PART B:
DETAILED COMMENTS

GENERAL COMMENTS:

General comment: Previous comments:	The WCG submitted comments on the previous version of the Bill after being invited to do so by the National Assembly (NA) in 2023. No Comment and Response Report was received from the NA to assess why some of the comments have not been included or addressed in the current version of the Bill. The comments set out below therefore also include some of the WCG's comments on the previous version of the Bill which are still relevant. We request that the WCG be provided by the National Council of Provinces' (NCOP) Select Committee on Finance (SC) with a Comment and Response Report regarding the comments and recommendations in this document.
No consultation on material changes before the NA passed the Bill:	• The version of the Bill which the NA passed is substantially different from the version which was published by the 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 policy. The changes were not merely technical or semantic. • The NA's failure to solicit comments on the abovementioned changes is a defect in the public

	participation process which the 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. • 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. • 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. • 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] (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

	• 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.
Unconstitutional encroachment on organs of states' autonomy to determine their own preferential procurement policies:	• In *Minister of Finance v Afribusiness NPC*[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 policy, not a framework 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 a preferential procurement policy*… [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). • The Court held that section 217 of the Constitution of the Republic of South Africa, 1996 (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.

[3] (CCT 279/20) [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC) (16 February 2022)

	• 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: 1. the Constitutional Court in *Minister of Finance v Afribusiness NPC* made it clear that section 217 of the Constitution empowers each organ of state to set its own preferential procurement policy; 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 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. • 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 or not to adopt a preferential 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. • Lastly, the Bill also 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 24 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.
Costs and benefits of preferential procurement:	• Promoting a socio-economic issue through preferential procurement comes at a financial cost. Taking the pillars of procurement, in particular value for money and cost-effectiveness, into account, together with the current budget cuts, careful consideration must be given to what will be promoted and the cost implications of such a promotion, as well as the ability to verify that the promotion causes achieve the intended results. • When determining promotable causes in preferential procurement legislation and policy, the type of goods and services being procured should be considered, as well as the ease of determining the value to be allocated to such promotable causes without placing a further financial burden on suppliers and unduly enriching certification companies to provide suppliers with such certification. The burden placed on procuring institutions' SCM units to adhere to compliance requirements in this regard should also be considered. The ability of the procuring institution's work force also plays an important role, and suitably qualified clerks of an appropriate senior level must administer the procurement process.

	• The existing procurement laws and the proposed provisions in the Bill fail to provide the precise legal certainty and oversight required for preferential procurement, and they fail to ensure that the advanced administrative capabilities required for preferential procurement are in place, which exacerbates poor implementation. For example, procuring institutions generally have limited insight into the national supply base. • Additionally, an overly complex tender system poses high barriers to entry for potential tenderers, it hampers industrialisation efforts, and it favors fraudulent conduct over legitimate business operations, promoting the proliferation of tender rigging. • There should also be provision made in the Bill to quantify and monitor the costs paid by organs of state for preferential procurement, such as the hiring of new staff, setting up the advanced administrative capabilities and systems required, and the premium paid to preferred bidders over least-cost bidders, to enhance transparency, accountability, cost-control and cost-effectiveness.
Policies and initiatives:	• The Bill repeats many of the policies and initiatives which precede it in the existing laws, however, there has been inadequate consideration as to whether those policies and initiatives produced the intended results, for example in promoting local production, creating more jobs, and correcting past injustices. Furthermore, inadequate consideration has been given to the counter-productive effects of these policies and initiatives, such as adding additional red tape, increasing prices, decreasing quality and incentivising suppliers to either misuse, creatively avoid the purport of the policies and initiatives or in some cases fraudulently bid or supply goods and services through the procurement systems. • A shift in thinking is required that would deliver more viable and meaningful outcomes instead of repeating the past

