PART A: CONSTITUTIONAL AND LEGAL CONCERNS

1. Constitutionality of the National Assembly's and National Council of Provinces' public participation processes regarding the Bill

1.1 The version of the Bill which the National Assembly (NA) passed is substantially different from the version which was published by the Standing Committee on Finance (SC) for public comment. The NA failed to solicit public comment on the numerous material or fundamental changes, in contravention of its obligation under section 59 of the Constitution of the Republic of South Africa, 1996 (the Constitution), before passing the Bill. For example, the complete substitution of chapter 4 (replacing one clause with no less than nine new clauses) required public input before the NA adopted those changes, because among other things the changes fundamentally depart from how the previous version of the Bill aimed to regulate preferential procurement, and significantly intrude into the autonomy of organs of state to determine their own preferential procurement policies. The changes were not merely technical or semantic.

1.2 The NA's failure to solicit comments on the abovementioned changes is a defect in the public participation process which the National Counsel of Provinces (NCOP) cannot cure by way of its own public participation process, because among other things the purpose and function of the NCOP is different from the NA, and the NCOP is a different body.

1.3 In *Doctors for Life International v Speaker of the National Assembly and Others*[1], the Constitutional Court held that the NA and the NCOP serve distinct purposes and functions – the first examines a Bill through the lens of national interests, and the second through the lens of provincial interests – and the Court therefore held that the NCOP could not rely on the NA's public participation process to satisfy the NCOP's duty to facilitate public participation. Similarly, we submit that the NA cannot – as it did – delegate its duty to facilitate public participation regarding these fundamental changes to the NCOP, and certainly not after the NA already passed the Bill. The public participation processes followed by the Provincial Parliaments, as requested by or agreed with the NCOP, also cannot cure the defect, for the same reasons.

1.4 It is important to note that the NA's proposed changes would have a lasting effect on all organs of state and members of the public wishing to supply organs of state with goods or services, or wishing to conclude contracts that will generate income for organs of state, yet the NA failed to solicit comments and input from these affected persons or bodies.

1.5 The situation is therefore analogous to that in *South African Veterinary Association v Speaker of the National Assembly and Others* (SAVA case)[2]. Regarding this omission by the NA, the following statement by the Constitutional Court in the SAVA case also rings true: "[h]*owever, a complete failure to take any steps to involve the public in a material amendment to a Bill cannot be reasonable by any measure*". It is submitted that this failure by the NA results in non-compliance with section 59(1)*(a)* of the Constitution.

1.6 The Courts (including the Constitutional Court) have in numerous instances ruled against Parliament in cases where public consultation in the law-making process were found to be lacking. In paragraph 23, the Constitutional Court in the SAVA case stated as follows: "[t]*his Court has held that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted*". We are of the view that the Bill does not conform to the Constitution in terms of both its content and the way public participation has taken place by Parliament. For the reasons set out in our comments, we submit that the NA and the NCOP have failed to fulfil their constitutionally imposed duties, and that the conduct of the NA and the NCOP is, as well as the Bill, if passed, will be, inconsistent with the Constitution.

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[1] (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).
[2] 2019 (3) SA 62 (CC) [2018] ZACC 49.

1.7 Additionally, the comment periods provided by the SC to comment on the current version of the Bill, and the NA to comment on the previous version, were too short, as it was practically impossible for the WCG's relevant internal stakeholders to adequately and meaningfully apply their minds to the extensive contents of the Bill and engage with each other to submit all of the adequate and meaningful comments at the relevant stages which it would have submitted if the period for comment had been appropriate.

1.8 According to the Parliamentary Monitoring Group website, the call for comments for the –

1.8.1 previous version of the Bill by the NA opened on 18 August 2023 and closed on 11 September 2023, providing less than a full month to consider this high-profile, complex and very important Billl; and

1.8.2 current version of the Bill by the SC opened on 30 January 2024, with a closing date of 12 February 2024, which on 8 February 2024 was belatedly extended to 12h00 on 22 February 2024, providing a disrupted comment period of less than a full month.

