PUBLIC CONSULTATION REPORT IN RESPECT OF THE PUBLIC PROCUREMENT BILL [B18B- 2023]

SUBMITTED BY

THE FINANCE PORTFOLIO COMMITTEE: KWAZULU-NATAL LEGISLATURE

1. Introduction

1.1. The Public Procurement Bill [B18B-2023] ("the Bill") was passed by the National Assembly, and as a section 76 Bill affecting provinces, transmitted for concurrence by the National Council of Provinces ("NCOP") on the 6th of December 2023, and accordingly submitted to the provinces for formulation of mandates. The Bill was referred to the Finance Portfolio Committee on the 11th of December 2024 as the appropriate committee for the conferral of a negotiating and a final mandate in accordance with the Mandating Procedures of Provinces Act, 2008.

1.2. The Bill seeks to seeks to regulate public procurement and to prescribe a framework within which preferential procurement must be implemented. Section 217(1) of the Constitution of the Republic of South Africa ("the Constitution") requires organs of state in the national, provincial and local sphere of government or any other institution identified in national legislation, when contracting for goods and services, to do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. S217(2) prescribes that S217(1) does not prevent the organs of state or institutions from implementing a *procurement policy* providing for categories of preference in the allocation of contracts [S217(2)(a)] and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination [S217(2)(b)]. National legislation is required to prescribe a framework within which the policy referred to in S217(2) must be implemented. The Preferential Procurement Policy Framework Act 2000 (Act No. 5 of 2000) ("PPPFA"), was enacted for this purpose.

1.3. The Memorandum on Objects of the Public Procurement Bill indicates that the public procurement regime in South Africa is currently fragmented due to the number of laws which regulate procurement across the public administration. It further submits that this fragmentation results in confusion as different procurement rules apply and that the Bill is intended to create a single framework regulating procurement. We are aware

that there have been numerous court challenges based on procurement prescripts. In the case of *Minister of Finance v Afribusiness [2022] ZACC 4*, the Constitutional Court confirmed an order of invalidity of the Preferential Procurement Regulations, 2017 issued in terms of the PPPFA as the Minister acted outside the scope of his powers in terms of the PPPFA. There is therefore a need for a public procurement Bill that regulates public procurement in a manner that is clearer, less fragmented and less susceptible to legal challenge.

2. Briefings on Bill and public hearings

2.1. The Select Committee on Finance held a briefing by the National Treasury on the Bill on the 6th of February 2024. All provinces were invited to this briefing and members of the Finance Portfolio Committee of the KwaZulu-Natal ("KZN") Provincial Legislature attended and participated in that briefing. The Committee, with due regard to s118(1) of the Constitution, conducted 3 public hearings in KZN on the 15th and 22nd of February 2024 as well as on the 1st of March 2024 respectively at the following venues: the Pietermaritzburg City Hall in the Msunduzi Local Municipality, the Nkandla Indoor Sports Centre in the Umhlathuze Local Municipality as well as in the Dannhauser Town Hall in the Newcastle Local Municipality..

2.2. Notice of public hearings

Notice of public hearings were published in newspapers circulating in the province. The Bill was placed on the KZN Legislature's website together with a notice calling for public comments on the Bill and also publicised on the Committee's Facebook Page. Invites were extended to the various municipalities as well as political leadership and copies of the Bill were delivered in advance of the hearings to all district municipalities and the eThekwini Metro. The Committee also called for written submissions on the Bill via the newspaper and website notices as well as at each public hearing. The Committee made sufficient copies of the Bill as well as copies of the presentation of the Bill as translated into isiZulu available at each public hearing. The briefings on the Bill were presented in English with translation into isiZulu as well. The public hearings were well attended by members of the public.

3. Public comments received

3.1. Oral submissions raised at public hearings:

(a) The Committee received various oral submissions at the public hearings. These comments raised by members of the public ranged from those in support of the Bill, those not in support, complaints against the existing procurement system and lack of access to opportunities to participate in bids as well as clarity-seeking questions on the provisions of the Bill. The oral submissions received related in the main to the following:

(a) Concerns about the Public Procurement Office ("PPO") being housed in Treasury. The view was expressed that the PPO should be an independent Office akin to the Auditor General's office or the Public Protector. Members of the public also of the view that the PPO should not just exist at national level, but provision should also be made for PPO's to be established at provincial level as well.

(b) Suppliers in the construction industry saw this Bill as not benefitting them in any way.

(c) There were also proposals from supply chain management ("SCM") officials that there needs to be definitions of both "irregular expenditure" and "irregular procurement" in the Bill as there are differences.

(d) Public private partnerships should be expanded upon in the Bill as they can assist in revenue generation.

(e) Consideration should be given to the trumping clause (Clause 3(4) of the Bill) as it may result in conflict with the Broad-based Black Economic Empowerment Act 53 of 2003 ("BBBEE"). It should be clarified that the provisions of this Act prevail in as far as it concerns matters of public procurement.

(f) Concerns were raised as to the definition of "black people" being aligned to the definition in the BBBEE Act. It was proposed that the definition should specify Black African people and Indian and Coloured people should be called that rather than "Black people".

(g) Some were of the view that the particular section in provincial treasury that will be responsible for implementation of the Bill must be clearly specified in part 2 clause 6 of the Bill so that they can be established in legislation to avoid misalignment of functions.

(h) Further, clause 28 of the Bill, while establishing a procurement function, still does not address SCM officials concerns as it opens the existing SCM units in institutions to vulnerability as they fall under the CFO. The Bill should clearly specify that the procurement function should account directly to the Accounting Officer rather than the CFO. The sentiment raised was that you cannot professionalise a body under a body.

(i) With regard to chapter 4 of the Bill dealing with preferential procurement, members of the public indicated that the preferential points allocation would be increased in Chapter 4, some even suggesting a 50/50 spilt.

(j) Concerns were raised that the Bill would lead to more corruption as it gives a lot of power to the Minister to enact regulations.

(k) With regard to chapter 6 of the Bill dealing with the Procurement Tribunal, it was indicated that the KZN province has been handling tribunal matters. Doubts were expressed as to whether the mechanisms set out in the Bill in respect of the Tribunal will ever work practically as the process may take too long with a central tribunal. The Procurement Tribunal will need to have branches at provincial level to avoid delays. There were also concerns as to the partiality of the Procurement Tribunal if under pollical oversight and it was indicated that there was a need to eliminate conflict of interest as far as possible. Other questions raised on the Tribunal was whether they had any other functions other than the 2 specified in clause 38(1).

(l) Some suppliers raised concerns with the standstill procedure in clause 55 of the Bill while emergency procurement is allowed to continue.

(m) Other suppliers also raised questions around the review fees to be paid under clause 51 of the Bill- It needs to be affordable so that it does not prevent small businesses from being able to challenge decisions.

(n) The concern was also raised on the issue of quality versus the lowest price, pointing out that the risk when choosing the lowest bidder, may affect the quality of the work performed.

(o) The Bill did not properly define “preferential procurement” and it would have been helpful if other terms like “conflict of interest”, undue influence” were also defined in the Act as they are dealt with in the Bill. Other definitions suggested to be added include “fraud” and “corruption”.

(p) Suppliers also indicated that they were hoping to see standardisation of procurement laws throughout the province so that they could understand the procurement requirements as currently they vary.

(q) The need for the Bill to also protect subcontractors as they experience real problems. The issue of providing more work to sub-contractors in terms of preferential procurement was also raised.

(r) Concerns were raised as to the whether the Bill adequately protects whistleblowers and affected persons who do not comply with directions inconsistent with the Act from threats.

(s) There were also concerns raised as to what is perceived as centralisation of procurement, with concerns that this may result in more delays as compared to continuing with the existing procurement system.

(t) The Bill should alleviate the problems that are effecting departments, suppliers and businesses rather than cause confusion and open up further room for corruption.

