforcement or legal proceedings; or
> (f) information that is likely to prejudice national security; …

39. The second solution has the advantage of aligning the whole provision with the carefully crafted balance of the Promotion of Access to Information Act:

> 1. Definitions (partially reproduced)
> "**confidential information**" means <u>information that is legitimately confidential under the Promotion of Access to Information Act</u> **[-**
>
> **(a) personal information protected in terms of the Protection of Personal Information Act, 2013 (Act No. 4 of 2013);**
> **(b) commercial information, the disclosure of which is likely to damage a commercial interest of a bidder;**
> **(c) information that is likely to endanger the life or safety of a person;**
> **(d) information that is likely to prejudice or impair the security of a building, structure or critical system, including but not limited to, a computer system, a communication system and a transportation system;**
> **(e) information that is likely to prejudice law enforcement or legal proceedings; or**
> **(f) information that is likely to prejudice national security;]** …

COMMENT ON SECTION 64:

40. In its response to our proposal for incentivised whistleblowing to be included in procurement, the OCPO has agreed with the principle, but it argues that incentivised whistleblowing is best treated within general whistleblowing legislation, because whistleblowing is needed more broadly than in public procurement alone. This elides the extent to which South Africa already has a tradition of incentivised whistleblowing provisions in legislation dealing primarily with other matters, which we see especially in environmental legislation. Procurement also has special features which justify making provision for incentivised whistleblowing in the Bill. Procurement handles large sums of money, which means that whistleblowing can be incentivised without cost to the state. In order to do so, incentivised whistleblowing provisions must be carefully moulded to procurement operations, which is doubly necessary to ensure that abuse of incentivised whistleblowing doesn't become disruptive of those operations. The Protected Disclosures Act also 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. The appropriate place for incentivised whistleblowing in procurement is in this Bill.

PROPOSAL ON SECTION 64:

41. We propose the following:

> 64. Regulations (partially reproduced)
> (1) The Minister—
> …
> (b) may make regulations—
> (i) permitted by this Act to be prescribed;

(ii) regarding negotiations with a preferred bidder or bidders before the award of the bid;
(iii) regarding requirements for bidders to comply with specified legislation;
(iv) regarding lifestyle audits of persons automatically excluded in terms of section 13 and their immediate family members and related persons, if an immediate family member or a related person is awarded a bid or bids above a threshold stipulated in the regulations;
(v) after consultation with the Minister responsible for justice and constitutional development, regarding the protection and promotion of whistleblowers in procurement;
[(v)](vi) regarding the retention of procurement data; and
(vii) regarding any procedural or administrative matters that are necessary to implement this Act.

COMMENT ON SECTION 65:

42. A number of submissions to the Standing Committee argued that binding instructions, since they have the force of law, should only be issued after a public participation process. The proposal was accepted. The Standing Committee, however, also expanded the definition of "this Act" in s1, which now includes instructions, codes of conduct, and notices. It is submitted that since all these instruments have the force of law, they should all be issued after a public participation process.

PROPOSAL ON SECTION 65:

43. Therefore, we make the following proposal:

65. Issuing of [I]instructions, codes of conduct, and notices (partially reproduced)
(1) The Public Procurement Office or a provincial treasury must, before making an instruction, code of conduct, or notice, publish–
(a) a draft of the instruction, code of conduct, or notice;
(b) a statement explaining the need for and the intended operation of the instruction, code of conduct, or notice;
(c) a statement of the expected impact of the instruction, code of conduct, or notice; and
(d) a notice inviting submissions in relation to the instruction, code of conduct, or notice and stating the form and manner in which the submissions are to be made.
(2) (a) With each instruction, code of conduct, or notice the Public Procurement Office or a provincial treasury must publish a consultation report.
(b) A consultation report referred to in paragraph (a) must include–
(i) a general account of the issues raised in the submissions made during the consultation; and
(ii) a response to the issues raised in the submissions.

44. Thank you for your consideration of these comments and proposals. PARI stands ready to assist this committee in its deliberations and, whenever called on, to contribute to the improvement of this important Bill, and to the broader process of public procurement reform.

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