1.9 Interested members of the public complained that the NA's period was inadequate to comment on the previous version of the Bill, yet those complaints were ignored and this likely contributed to the NA's inadequate consideration of the flawed Bill which was subsequently passed with unwarranted urgency and sent to the NCOP. Similar comments are being raised by members of the public about the SC's comment period.

1.10 It is clear that the Bill, if signed into law, will have a significant impact on all organs of state and the public, and will require extensive organisational changes in all organs of state. From a provincial government point of view, the Bill will impact extensively on provincial treasuries, as well as all other provincial government departments and public entities. The impact needs to be understood by all those involved, and meaningful and coherent responses need to be developed and collated into a single set of comments. This could not happen within the disrupted period provided by the SC.

1.11 Parliament has failed to properly facilitate public participation in the law-making process. The public and organs of state have not been given a reasonable opportunity to study the Bill, know about the issues and have an adequate say. Specifically with regard to organs of state, the short commenting periods set by the NA and NCOP did not take into account the internal processes that need to be followed to analyse the Bill and draft meaningful comments.

1.12 We are of the view that the Bill does not conform to the Constitution in terms of the manner in which public participation has taken place by the Legislature (NA and NCOP).

1.13 We submit that the NA and the NCOP have failed to fulfil their constitutionally imposed duties, and that the conduct of the NA and the NCOP is, as well as the Bill, if passed, will be inconsistent with the Constitution.

2. Constitutionality of the substance of the Bill

2.1 The Bill has the effect of interfering in the autonomy of the provinces and municipalities. The proposed establishment of a PPO, based on our understanding of the institutional structure of the proposed PPO (see our general comment in this regard below), as an independent entity, yet a part of the National Treasury, with the power to issue binding instructions on any procurement-related matter, has the effect of usurping the autonomy of provinces and municipalities to make procurement decisions.

2.2 Procurement decision-making is separate and distinct from financial decision-making. Section 217(1) of the Constitution provides that an organ of state in the national, provincial or local sphere of government must contract for goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. This is subject only to limitations in the Constitution and to legislation consistent with the Constitution.

2.3 Section 217 of the Constitution obliges each procuring institution to only procure in terms of a system which is fair, equitable, transparent, competitive and cost-effective, and therefore each institution must take control of its procurement system to ensure that the system complies with those values. Any purport in the Bill to exempt procuring institutions from developing their procurement system in accordance with section 217 of the Constitution is unconstitutional.

2.4 The Bill appears to proceed from the basis that all procurement operations are corrupt and irregular and there is a dire need for greater, more stringent financial control, with a move to a process-driven framework that is predetermined at the national level. This leaves little room for variations in approach at provincial or local levels. It is also likely to result in decreased ownership of procurement systems by procuring institutions.

2.5 Regarding preferential procurement, the prescripts proposed in the Bill do not meet the standard of what may be construed as a policy framework for preferential procurement within the meaning of section 217(2) and (3) of the Constitution. Characteristics of such a framework should include the principles and long-term goals that form the basis of the envisaged rules or regulations, the guidelines and overall vision for and direction of procurement system planning and development. The Bill instead usurps the preferential procurement policy decision-making powers of all organs of state in favour of the Bill's centralised, prescriptive, and paternalistic approach.

2.6 In *Minister of Finance v Afribusiness*[3] , the contents of the Preferential Public Procurement Regulations, 2017, including its requirements for set-asides and compulsory sub-contracting, were unanimously described by the Constitutional Court as setting preferential procurement <u>policy</u>, not a <u>framework</u> for the organ of state to make such policy decisions. Madlanga J, writing the majority judgment in that matter, stated the following:

> "[111] ... *The impugned regulations are meant to serve as <u>a preferential procurement policy</u>*… [i]*f each organ of state is empowered to determine its own preferential procurement policy, how can it still lie with the Minister also to make regulations that cover that same field?*" (our emphasis).