3.2. **The important aspects emanating from the oral comments raised at the public hearing that the Committee notes for consideration are as follows**:

(a) The need for independence of the Public Procurement Office;
(b) PPO's to be established at provincial levels as well;
(c) Qualifying the trumping clause so that it prevails in as far as it concerns matters of public procurement;
(d) Reporting by the procurement units directly to the Accounting Officer;
(e) The Procurement Tribunal to have provincial branches to expedite matters rather than a centralised tribunal; and
(f) Adequate protections for whistleblowers.

3.3. Written Comments

The Committee received **14** written submissions by the closing date of 8 March 2024 from the following stakeholders:

(a) Miss Zamashandu H Mbatha: Director: Nyampela (Pty) Ltd

Miss Mbatha indicated that the company does support the Bill. She suggested some supplier duties that in her view could add "good results to the Public Procurement Bill" as she is of the view that as suppliers, they are not clear as to the duties and remuneration of the supplier. These duties suggested include skills and competencies of being a supplier, operations, outputs, client service delivery, budget and financial management, legal requirements and talent management.

(b) Mr. Themba Menyuka- Director of W M AND M Trading Enterprise.

Mr Menyuka raised concerns with the high cost of printing tender documents for bidders, with unnecessary tender information to the tender document for grade 2 to grade 5 contracts. He submitted that that the tender documentation for grade 5 contracts and below must be reduced and only include necessary documentation like the cover page/tender summary, bill of quantities and form of offer and

acceptance. The Contract Document should not form part of the tender document and must only be provided to the company that has been awarded the contract. He also indicated that currently when it comes to sub-contracting, the main contractor has unfettered power to decide which aspects of the project are sub-contracted and submitted that tender documents must clearly define the quantities that the main contractor must reserve for sub-contracting. He further indicated that in some cases, the main contractor does not pay subcontractors, citing examples where the sub-contractors had to be paid by the new main contractor which raises the question as to how the new main contractor was going to recover the funds that he had paid to the sub-contractors that were owed by the previous main contractor. He further submitted that tender documents must have a provision which compels the main contractor to pay sub-contractors after the achievement of the agreed upon milestone rather than waiting to be paid by the department/entity before paying sub-contractors. The main contractor can submit an invoice to the department/entity that awarded the contract and recover funds from the department/entity to avoid non-payment of sub-contractors. A typical example where this is done is in event management whereby the event manager pays sub-contractors/service providers immediately after the conclusion of the event and then submit an invoice to recover the funds. National Treasury must include provisions in all awarded contracts to protect sub-contractors in cases where the Main Contractor breaches the CPG contract.

This submission raises subcontracting challenges and the Department must indicate as to how the Bill seeks to deal with such challenges.

(c) Gcinani Selby Mbatha

Mr Mbatha appreciated the consultation of bidders on the Bill and indicated that most of the provisions of the Bill sound well, but more can be said in some of the clauses. For example, clause 29 of the Bill prohibits certain individuals to be part of bid committees, however how are bidders supposed to “know if an employee of government is employed in terms of a certain legislation.”

(d) Shangase Traditional Council

This letter from the Shangase Traditional Council does not relate to the Bill but indicates that it will allow a certain cooperative to use its land for a fee and should that cooperative close down, the land shall remain the Chief’s.

(e) Amos Bhengu (Makheni Motors (Pty) Ltd)

This is a letter from a small business owner indicating his struggles as a small business owner in obtaining government contracts. No specific input was given in respect of the Bill.

(f) Matilda Projects

The female director of the above company raised complaints with regard to alleged favouritism in procurement and a call for moving away from the CSD system and a return to advertisement. She also raised the view that they are blocked access to government officials.

(g) Joint submission by Ms S Molefe, Mr S Khomo and Adv N Ntsaluba[1]

This joint submission proposes that the Bill should pronounce on the positioning of the procurement function and reporting to the Accounting Officer, and not the CFO, as best practice, which in their view will allow for independent professionalisation of procurement. Their specific comments are listed below in tabular format as received:

No.	Chapter	Section	Clause	Comments and Proposed change
1	2		Establishment of Public Procurement Office	a. Similar office must be established at **provincial treasury level**. b. There are always gaps in discharging provincial SCM oversight responsibilities to the delegated procuring institutions due to considerable powers being centralised to national treasury. c. This can assist in ensuring that there is a structured approach from National to Provincial Treasuries in dealing with matter relating to public procurement. d. Since the Act delegates some of the powers to PTs, the Act must also establish Provincial Public Procurement Office to handle provincial scale matters. e. It is common course that currently there are provincial SCM units playing a role of the current OCPO at provincial scale.
2.	4	17(5)(a)	(5) Persons referred to in subsections (1)(b) and (2)(b)(i) include, but are not limited to—	a. We propose a **new definition for Black People**.

[1] Author 1: Miss Sinenhlanhla Molefe (SCM Transversal Policies, KZN Provincial Treasury, Author 2: Mr Sanele Khomo SCM Head uMgeni Municipality and author 3: Adv. Nandipha Ntsaluba (Advocate).

			(a) black people, as defined in section 1 of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);	b. During the implementation of PPR17 and PPR22 as government, we found ourselves having a difficulty of applying preferential procurement to **advance Africans in particular**. c. We propose that the definition of black be explicit. Black people to be either defined in isolation from Indian and coloured people just like when applying for a job opportunity. d. If the general (BBBEE) definition is used, procuring institutions should be able/ allowed to target "black Africans" direct without confusing them with either Indian and Coloured people. e. This definition as it stands is a breeding ground for construction mafia and violent business forums.
3.	5	28(1)	Every procuring institution must establish a procurement function as part of its procurement system.	a. We propose an enchantment (sic enhancement) to this section: Establishment of procurement **units**. Every procuring institution must establish a procurement **unit** as part of its procurement system. b. AA or AO must establish a procurement unit in his or her institution. The unit must be under the **direct supervision to the AA** or delegated authority directly accountable to the AA for Entities; c. for Departments, Municipalities and Municipal Entities the unit must be under the direct supervision and reports to the AO. d. This is because the current establishment is misaligned.

				e. CFOs are not Procurement practitioners by professions. f. This decision will also be of great value should public procurement be professionalised.
4.	6	38(1)	The Public Procurement Tribunal is hereby established to review decisions taken by—	a. The **tribunal must also be established at provincial level** to have jurisdiction on provincial matters. b. Currently here in KZN the Provincial Bid Appeal Tribunal and the Municipal Bid Appeal Tribunal are pressured by the load of work they have to deal with. c. This is meant to serve 14 departments excluding entities and 53 municipalities. d. It is unimaginable how the centralize tribunal will handle over 2 million matters from approximately 800 procuring institutions countrywide. e. This may lead to stalling of crucial service delivery as matters are being adjudicated.
5.	6	38(2)(a)	(2) The Tribunal— (a) is independent;	a. The independence of this body will always be questioned if the political head is responsible for its appointment and accountability. b. It is advisable to **reconfigure this appointment and be independent from political oversight**. c. The commission of inquiry into State capture, made good recommendations into this effect "tribunal must be appointed by a

				committee formed by AGSA, PPSA and Ministry of Finance Representative".

Some important considerations from this submission:

(a) Current definition of 'black person' to be reconsidered.
(b) Establishment of public procurement offices and tribunals at **provincial levels** to facilitate handling of the workload;
(c) Alignment of language to that of procurement units rather than procurement function and **direct reporting** lines to the Accounting Officer rather than the CFO; and
(d) Independence of the Tribunal, if appointed by political head.

(h) Sandile Gabela: Acting Manager Supply Chain Management (personal submission)

Mr Gabela supplemented his verbal submissions made at the public hearing as tabulated below:

RELEVANT SECTIONS IN THE BILL	**IMPLICATIONS AND IMPACT**	**RECOMMENDATION**
S2(1)b determine a preferential procurement framework for all procuring institutions within which to implement their procurement policies as envisaged in section 217(2) and (3) of the Constitution.	Not providing a standardised or universal definition of the term "*preferential procurement*" leaves it open to different interpretations.	Preferential procurement "*comprises participation programmes aimed at the engagement of Small Medium Micro Enterprises (SMMEs) owned by previously disadvantaged persons in all types of contracts*."

Definitions excludes: *procurement conflict of interest*. Undue influence (elaborated in s (14)	Not defining these crucial terms leaves it to various interpretations, these must be defined in the context of public procurement. These are in various studies as core causes of corruption.	*Procurement conflict of interests* occurs when, in performing formal duties, an employee can be or appears to be influenced to make a decision that benefits him/her personally
s3(2) provides for the application of portions of the Act to Parliament and Provincial Legislatures.	There is no explanation as to why only the preferential procurement provisions applies to Parliament and provincial legislatures and not the entire the Act. This perpetuates the fragmentation which this Act wants to end. Also, it undermines the objective of the Act in this regard.	The Act must apply to parliament and provincial legislatures. The Financial Management of Parliament and Provincial Legislatures Act, 2009 be amended as PFMA, MFMA and so on. V
S3(4) In the event of a conflict between a provision of this Act and a provision of any other legislation, the provision of this Act prevails.	The BBBEE Act has a trumping clause, this creates confusion as to which Act will be superior.	Clarity must be provided with regards to this and any other trumping clauses in various legislations.
s4(1) There is hereby established a Public Procurement Office within the National	Not including the same office for provincial treasuries who	S4(1) must include within the National Treasury and Provincial Treasury.

Treasury.	are closer to organ of state is disastrous.	
S (19) Subcontracting as condition of bid.	This was in the 2017 preferential procurement regulations and had a few challenges during the implementation.	Subcontracting is better implemented as the condition of contract not a condition of tender as per s(24).
S28(1) Every procuring institution must establish a procurement function as part of its procurement system.	This will lead to fragmentation again with no uniformity and open to abuse of the procurement function. The Act must prescribe as to where the procurement function must be located. Currently it is defined that it must be under the office of the CFO, this is not effective. Having the procurement function under the CFO has not worked, it led to the procurement function being paper pushers while it must be	The Act must state that every procuring institution must establish a procurement function as part of its procurement system under the supervision of the Accounting Officer or Accounting Authority

	a strategic partner within the organ of state.	
30(1), the Public Procurement Office must, by instruction, determine requirements for digitisation, automation, reporting and innovations that information and communication technology may enable, applicable to procurement processes by procuring institutions.	The danger of the blanket approach is that the environments and challenges faced by the procuring institutions are not the same. hence the system might end up being an impediment than an enabler.	The Public Office must open for comments on the draft terms of refence for the procurement of the e-procurement system. The period for comments must be for not less than 30 days. This can also be applicable to organised business structures.
38. (1) The Public Procurement Tribunal is hereby established to review decisions.	The danger of having one structure at national is the delays in service delivery and increase in procurement by other means. KZN has an experience in the tribunal function model as it is the only province that has a formal structure to consider bidders appeals.	From the KZN Provincial Treasury experience, the **provincial** and in some instances, **regional tribunals** must be established. This will assist to fast track the finalisation of received appeals or complaints. Secondly, at national level an appeal tribunal structure can be established to consider appeals from provincial tribunals. Similarly, provinces will consider regional appeals where applicable.

Some important considerations from this submission:

(a)	Definitions for preferential procurement, undue influence, conflict of interest;
(b)	Application of the Act to Parliament and Provincial legislature and amendment of FFMPLA to eliminate fragmentation;
(c)	PPO's at provincial level as well;
(d)	Procurement function under supervision of AO;
(e)	Provincial and regional tribunals to be considered.

(i) KZN Department of Economic Development, Tourism and Environmental Affairs (EDTEA)

EDTEA's submission on the Public Procurement Bill is tabulated below:

Clause	Provision	Proposed amendment	Reason
Chapter 1: 1	"Black people" has the meaning assigned in section 1 of the Broad-Based Black economic Empowerment Act, 2003 (Act No. 53 of 2003).	***The term "black people" must be redefined.*** "Black people" has the meaning assigned in section 1 of the Broad-Based Black economic Empowerment Act, 2003 (Act No. 53 of 2003). ***However, procuring institutions can use EAP targets to target within race groups to ensure mainstreaming of the majority of the previously disadvantaged***	• The term "black people" is a generic term which means Africans, Coloureds and Indians— (a) who are citizens of the Republic of South Africa by birth or descent; Or. (b) who became citizens of the Republic of South Africa by naturalisation (i) before 27 April 1994; • ***The categories listed under black does not have the same inequality experience and transformation amongst the listed category should not be the same.*** The use of the Economically Active Population (EAP) targets will assist in ensuring the mainstreaming of the majority of the economically active population into the main economy. The above will allow for the advancement or transformation

		population into the mainstream economy.	as the majority of the mass population will be targeted as envisaged in section 2 (2) (c).
Chapter 1: 2 (2)	Insertion of a new section on stimulating economic development.	Insert 2(2) (d) (v*)* ***despite section 2(2)(d)(i) above provinces and local municipalities must be able to use procurement to promote social and economic development within their boundaries as envisaged in chapter 6 and 7 of the constitution including schedule 4&5. This will allow provinces and local municipalities to realise the objectives set out in subsection (2)(c) and (2)(d)(ii) above***.	• To allow provinces and local municipalities the power to use procurement to stimulate provincial and local economic development within their boundaries. • The proposal will support advancement of transformation and local economic development as provincial and local government have the responsibility of mainstreaming the mass of the marginalised into the mainstream population
Chapter 1. 2. (1) The objects of this Act are, with due regard to sections 195, 216	introduce uniform treasury norms and standards for all procuring institutions to implement their procurement systems as envisaged in section 217(1), read with section	Inclusion of The object of this Act is also to propose alignment of transformation policies with the Procurement policies.	There is a misalignment between the B-BBEE Act with the Procurement Policy. This policy must also align the two Acts so that transformation agenda can be implemented.

and 217 of the Constitution, to—	216(1), of the Constitution; and (b) determine a preferential procurement framework for all procuring institutions within which to implement their procurement policies as envisaged in section 217(2) and (3) of the Constitution		
Chapter 1: 4 (4)	In the event of a conflict between a provision of this Act and a provision of any other legislation, the provision of this Act prevails.	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. ***However, in terms of Preferential Procurement the provisions of the Black Economic Empowerment (B-BBEE) Act as amended will take precedence.***	There is a **need to ensure alignment to the Broad-Based Black Economic Empowerment (B- BBEE) Act**. The B-BBEE Act has been established as a framework for the promotion of black economic empowerment through the use of the generic codes and sector codes or transformation charters. • B-BBEE has been defined as a "viable economic empowerment of all black people in particular women, workers, youth, people with disabilities, and people living in rural areas, through diverse but intergrade socio-economic strategies that include…. preferential procurement from enterprises that are owned or managed by black people...".

			• Section 10(1) and subsection 10 (1)(b) of the B- BBEE act states that every organ of state and public entity must apply a relevant code of good practice issued in terms of this Act in developing and implementing a preferential procurement policy amongst other transformation levers. • Section 3(2) of the B-BBEE Act of 2013 states that "In the event of any conflict between this Act and any other law in force immediately prior to the date of commencement of the Broad-Based Black Economic Empowerment Amendment Act, 2013, this Act prevails if the conflict specifically relates to a matter dealt with in this Act". Therefore, the Procurement Act must be clear in terms of the precedence set by the B-BBEE Act in terms of Preferential Procurement while it will triumph other laws in terms of other provisions of the Procurement Act. The B-BBEE Act takes precedence over Preferential Procurement matters.
Chapter 3 (13)(1)	The following persons **may** not submit a bid:	The following persons ***must*** not submit a bid:	The document is giving a platform for non- compliance as the statement is subjective. There is a need to align to section 11(1)(a) on automatic exclusion
Chapter 4 (17)(2)(a)	The Minister must, subject to this subsection, prescribe targets for set-	The Minister must, subject to this subsection, prescribe targets for set-aside referred to in subsection (1). *The set targets must consider*	The alignment of procurement opportunities to the EAP targets will allow for the mainstreaming of the mass population into the mainstream economy.

	aside referred to in subsection (1).	*the Economically Active Population (EAP) targets as annually reported by the Commission for Gender Equity (CGE).*	
Chapter 4 Preferential Procurement		The KwaZulu-Natal Provincial Government supports the introduction of set-asides for preferential procurement, the pre-qualification criteria for preferential procurement, subcontracting as condition of a bid, the designation of sectors for local production and content and measures for sustainable development.	• The province of KwaZulu-Natal has a number of transformation policies and strategies which cannot be implemented due to the existing conflict between transformation policies and procurement prescripts. • The Province has adopted the Operation Vula Framework which has identified commodities for targeted procurement targeting Black Africans in particular. • Furthermore, the province had adopted the Procurement Indaba Resolutions in 2015 which advocated for 60% of the provinces procurement to go towards Black Africans based on the Provincial EAP targets. o Women 30% o Youths 35% o Persons with Disabilities 5% o Military Veterans 10% • Therefore, there is a need to further elaborate on the Black definition to accommodate for targeting based on EAP targets.