2.7 The Court held that section 217 of the Constitution empowers the procuring organ of state to set its own preferential procurement policy, not the Minister. The Court therefore declared those regulations unconstitutional and invalid.

2.8 The Bill repeats very similar, if not more onerous, preferential procurement policy prescriptions to those that were declared invalid in the Preferential Public Procurement Regulations, 2017. The implicit assertion is that Parliament (unlike the Minister) has the Constitutional authority to set preferential procurement policy for all organs of state. However, this is incorrect and unconstitutional, for the following reasons, among others:

2.8.1 the Constitutional Court in A*fribusiness* made it clear that section 217 of the Constitution empowers each organ of state to set its own preferential procurement policy;

2.8.2 if Parliament enacts legislation which compels other organs of state to adopt specific preferential procurement policies, this will unconstitutionally divest those organs of state of their Constitutionally envisaged autonomy to adopt their own preferential procurement policies; and

2.8.3 section 217(3) of the Constitution only empowers Parliament to enact legislation providing for a <u>framework</u> in which such a preferential procurement policy must be adopted. Section 217 does not empower Parliament to compel other organs of state to adopt specific preferential procurement policies. If such a drastic intrusion were intended, the wording of the section would have been explicit and the word "*framework*" would not have been used.

2.9 The Bill also compels an organ of state to adopt a preferential procurement policy, however the Constitution envisages that organs of state have a <u>discretion</u> to decide whether to adopt a preferential

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[3] *Minister of Finance v Afribusiness NPC (CCT 279/20) [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC) (16 February 2022)* at para 113.

procurement policy. A preferential procurement policy is one of many available policy options available to an organ of state to uplift historically disadvantaged individuals (HDIs). The Bill renders preferential procurement compulsory, which is not only unconstitutional, but will also undermine an organ of state's ability to select the most effective redress policies and programs for HDIs.

2.10 Furthermore, the Bill purports to empower the Minister to prescribe by regulation certain procurement policy prescripts for other organs of state, such as issuing "prequalification" requirements, targets for "set-aside", thresholds, categories, preference measures under draft clause 22, contract preference measures under draft clause 23 and subcontracting requirements, all binding on those other organs of state. This repeats the same error which the Constitutional Court identified in *Afribusiness*, as the Constitutional Court clearly held that the procuring organs of state have the Constitutional authority to determine for themselves these preferential procurement policy positions, not the Minister.

3 The Dispute Resolution Process:

3.1 The lawfulness and practicality of the "internal processes" proposed in Chapter 6 of the Bill are unclear, in that these processes:

(a) are not in alignment with established contractual and administrative law principles (including the principle of *functus officio*), and the requirements relating to consultation (other bidders must be informed and provided with an opportunity to make representations, etc.);

(b) lengthen the procurement process considerably;

(c) unnecessarily complicate the process;

(d) would hamper service delivery and, may in fact bring service delivery to a standstill in certain circumstances;

(e) would be impractical as a result of the volume of matters which the Tribunal would be obliged to deal with and the stipulated timeframes that must be complied with;

(f) would require the allocation of state funding, in this current constrained economic climate, to fund the operations of the Tribunal and the reimbursement of the incidental costs contemplated in draft clause 52(4)*(c)*; and

(g) create considerable uncertainty around the finality of the procurement process and the decision-making authority of the accounting officer or accounting authority (there is no certainty regarding the applicable time frames. For example, draft clause 37(1) provides that a bidder may submit an application for reconsideration if the bidder is not satisfied with a decision to award a bid within 10 days of the date the bidder is informed of the decision to award a bid. In terms of draft clause 37(4) of the Bill, a procuring institution may however dismiss an application for reconsideration if the application was not submitted within 10 days of the date the bidder is informed of the decision to award a bid. A procuring institution would have a discretion as to whether to dismiss the application.