Chapter 4 (22)	A procuring institution may, in accordance with prescribed conditions, provide for measures to advance **sustainable development in procurement.**	Insert section 22 (1) … ***The B-BBEE codes have identified supplier development as a sub-priority to enhance economic transformation. Procuring institutions are required to address challenges faced by EME's and QSE's that are 51% Black Owned through Supplier Development. The main objective of supplier development is to contribute towards the development, sustainability and financial and operational independence of beneficiaries as prescribed in the B- BBEE legislation.*** ***1 (a) Implementation of Supplier Development must be aligned to procurement opportunities.*** ***(b) Procuring institutions must respond to the needs of the small businesses that are being***	• Supplier development is key to addressing transformation challenges and addressing barriers to entry into the main sectors of the economy.

		supported. ***(c) The Supplier Development relationship must be formalised with clear objectives, priority interventions, key performance indicators and a clear implementation plan with defined milestones.***	
Chapter 6 Part 2 (39)	The Tribunal consists of as many members as the Minister appoints with due regard to section 40.	The Tribunal must be decentralized to the provincial offices. ***At a provincial level the MEC responsible for the Provincial Treasury must appoint members of the Tribunal as per section 39 (2), (3) (4) and Section 40.***	• To avoid delays in decision making and to fast track reviews.
Chapter 6 part1 (37)(3)	An application referred to in subsection (1) must be submitted to the procuring institution within **10 days** of the	An application referred to in subsection (1) must be submitted to the procuring institution within ***5 days*** of the date the bidder is informed of the decision to award a	• To avoid delays or fast track the finalization of the procurement process

	date the bidder is informed of the decision to award a bid.	bid.	
Chapter 6 part 3 (49) (1) & (2)	**Review of decision of procuring institution** • (1) If a bidder is not satisfied by a decision made by a procuring institution in terms of section 37, that bidder may, within **10 days** of being informed of the procuring institution's decision, submit an application for review to the Tribunal. • (2) Despite the period stated in subsection (1), a bidder may request the Tribunal	**Review of decision of procuring institution** • If a bidder is not satisfied by a decision made by a procuring institution in terms of section 31, that bidder may, within ***5 days*** of being informed of the procuring institution's decision, submit an application for review to the Tribunal. (2) Despite the period stated in subsection (1), a bidder may request the Tribunal to consider an application for review filed after the expiry of the period mentioned in subsection (1), but not later than **10 days** of being informed of the procuring institution's decision, on	• To avoid delays or fast track the finalization of the procurement process.

	to consider an application for review filed after the expiry of the period mentioned in subsection (1), but not later than **15 days** of being informed of the procuring institution's decision, on the ground that the application raises public interest considerations.	the ground that the application raises public interest considerations.	
Chapter 7 (64) (1)(a)(iii)(cc)	1) The Minister— (a) must make regulations regarding— (iii) the requirements for security vetting(cc) a bidder before the award of a bid	Review the requirement	• In terms of the requirement for vetting, there is a need to consider the capacity of the National Intelligence Agency (NIA). There is a need for clarity as to whether the requirement for vetting applies to all bidders or under specific circumstances e.g. where a service or a product is provided on government premises. • The requirement is likely to cause delays in finalising the

			procurement process

The comments by the KZN EDTEA are noted especially as it pertains to economic development. The issues may be submitted for clarification by the Department as to how the Bill addresses such issues, if at all.

(j) KZN Department of Public Works (DPW)

The KZN DPW's submission on the Public Procurement Bill is tabulated below:

No.	Clause	Provision	Proposed Amendment (changes in red and italicised)	Reason/Comment
1.	8(2)	A procuring institution may, as prescribed, reconsider its own decision made in terms of this Act, if the decision was based on error of law, error of fact or fraud.	A procuring institution may, as prescribed, reconsider its own decision made in terms of this Act, without approaching a competent court, if, within 6 months after making the decision, it has discovered that there has been any contravention of legislation in the making of such decision. Should the prescribed period have lapsed, or there be any other ground for reconsideration, the procuring institution shall approach a court with competent jurisdiction for such reconsideration.	

2.	17(3)	Categories for set-asides	The insertion of the following categories: *(k) military veterans* (*l)persons in categories (a) to (k) who are registered on a developmental programme of the procuring entity* Sections referring to prescribed percentages should take into account this insertion.	Military veterans are required to be included in the category for set-asides, as this group is a provincial priority. Provision should also be made for set-asides for contractors/service providers in departmental developmental programmes
3.	18(1)(b); 18(1)(c)	Categories for pre-qualification criteria	The insertion of the following categories: *18(1)(b) persons referred to in section 18(3)(a), (b), (c), (d), (e), (f}, (k) or (l);* 18(3)(c)(x) persons in categories (a) to (k) who are registered on a developmental programme of the procuring entity Sections referring to prescribed percentages should take into account this insertion.	Military veterans are required to be included as a direct category for pre-qualification, as this group is a provincial priority. Provision should also be made for contractors/service providers in departmental developmental programmes to be included as a category for pre-qualification criteria.
4.	19(2)	Categories of subcontracting	The insertion of the following categories: 19(2)(j) persons in categories (a) to (i) who are registered on a developmental programme of the procuring entity Sections referring to prescribed percentages should take into account this insertion.	Provision should be made for contractors/service providers in departmental developmental programmes to be included as a category for subcontracting.

5.	38	Establishment of Tribunal		Raised previously: it is suggested that provision be made for provincial Tribunals in all provinces.
6.	47(1)	The Chairperson must constitute a panel for each application envisaged in section 49 or 50.		Raised previously: might result in delays with severe service delivery implications. To be reconsidered to provide for predetermined provincial panels, instead of constituting a panel for each application.

KZN DPW has raised a number of inputs for consideration.

(k) KZN Provincial Treasury (Provincial Supply Chain Management)

KZN Provincial Treasuries submissions are tabulated hereunder:

Clause	Provision	Proposed amendment	Reason
Preamble	***WHEREAS*** *section 217(1) of the Constitution of the Republic of South Africa, 1996, stipulates that contracting of goods and*	Kindly add municipalities to this provision	

	services by organs of state in the national, provincial sphere of government, and other institutions identified in national legislation, must occur in accordance with a system which is fair, equitable, transparent, competitive and cost-effective		
Chapter 2 Part 1- Public Procurement Office 5(1)(c)(i)	*provide advice and assistance to procuring institutions; and*	It is recommended that the Provincial Treasury be included on this responsibility. Part 2- covers provincial treasuries. However, Part 2 should also indicate the **establishment of PPO at the provincial treasury level** which performs functions as detailed in part 2	Currently Provincial Treasury is providing this role, such responsibility needs to reflect on the Bill. VB note- calling for independent office, may not necessarily be housed in Provincial Treasury. Cant ask for both in and out of treasury, conflicting provision.
Chapter 3 Automatic exclusion from submitting a bid 13.(1)	**Automatic exclusion from submitting bid** **13.** (1) The following persons may not submit a bid:	**13.** (1) The following persons MUST not submit a bid; MUST not participate in government procurement opportunities and MUST not register on the	The employees of the state continue to register on the Central Supplier Database

		database created by the Public Procurement Office in terms of section 5(1)(i):	[Note: the use of 'may here is in the peremptory sense, not discretionary sense]' (CSD). Section 13 also specifies exclusions, including Schedules 2 and 3 of the PFMA. There is ongoing confusion on whether Schedule 3C and Schedule 3D employees of entities are regarded as employees of the state. Since the same is excluded from submitting a Bid, likewise Schedules 2 and 3 institutions of the PFMA should exclude their officials from registering on the database created by the Public Procurement Office in terms of section 5(1)(i).
Chapter 3: Directions inconsistent with Act:14(3)	*If the supervisor does not initiate an investigation, the Public Procurement Office or the*	It needs to be clear on who in provincial treasury will initiate the	Perhaps Accounting officer should investigate, if not resolved within a certain time frame, then

	relevant provincial treasury must initiate an investigation in the prescribed manner unless reported in terms of subsection (2)(d).	investigation, is this not the function of forensic within the institution?	PPO at provincial level may intervene.
Section 16(b) &17	the protection or advancement of **persons or** categories of persons…….. whilst section 17 talks about categories of persons only.	Section 16(b) talks about **persons or** categories of persons, whereas section 17 only talks about categories of persons.	No consistency
Chapter 4: Preferential framework and procurement policies 17(2)(d)	*d) If no target for set-aside for a category of persons is prescribed in terms of paragraph (a), a procuring institution is not precluded from setting aside a bid for that category.*	This provision needs to be clarified further. It is recommended that more stringent conditions be applied, and more clarity may need to be provided by the regulations.	If the institutions are given more powers therefore this may be abused.
Chapter 4 Preferential framework and procurement policies 17(5)(d)	*(d) qualifying bids may be evaluated further in terms of the prescribed criteria which may include complementary goals*	Define “complementary goals”	
Chapter 4: Preferential framework and procurement Policies:17	*18. (1)A procuring institution must, in accordance with the prescribed thresholds and*	It is recommended that the highlighted line be incorporated in section 17 of the bill.	

	conditions, apply prequalification criteria to promote preferences in the allocation of contracts, by advertising a bid with a specific bid condition that only one or more of the following bidders may respond:		
Chapter 5: Procurement system and methods 25(3) (a) & (d)	*(3)A procurement system referred to in subsection (1) must provide for the following matters in a manner consistent with this Act:* *(c) demand management.* *(d) procurement planning and budgeting;*	There should be more clarity provided on why demand management is separate from procurement planning and budgeting.	The separation of these functions may have an impact on job descriptions for each institution.
Section 29	(1)The following persons may not be members of bid committees envisaged in subsection (1): (a)…… (b) a person appointed in terms of section 12A of Public Service Act…..	The section should also include support staff to Municipal office bearers.	

Chapter 5 Procurement system and method 33 (2) (b)	*b) that the information referred to in paragraph (a) be published as quickly as possible—*	Kindly be specific or define "as quickly as possible"	The highlighted term needs to be clearly defined so that it does not open doors to various interpretations.
Chapter 6 Establishment of Tribunal 8(1)	***38.** (1) The Public Procurement Tribunal is hereby established to review decisions taken by—*	There needs to be an indication on where the Tribunal will be located. Recommend that the Tribunal be decentralized to provincial treasuries.	Currently, it seems as if the Tribunal will be established at National. Will there be enough capacity for this to be effective?
Chapter 6 Section 37	*Tribunal or court may ……*	The bidder must first approach the tribunal, and such is consistent with Section 49	Bidders are being given a choice whether to approach the tribunal or court of law. It would appear that section 37 gives bidders an option to either go to court or the Tribunal.
Chapter 6 Panels of Tribunal 47(1)	*47. (1) The Chairperson must constitute a panel for each application envisaged in section 49 or 50.*	This provision needs further clarity. It is recommended that a panel be established for each Province.	If the Tribunal structure is established at National, it is therefore recommended that the panel be established for each province.

Chapter 6 Review of decision of procuring institution	*49 (2) Despite the period stated in subsection (1), a bidder may request the Tribunal to consider an application for review filed after the expiry of the period mentioned in subsection (1), but not later than 15 days of being informed of the procuring institution's decision, on the ground that the application raises public interest considerations.*	It is recommended that the 15 days be also included under section 37 if it is of public interest.	[Note: Currently 10 days]
It is also recommended that the following definitions be included in the Bill: • **Set aside; Functionality**; **Complementary goals; Quickly as possible; Categories of persons; Statement of requirements**			

KZN Provincial Treasury has raised some important considerations for inclusion in the Bill.

(l) eThekwini Metro Municipality submission

(a) The eThekwini Municipality ("eThekwini") acknowledges and welcomes the move by national government to promote a centralised procurement system that is fair, equitable, transparent, competitive and cost-effective, as outlined in section 217 of the Constitution. eThekwini also acknowledges national governments attempt to reduce the fragmentation of procurement law amongst the different spheres of government. However, eThekwini Municipality submits, with respect, that such efforts cannot impede upon nor compromise local government's authority and right to exercise its constitutionally mandated powers and functions.

(b) eThekwini is of the view that certain provisions of the Bill, as they currently stand, are in direct odds with constitutionally enshrined powers of local government. They respectfully submit that 'municipal procurement' is an i*ncidental power* that is protected by the Constitution, and all national and provincial governments have to respect this protection.

(c) In eThekwini's assessment, the Bill in its current form reveals provisions which, alarmingly, have the potential to compromise and impede a municipality's ability and right to exercise its powers and perform its functions. In the main, it is noted that the Bill provides for, inter alia,−

(a) the establishment of a Public Procurement Office ("PPO") to 'promote' compliance with the Bill by procuring institutions;

(b) a range of powers to be afforded to the PPO and provincial treasuries; and

(c) the establishment of a Public Procurement Tribunal ("PPT") to review decisions taken by, amongst others, a procuring institution such as a municipality.

(d) eThekwini's submission further goes on to detail the powers of the PPO, Provincial Treasury and the PPT as set out in the Bill and submits that some of the provisions as they relate to the PPO, a provincial treasury and the PPT mentioned above are, respectfully, *constitutionally invalid*. In their view, these provisions are over-reaching and, in the case of search and seizure powers of the PPO, borders on self-help. They submit that such intrusive powers allow these institutions to effectively step into the shoes of a municipality and take procurement decisions on behalf of a municipality. They find that the use of words such as *'binding instructions', 'intervene', 'direct',*

'require' and *'review'* (amongst others) is regrettably concerning. Such language communicates to the reader that these institutions' powers extend beyond the mere exercise of establishing norms and standards/framework legislation and delves into the actual executive exercise of a constitutional function of local government. In their view, while some words like *'advise'* and *'promote'* appear non-binding and advisory on paper, the fact that the PPO and a provincial treasury can issue written instructions, and that such 'instructions' are given the force of law under the Bill, can translate to all recommendations of the PPO and provincial treasury being rendered as 'instructions'/directions and binding on municipalities for all intents and purposes. They submit that municipal power to procure goods and services may be subject to legislation that establishes *norms and standards*. However, such legislation, or in this case the provisions of the Bill discussed above, may not be used to usurp or take over the procurement decision-making powers of a municipality.

eThekwini further goes on to cite numerous constitutional court cases that illustrate that the power to regulate local government does not entitle provincial and national governments to usurp the function by exercising a power on behalf of municipalities.

eThekwini, in relation to the Bill's aim of the reduction of the fragmentation of procurement laws, submits that the current construct of the Bill, the power of the Minister to make numerous regulations, and the issuing of binding instructions by the PPO and provincial treasuries (amongst other provisions) can result in the unintended creation of a complex and convoluted procurement environment. In their view, if the current procurement framework (with its numerous and ever-changing treasury circulars) is anything to go by, the new procurement environment proposed by the Bill will do very little to change the landscape as intended. In their view, it may just worsen the status quo.