Reconsideration processes by the institution:

3.2 The Bill creates significant confusion around when a decision-maker is considered to be *functus officio* (i.e. when a decision is considered to be final). In essence, the introduction of the proposed internal remedies undermines the decision-making authority of an accounting officer or accounting authority (or delegate), and are thus both problematic in principle and broadly countervailing of the accountability environment established in the PFMA and Local Government: Municipal Finance Management Act, 2003 (MFMA).

3.3 Draft clause 37 empowers procuring institutions to reconsider their own decisions. Draft clause 8(2) takes this authority further by explicitly providing for a procuring institution to reconsider a decision which would, in the normal course, be regarded as final. If the same decision-maker is empowered to reconsider their

own decisions, it is submitted that they would not be able to do so objectively. Furthermore, and more importantly, in terms of settled administrative law principles, a decision-maker is *functus officio* once a decision is made and communicated.

3.4 Notwithstanding the concerns around the lawfulness of the reconsideration processes, it could also be problematic from a practical perspective if numerous unsuccessful bidders (and/or interested parties) initiate reconsideration processes at various points within the stipulated period, all of which would require investigation and consideration.

3.5 It is proposed that all the provisions pertaining to a reconsideration process are deleted as a decision-maker should not be allowed to reconsider that decision. A simplified internal remedy should be considered.

The Review Process (clauses 49 to 54):

3.6 Section 33 of the Constitution and the Promotion of Administrative Justice Act, 2000 (PAJA), which was enacted to give effect to section 33 of the Constitution, refer to judicial review proceedings in a court or tribunal.

3.7 The review by the Tribunal of a decision contemplated in the legislation is to be considered as an internal remedy as contemplated in section 7(2) of PAJA, which may be challenged in court through judicial review proceedings. Its true nature is therefore administrative rather than judicial. This is not made clear in the provisions relating to the Tribunal.

3.8 In South Africa, judicial review proceedings can only be instituted in a Court. Tribunals have not yet been established to fulfil such function.

3.9 We are not opposed to the introduction of an internal remedy, provided that such remedy is: (a) quicker, easier and more affordable than court proceedings; and (b) will not only be limited to decisions pertaining to competitive bidding.

3.10 When one considers the vast number of procurement transactions undertaken by institutions across South Africa, it is inconceivable that one body, such as the envisaged Tribunal would have sufficient and adequate capacity to attend to internal remedy proceedings arising from procurement related decisions made by all institutions in the country. There should, at least, be one such body per province if all internal remedy proceedings are to be dealt with by a Tribunal before reviewing the matter in a court, and even such a scheme may stretch available capacity and not be adequate. In light of the current economic challenges faced by our country this option may, however, not be advisable from a cost perspective. An alternative option would thus have to be considered.

3.11 It is accordingly proposed that-

(i) The entire Chapter 6 of the Bill is replaced with an internal remedy process which is efficient, cost-effective and practical.
(ii) The internal appeal authority should not be at a national level in respect of all spheres of government. The executive authority of each institution should be considered to be the authority, empowered to consider and attend to internal remedy proceedings;
(iii) The internal remedy should equally apply to any administrative decisions made by an institution pertaining to procurement which were communicated to the affected parties (and not only in respect of competitive bidding processes);
(iv) The timeframes applicable to such proceedings should be clearly and sequentially stipulated in all provisions pertaining to such proceedings, and provision should not be made for condonation of non-compliance;

(v) Compliance with the lengthy timeframes contemplated in the Promotion of Administrative Justice Act (PAJA) and the Promotion of Access to Information Act (PAIA) may impact service delivery. Therefore, we propose that Parliament should explore the appropriate mechanisms to create a balance between the principles and timeframes stipulated in the aforesaid legislation and the need to achieve finality in procurement processes to ensure that service delivery is not hampered.

(vi) A decision-maker should be required to communicate the reasons for a decision that was made when the decision is communicated. This would expedite the process.

(vii) The grounds on which internal remedy proceedings may be instituted should be clearly stipulated in the Bill; and

(viii) The provisions pertaining to such internal remedy must be aligned to PAJA. Consultation processes should be incorporated into the Bill (e.g. other bidders must be informed and provided with an opportunity to make representations when an aggrieved bidder instituted internal remedy processes, etc.)