In addition to eThekwini's belief that certain provisions of the Bill are constitutionally invalid, it is eThekwini submission that the Bill has potentially failed in its objective to reduce the fragmentation of procurement laws amongst the three spheres of government. In view of the issues they highlighted, eThekwini submits that the Bill must be revisited and amended accordingly to eliminate encroachment into the procurement powers of local government**.**

Some important consideration emanating from eThekwini's submission:

(a) Constitutional invalidity due to overreaching and usurping of municipality's procurement powers; and
(b) Fragmentation of procurement laws due to numerous regulations and binding instructions in terms of the Bill.

(m) Joint Strategic Resource Submission (JSR)

The JSR[2] submission to the KZN Legislature focuses on the following (a) the significant newly proposed text on preferential procurement in Chapter 4 which was introduced in B18B-2023 (the December 2023 version of the Bill), (b) the need for independence of the regulatory functions in public procurement, and (c) several other issues.

JSR's submission concludes that the B18B-2023 version of the Public Procurement Bil raises significant constitutional issues; the Bill should provide for the independence and effectiveness of Public Procurement regulatory functions, and it requires strengthened anti-corruption enforcement mechanisms in particular with respect to debarment and informant disclosure/incentivized whistleblowing.

(a) B18B-2023 raises significant constitutional issues

JSR submits that the tabled Bill is not clear on whether it sees procuring institutions or the National Treasury as the first mover in setting up public procurement policies for procuring institutions. They submit that is an important constitutional question and this ambiguity still persists in the current version of the Bill B18B-2023.

JSR submits that there are a number of other constitutional issues raised by B18B-2023. which include:

(a) The degree of competency of Parliament to legislate in this field in the national and provincial spheres as compared with the local sphere;

(b) A number of rights-based and substantive/procedural rationality potential challenges;

[2] Submission on behalf of the Joint strategic Resource including Ryan Brunette, Public Affairs Research Institute (PARI); Prof Jonathan Klaaren, University of the Witwatersrand; Ms Motlatsi Komote, Corruption Watch (CW); Dr Sarah Meny-Gibert, Public Affairs Research Institute (PARI, Prof Geo Quinot, African Procurement Law Unit (APLU), University of Stellenbosch, Ms Nicki Van 't Riet, Corruption Watch (CW) and Prof Ron Watermeyer, University of the Witwatersrand.

(c) The necessary clarity, certainty, and inclusion of price in the provisions on targeted procurement; and

(d) The need for inclusion of statutory principles including those linking to constitutional principles of section 217.

The JSR submission goes on to deal with 2 constitutional issues with B18B-2023 namely, the necessary clarity, certainty, and the **inclusion of price** in the provisions on targeted procurement and second, the need for inclusion of statutory principles including those linking to the constitutional principles of section 217.

The Necessary Clarity, Certainty and the Inclusion of Price in Provisions on Targeted (aka Preferential) Procurement

The JSR submit that in quite possibly the most significant change, the December 2023 version of the Bill no longer has provisions indicating that the policies referred to in Chapter 4 are necessarily preference-based in their effect (i.e. requiring bidders to compete, in part, on price, with the price score being added to the 'preference' score in order to determine the successful bidder). In JSR's view, the revised Chapter 4 conflates two distinct constitutional concepts as set out in section 217(2) of the Constitution, viz. (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. In their view, these are two distinct mandates and should thus be clearly differentiated in the statutory framework required under section 217(3) of the Constitution. They submit that the conflation in the revised Chapter 4 will inevitably lead to uncertainty, contestation and (most likely) constitutional challenge to the statute. This will have significant adverse implications for the procurement system as witnessed by the similar scenario following the Constitutional Court ruling that the Preferential Procurement Regulations, 2017 were largely invalid in 2022. They further submit that the *removal of price as one presumptively required criterion in evaluating the value for money of tenders offered to organs of state increases the potential for higher costs – which undermine growth and employment, and which increases the risk of corruption.*

The JSR therefore advises that in order to maintain the integrity of the procurement system, that *price be reinstated as a necessary (but not sufficient) criterion of key importance in evaluating tenders*, in the context of a clear framework for preferential treatment. The JSR further recommends that the Bill sets out a clear framework for how value must be determined within the procurement context, including setting out the parameters of criteria, including price, to be used in determining value for money.

The JSR are further of the view that Chapter 4 also has significant uncertainty regarding its content. The relative weight of preferences, set-asides, prequalification criteria, subcontracting or local content, as against other evaluation criteria such as price and functionality, is essentially left to the Minister *to decide by means of regulations and no guidance is given* to the Minister in this regard.

The Need for Statutory Principles Including Those Linking to the Constitutional Principles of Section 217

The JSR re-iterated its stance to previous versions of the Bill that the Bill should embed statutorily the principles for procurement and establish checks and balances framed around section 217 of the Constitution. They submit that policy principles for procurement should be formulated and embedded in primary legislation rather than in subordinate legislation. They further propose that having clear procurement principles at the level of statute enables effective and strategic action by procuring institutions. Furthermore, such clear procurement principles facilitate across-government coordination, and eliminates reliance by both public and private actors on regulations and instructions to interpret and apply the constitutional principles. With a statute to rely upon and to interpret, different organs of state may be able to resolve differences of public procurement policy – as well as disputes with the private sector and thereby to more effectively perform public functions and deliver public services.

JSR argue that the consequence of *vesting enormous discretion in the relevant Minister without setting any parameters or guiding principles in the Bill* is that we could end up in a situation where the only options are an open bidding process, a request for quotations in low-value tenders, and single source procurement in emergencies or sole supplier situations.

They further submit that there is a significant diversity of contexts in which public procurement is done in South Africa, ranging from widely divergent types of organs of state, to fundamentally different sectors, to different mandates, levels of maturity, resources and geographical factors, etc. Given this, they question whether the relevant (national) Minister would be best placed to take primary decisions on the type and range of procurement methods that should be available. In their view, *Parliament, as the body properly representing all perspectives and interests, is probably better placed* (and arguably constitutionally obliged) to provide the main framework within which these decisions are to be taken.

Submission that the PPB Should Provide for the Independence and Effectiveness of Public Procurement Regulatory Functions

The Bill (December 2023) proposes a PPO that fulfils a number of functions and is located within National Treasury (as is the current Office of the Chief Procurement Officer). The Bill additionally proposes a Public Procurement Tribunal, also located (at least operationally) within National Treasury. In the opinion of the JSR, *adequate independence of the institutions fulfilling regulatory functions in public procurement – as distinct from the purchasing or operational functions is crucial.* Unfortunately, the current Bill does not provide for the adequate independence of these regulatory functions, in part because the agency/office performing those regulatory functions is not made distinct from the agency/office performing those purchasing functions. Furthermore, the independence of the institutions performing the regulatory and enforcement functions in public procurement is to a significant degree crucial to achieving anti-corruption objectives. With regard to the independence aspect, JSR propose that consideration should be given to splitting the regulatory and enforcement functions of the current Office of the Chief Procurement Officer from the remaining ("chief buyer") functions. The chief buyer functions should continue to be exercised within National Treasury, but the regulatory and enforcement powers could be placed within an independent regulatory body (akin perhaps to the Competition Commission and Tribunal) distinct from National Treasury.

JSR are of the view that the extensive powers of the PPO in respect of *investigation* as retained in B18B-2023 may *be unduly intrusive*. This clarification and review of the Bill's investigation powers needs also to be aligned with the existing investigative power of the Special Investigative Unit (which has been investigating complex procurement fraud cases for nearly ten years), the new Investigating Directorate of the NPA, as well as with any new anti-corruption agency that results from the continuing work of the NACAC[3].

The Bill as tabled gave the proposed Public Procurement Office and Provincial Treasuries the power to *review procurement policies of procuring institutions and to propose changes*. B18-2023 section 5(2)(d). The version of the Bill that has been passed by the National Assembly has removed these provisions, and this weakens the regulatory and enforcement powers in public procurement that could and should be exercised towards integrity and accountability in the public procurement system. JSR are of the view that this regulatory power should be restored.

The PPB should strengthen its Debarment provisions

[3] National Anti-Corruption Advisory Council.

JSR submit that the Bill has not taken advantage of the opportunity to align the debarment provisions in public procurement regulation with the tender defaulter (e.g. debarment) provision in anti-corruption law. Sections 28-33 of the Prevention and Combatting of Corruption Act 12 of 2004 currently provide for a Register of tender defaulters also in National Treasury. Apparently, this Register is currently empty. The regulatory mechanism for debarment is not aligned with the criminal mechanism for debarment.

The PPB should provide for interim incentivized whistleblowing in public procurement

JSR submit that the Bill is missing the mechanism of incentivized whistleblowing in the field of public procurement. They are of the view that whistleblowing is a clear counter-corruption mechanism and is of particular importance in the field of public procurement. They are of the view that whistleblowing is a key control that belongs in and should be aligned and fitted to public procurement and not left entirely to the Protected Disclosures Act 26 of 2000. In the interim, the JSR advises that the Bill must be supplemented with a clause enunciating broad principles and explicitly allowing informants in the field of public procurement corruption to receive proportionate *incentives or rewards* for that information where recoveries have been made. Such a provision would be of direct assistance to the law enforcement agencies. The JSR is thus of the view that the current legislative opportunity should be used to introduce urgently needed whistleblowing mechanisms in procurement. The introduction of whistleblowing mechanisms in procurement in this Bill would provide valuable inputs into the development and refinement of more general whistleblowing interventions in future.

The JSR advises an interim empowering clause such as the following:

"(1) The Minister of Finance is empowered and directed to formulate and enact regulations providing for proportionate financial incentives for informants reporting information to law enforcement agencies which materially assists with realized recovery of funds directly linked to public procurement fraud (including corruption); such regulations may differentiate among eligible persons and shall disqualify persons with false motives.

(2) Such incentives shall be valid and payable only after the recovery of the funds in a court of law."

The Bill should adopt transparency standards (including open data and open Contracting)

JSR make proposals for open contracting. From a JSR perspective, the current Bill provisions have failed to fully embrace an important tool, viz. open contracting, in ensuring that public contracts are fair, open and efficient through open data and smarter engagement. Open

contracting, which has been adopted in procurement reforms by many countries, follows the money across the full procurement cycle commencing with the planning and onto delivery and implementation through disclosure of machine-readable data in a common model. This allows officials and civil society alike to interpret and use the data. The JSR advises that section 33 of the Bill should be expanded to embrace an open contracting system which requires disclosure across the full procurement cycle.

JSR raises important issues for consideration by the Committee most notably:

(a) The issue of price being removed from the Bill (include price again);
(b) The vesting of enormous discretion to the Minister in regulations with no guiding principles, and that Parliament is best placed to provide the main framework;
(c) With regard to the PPO- its independence; its intrusive powers in respect of investigations;
(d) Restoration of the power of the PPO and Provincial Treasury to review procurement policies of procuring institutions and to propose changes;
(e) Need for the strengthening of debarment provisions ;
(f) The addition of incentivised whistleblowing provisions in the Bill; and
(g) Inclusion of transparency standards (open contracting system).

(n) Public Affairs Research Institute- University of Johannesburg (PARI) submission

PARI, in an extensive submission, raises a number of concerns with the Bill. The first being that of constitutionality. PARI points out that in the existing South African procurement system, open competitive tenders are evaluated on the basis of a *combination of price and preference* which are the norm. This norm strikes a clear balance between the s217(1) principles and procuring institutions must justify departures from it. PARI's view is that 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* (in the Bill), which is a first in the world of procurement law. In PARI's view, we have in the Bill 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. In PARI's view, *this suggests clear grounds for a claim of unconstitutionality.*

PARI is of the view that the Bill doesn't create a single framework, but two. In their view, these two frameworks have already been drafted inconsistently hence this incoherence is likely to persist and proliferate in subordinate law and across the procurement systems and policies of procuring institutions. They argue that this does not augur well for the Bill's central objective, which has been to *consolidate, clarify, and cohere the public procurement legislative landscape*, and in PARI's view, it heralds persistent tension between preferential and broader public procurement law and practice.

The new *Chapter 4* raises a series of further issues, which PARI addresses in sequence: 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. PARI says this leaves open the question of which public agencies will be responsible for the development of procurement policies and systems.

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. In PARI's view, 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. In PARI's view, the Bill confuses this terminology and so may undermine operational coordination and legal certainty in procurement.

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. 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. In PARI's view, this risks pre-disqualifying all capable bidders from many procurement processes.

s19(1) requires procuring institutions, "where feasible," to subcontract contracts above a prescribed amount. The word "feasible" is amorphous in PARI's view. 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.

PARI further submits that 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.

PARI further point out that s17, s18, and s19 all refer to *final adjudication of bids being made* in terms of "prescribed criteria," which may include "complementary goals." In PARI's view, 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.

PARI, in summary, submits that 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. In PARI's view, 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.

PARI refers to the NEDLAC Act which 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. PARI therefore proposes on these grounds that the Committee refer Chapter 4 back to NEDLAC for proper consultation before passage of the Bill into law.

Concerns around integrity and transparency

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. PARI believes 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

PARI then goes on to make legislative proposals on additions, deletions or insertions in clauses 5, 6, 11, 30, 33, 34, definitions (S1), 64,and 65. The Committee is referred to these individual legislative proposals in the PARI submission attached hereto.

PARI also submits that procurement 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. Hence PARI submit that the appropriate place for **incentivised whistleblowing in procurement is in this Bill**.

PARI COMMENT ON SECTION 65:

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.

PARI raises important issues for consideration by the Committee most notably-:

(a) The issue of the removal of price from the Bill and radical departures from S217 principles which may be grounds for unconstitutionality;
(b) The Bill does not consolidate the procurement landscape as it creates 2 separate frameworks,
(c) New chapter 4 raises issues and confusion of terminology;
(d) Marginalisation of the BBBEE Act by Bill;
(e) Prescribed criteria too open-ended for a constitutionally required framework;
(f) Concerns around transparency and integrity;
(g) Incentivised whistleblowing; and
(h) Force of law of binding instructions require public consultation.

4. Discussion

4.1. While it is acknowledged that the Public Procurement Bill is a crucial piece of legislation intended to address the problem of fragmentation in procurement laws, as evident from the numerous inputs and persuasive arguments noted above, the Bill has raised numerous areas of concern that appear to be insufficiently addressed.

4.2. If the Bill is passed in haste in its current form without addressing the many constitutional, substantive and legal challenges raised, it may be susceptible to legal challenge in an environment that already has a proliferation of procurement caselaw. It should be noted that even if the Bill is passed, it will still not be capable of implementation due to the number of regulations required to operationalise it.

4.3. Much content is still to be provided in regulations. It is also concerning that many key framework aspects that should form part of the Bill, have been devolved to the Minister to prescribe by way of regulations. Multiple pieces of regulations, binding instructions and directions could have the unintended consequence of further fragmentation of procurement laws and resulting in more confusion, which the Bill was intended to dispel.

4.4. Instructions have been included under the definition of “this Act”. This would mean that the PPO, National and Provincial Treasuries have law-making powers. These are not subject to parliamentary oversight and may be regarded as too broad a power.

4.5. Chapter 4 of the Bill needs to be reconsidered as it does not set clear frameworks for preferential procurement. It also makes no reference to the preferential points system and leaves much to the Minister's discretion by way of regulations.

4.6. The Independence of the PPO if housed within Treasury, which also houses the chief procurement officer (chief buyer) may need to be reconsidered. The numerous proposals for PPO's and Tribunals to exist on a provincial level have also been noted.