The Stand Still Process (clause 55):

3.12 The proposed process would hamper service delivery and, may in fact bring service delivery to a halt for the duration of such stand-still periods.

4 Introduction of different regulatory instruments in the Bill:

4.1 Draft clauses 5(2)*(a)* to *(c)* introduce different regulatory instruments into the Bill which may be used by the PPO as tools to implement the Bill. These include model procurement policy, binding instructions and non-binding guidelines. In addition, the Minister is empowered in terms of draft clause 64 to make regulations on a range of matters. Despite the fact that the Bill indicates that the instructions are intended to be binding and the settled legal position that properly authorised regulations are binding, it is not clear what the intention is, as far as their legal status is concerned, for the rest of the instruments.

4.2 The introduction of these instrument raises the following difficulties:

(a) The fact that different instruments are used causes confusion as to their legal status. Numerous judgments have been made by the courts where this question arose in the context of policy versus legislation. The courts have taken the approach that policy is not binding to the extent that law is binding and that the persons targeted by such a policy instrument may, with reason, depart from the prescripts of such policy instruments. The question then becomes - what of these other regulatory instruments that are now introduced in the Bill. In the case of instructions and guidelines there is some clarity provided in the Bill i.e. the former is intended to be binding whilst the latter is not. This is true of regulations as well. However, in the case of policy there is no such clarity. This will no doubt lead to confusion and issues of interpretation.

(b) There is furthermore no clarity on what the difference is between all these instruments. For example, what is the difference between a guideline and an instruction. In the Bill, the obvious difference is that the former is non-binding whereas the latter is intended to be binding. However, what would be the qualitative difference between the two? Without a clear understanding of the difference between the instruments, it may be that these instruments become conflated and content that is intended not to be binding may be included in instructions that are intended to be binding. It is therefore imperative that the Bill, if it is decided to retain the tool of employing different regulatory instruments to give effect to the implementation of the Bill, makes clear and express provision for the qualitative difference between these instruments.

(c) The introduction of a broad range of instruments will itself lead to an ever more extensive and complex regulatory environment. In the absence of any countervailing pressure to reduce the regulatory burden, through requirements for regular reviews and impact assessments, or the

automatic expiry of specific issuances, a growing burden of "red tape" will incrementally raise costs and cause delays in procurement.

(d) Furthermore, of concern is that the consultative process prescribed for the PPO and PTs to follow before issuing instructions does not expressly require consultation with SALGA and COGTA before the instructions are issued. It is submitted that as role-players, these institutions must at least be given an opportunity to have input into any instrument which will affect how they operate in the procurement space, more so where the instrument at issue is intended to be binding such as in the case of instructions. It is therefore proposed that the Bill makes express provision for a consultation process that must require consultation with SALGA and COGTA before the PPO or a PT issues any of the instruments, especially in the case of instructions.

5 Institutional structure of the PPO:

5.1 Draft clause 4(1) of the Bill establishes the PPO "within the National Treasury". Draft clause 4(2) of the Bill provides that the head of the PPO and its officials must ensure that they perform their functions impartially and without fear, favour or prejudice.

5.2 Our understanding is that if the PPO is to be allocated within the National Treasury, it would effectively be established as a component within the National Treasury, accountable to the Minister of Finance. However, draft clause 4(2) indicates that the head and officials of the PPO are required to be impartial when performing their functions. This proposed institutional arrangement amounts to a half in, half out approach. On the one hand the PPO's head and officials are to perform their functions as though they are part of a body which is "distinct" from the National Treasury and in an impartial, and by implication independent, manner, yet on the other, it is a component within the National Treasury.

5.3 It is submitted that for as long as there is ambiguity on the issue of the independence of the PPO, there will be confusion. It is proposed that the institutional arrangements of the PPO are reconsidered.

Please find attached the clause-by-clause analysis of the Bill contained in the template of specific comments marked "PART B".