4.7. **Having considered the above submissions received on the clauses of the Bill, the Committee proposes the amendments listed below:**

In view of the number of proposed amendments and the time at our disposal, our proposed amendments may not all be fashioned into clause-by-clause textual amendments of the Bill. Should the Select Committee agree with the proposed policy changes, then the textual amendments to the Bill can be fashioned thereafter. The following amendments are proposed: [Insertions in existing enactments indicated in underlined text, deletions in bold text within brackets]:

4.7.1. Preamble:

Add Local government to the Preamble as follows:

***"WHEREAS** section 217(1) of the Constitution of the Republic of South Africa, 1996, stipulates that contracting of goods and services by organs of state in the national, provincial sphere <u>and local sphere</u> of government."*

Reason: This is more accurate in terms of S217(1) of the Constitution and local government has been omitted.

4.7.2. Definitions clause of Bill (Clause 1)

(a) Amendment to the definition of "Black People" to qualify it so that it does not just align with the definition in the BBBEE Act. It is proposed that the following be added to qualify the definition (perhaps in a substantive section) that "<u>procuring institutions can use EAP targets to target within race groups to ensure mainstreaming of the majority of the previously disadvantaged population into the mainstream economy</u>".

Reason: Comments indicate that the categories listed under "black" (in the BBBEE Act) do not have the same inequality experience and transformation amongst the listed

category should not be the same. The use of the Economically Active Population (EAP) targets will assist in ensuring the mainstreaming of the majority of the economically active population into the main economy and will allow for the advancement or transformation as the majority of the mass population will be targeted as envisaged in section 2 (2) (c).

(b) Addition of appropriate definitions for “set asides”, “prequalification” “functionality”, “Complementary goals”, “statement of requirements” to obviate interpretational challenges”.

4.7.3. Clause 3(4) Conflict of provisions

The trumping clause in the Bill must be reconciled with the trumping clause in the BBBEE Act. Clarify in the text of the Bill when the Public Procurement Act will prevail over the BBBEE Act so that it will allow for alignment between the 2 Acts and create an order of precedence.

Reason: Currently both these Acts trumping provisions are fashioned to prevail over any other legislation.

4.7.4. Clause 4(1):

(a) Amendments to provide for the independence of the Public Procurement Office (PPO) in clause 4(1) of the Bill.

Reason: The Independence of the PPO if housed within Treasury, which also houses the chief procurement officer (chief buyer) may need to be considered.

(b) Further amendments to clause 4(1) to establish PPO’s at Provincial level with the same functions.

Reason: To handle matters at a provincial level as they are closer to the organs of state and there are existing units performing similar functions. If all matters are centralised, this can cause delays.

4.7.5. Clause 17 of the Bill

(a) Clause 17(1) of the Bill:

Insert the following as underlined:

"17(1) A procuring institution must set-aside a bid for a category of persons provided for in subsection (3) in accordance with the prescribed thresholds and conditions by advertising a bid with a specific bid condition that only one or more of the bidders specified in subsection (3) may respond."

Reason:
Similar to provision in clause 18(1). It provides clarity as to how set asides will be communicated to bidders.

(b) Clause 17(2)(d) of the Bill allows a procuring institution to set aside a bid for a category where no target for set aside is prescribed. This clause needs to be clarified further to prevent abuse of this provision by procuring institutions.

(c) Clause 17(3): insertion of the following categories:
"(k) military veterans
(l)persons in categories (a) to (k) who are registered on a developmental programme of the procuring entity".
Sections referring to prescribed percentages should take into account this insertion.

Similar insertions of these categories to be made in clause 18(1)- categories for pre-qualification criteria, and in clause 19(2) categories for subcontracting.

Reason: Military veterans are required to be included in the category for set-asides, as this group is a provincial priority. Provision should also be made for set-asides for contractors/service providers in departmental developmental programmes.

4.7.6. Clause 28 of the Bill
Amendments to clause 28(1) of the Bill to specify where the procurement function should be located in the procuring institution and the reporting lines. Consider changing the terminology to "units" rather than function.
Reason: This will align with the existing units in institutions. Comments have also proposed for direct reporting of the unit to the Accounting officer to be more effective and independent.

4.7.7. Clause 29(1)

Clause 29(1) to also exclude support staff to municipal office bearers as members of bid committees.

4.7.8. Clause 33(2)(b)

A time frame needs to be inserted.

Reason: The use of the phrase “as quickly as possible” is open to interpretation.

4.7.9. Clause 38(1)

Clause 38(1) to indicate where the Public Procurement Tribunal is to be located. Stakeholders recommended that it be decentralised to the provinces to be more effective and the aspects of panels (Cl 47(1)) constituted provincially to be accordingly amended.

Reason:

This will assist to avoid delays in decision-making and to fast track reviews. KZN currently has a bid appeal tribunal which handles a number of matters. Concerns were raised by the public as to how a centralised tribunal will be able to handle the number of matters that will arise from procuring institutions in the whole country, leading to delays in finalising appeals.

4.7.10. Restoration in the text of the Bill of the power of the PPO and Provincial Treasury to review procurement policies of procuring institutions and to propose changes.

4.7.11. The need for the strengthening of the debarment provisions in the Bill by aligning the debarment provisions in public procurement regulation with the tender defaulter (e.g. debarment) provisions in anti-corruption law.

4.7.12. The addition of incentivised whistleblowing provisions in the Bill aligned and fitted to public procurement and not left entirely to the Protected Disclosures Act 26 of 2000.

4.7.13. Inclusion of transparency standards (e.g. open contracting system) which requires disclosure across the full procurement cycle.

4.8. In addition, public comments raised the following constitutional and legal challenges which require consideration and reply:

(a) Constitutional invalidity of the Bill due to overreaching and usurping of municipality's procurement powers;
(b) Fragmentation of procurement laws due to numerous regulations and binding instructions in terms of the Bill;
(c) The issue of the removal of price from the Bill and radical departures from S217 principles which may be grounds for unconstitutionality;
(d) The vesting of enormous discretion to the Minister in regulations with no guiding principles, and that Parliament is best placed to provide the main framework;
(e) With regard to the PPO, its independence is questioned and its intrusive powers in respect of investigations;
(f) The Bill does not consolidate the procurement landscape as it creates 2 separate frameworks;
(g) New chapter 4 raises issues and confusion of terminology;
(h) Marginalisation of the BBBEE Act by Bill;
(i) Prescribed criteria are too open-ended for a constitutionally required framework;
(j) Concerns around transparency and integrity; and

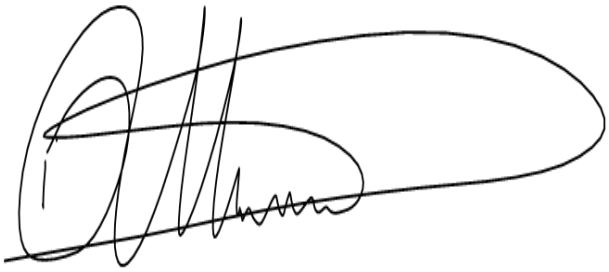
4.9. The following aspects are in the nature of comments and require clarity from the Department:

(a) Public comments also raised challenges experienced by subcontractors in public procurement. The Department must indicate how the Bill seeks to deal with such subcontracting challenges.
(b) Clause 25(3)(c)- clarity as to why "demand management " in clause 25(c) is separate from "procurement planning and budgeting" in Clause 25(d) as the separation of these functions may have an impact on job descriptions in each institution.
(a) Comments also indicate that there is misalignment with the BBBEE Act and the Bill and that the Bill must create alignment so that the transformation agenda can be achieved. How does the Department intend to address any misalignmen?.

5. Conclusion

(a) The amended NCOP dates for the negotiating and final mandates on the Bill are the 30th April 2024 and 7th May 2024 respectively. The Finance Portfolio Committee met on Friday, 22nd March 2024 to consider the Public Consultation Report, and as it was quite lengthy, met again on the 26th April 2024 in order to confer the negotiating mandate.

(b) The majority of the Committee agreed to confer a negotiating mandate to the NCOP in support of the Bill subject to the inclusion of the aforementioned proposed amendments for consideration by the NCOP.



26 April 2024

HON. TV XULU **DATE**

CHAIRPERSON: FINANCE PORTFOLIO COMMITTEE

KWAZULU-NATAL PROVINCIAL LEGISLATURE