	requirements that have a proven track record of not delivering on the envisaged outcomes.
Mandate of the Minister of Finance:	• The Bill proposes the centralisation of powers and authority, which is a huge concern. • In various instances, matters which fall within the mandate of Ministers other than the Minister of Finance are proposed to either be incorporated into the mandate of the Minister of Finance or would be subject to the influence of the Minister of Finance, for example, by requiring that decisions or regulations may only be made in consultation with the Minister of Finance. Another example of this is the proposal in the Bill that the CIDB be required to take certain decisions either in consultation or after consultation with the PPO.
Centralisation and lack of consultation with local government:	Centralisation manifests itself in the Bill in several ways which risk removing local government elected officials from procurement regulation. Centralising power in National Government disregards local knowledge, needs and geographical disparities, potentially hindering optimal procurement outcomes. Furthermore, the Bill lacks requirements for consultation with local government which contradicts the spirit of cooperative governance.
Role of the Public Procurement Office:	• Draft clause 4 of the Bill intends to “establish a Public Procurement Office” within the National Treasury. • We are concerned that the powers of the National Treasury, as contemplated in section 216(2) of the Constitution and the Public Finance Management Act (Act no. 1 of 1999) (PFMA) are usurped by the Public Procurement Office (PPO) who would be a functionary within the National Treasury. • It is important to ensure that section 216 of the Constitution (which deals with Treasury control) is adhered to.

	• The Bill should include provisions, detailing the role of the National Treasury in respect of procurement, which is currently lacking. • In terms of section of the PFMA, the Minister, as the head of the National Treasury, takes the policy and other decisions of the Treasury, except those decisions taken as a result of a delegation or instruction in terms of section 10. • There is no indication of the relationship between the PPO and the National Treasury. • There is no detail as to the oversight role of the National Treasury for the PPO. • The PPO contemplated in the Bill would not be independent, despite that the Bill asserts otherwise. The Bill does not clarify what the chain of command would be within the National Treasury in respect of the operation of the PPO. • In terms of section 10(1) of the PFMA, the Minister of Finance is empowered to delegate any of the powers entrusted to the National Treasury in terms of the PFMA to a head of a department forming part of the National Treasury or instruct the Head of Department to perform any of the duties assigned to the National Treasury in terms of this Act. • It is assumed that certain of the National Treasury's powers related to procurement have been delegated to the Chief Procurement Officer, who manages a component of the National Treasury. The National Treasury maintains an oversight role in respect of the OCPO. • In terms of the Bill however, the PPO (which we assume would substitute the OCPO) is given original powers (for example, in terms of draft clause 5). It therefore appears that the National Treasury has been deprived of any oversight role in respect of the PPO. This is problematic since the PPO falls within the National Treasury. • Reference is made in draft clause 4(2) to "[t]*he Head…of the Public Procurement Office*". No other mention is made in the Bill to this position. There is therefore no reference in the Bill

	to the establishment of this position or to the how an appointment is made to this position. • Issues that must be addressed in the Bill include the following: o How will the Head of the PPO be appointed? o What will be considered when such person will be appointed? o What would the authority and functions of the Head of the PPO be?
Capacity of the PPO:	• We are concerned that the PPO may not be able to fulfil the role envisaged in the Bill. • It must be considered whether the PPO would be able to fulfil such role, since the powers will be exercised, and functions will be performed, in relation to procurement country-wide, and it would affect procuring institutions across the country. • The OCPO, which currently performs a smaller role as the PPO, also nation-wide, does not dispense appropriately with the functions of its office as required, in large part because of the size of its jurisdiction and mandate as compared with its size, resources and capacity. Given this reality, replacing the OCPO with the larger PPO does not make sense. • Where it is foreseen that the PPO would not or might not be able to fulfil certain functions or exercise powers, the Bill should be amended to ensure that powers or functions imposed by the legislation are implementable and practical.
Instructions of the PPO:	• There are too many matters on which the PPO may issue instructions. Many of these matters should be addressed in the Bill itself. • One of the objects of the Bill is to create a single regulatory framework for public procurement to eliminate fragmented procurement prescripts. If the PPO is to issue instructions regarding so many aspects, this will contradict this object of the Bill.

Decision-making of procuring institution:	We propose that a substantive provision be added that deals with the awarding of the bid, notifying all bidders of the award, that reasons should be provided in that notification, and that bidders must be informed of the right to judicial review in line with PAJA. These aspects should not be left to subordinate legislation.
Authority of Accounting Officers and Accounting Authorities to determine and maintain an appropriate procurement and provisioning system:	• It is proposed in the Bill that sections 38(1)(a)(iii) and 51(1)(a)(iii) of the PFMA and Chapter 11 of the Local Government: Municipal Finance Management Act (MFMA) (which includes section 115), be deleted. • If so, this may result in an assumption that Accounting Officers and Accounting Authorities would no longer have the legislative mandate to ensure that his/her procuring institution has and maintains its own procurement and provisioning system. o Other provisions in the Bill however refer to a procuring institution's procurement and provisioning system, for example draft clause 8(1)(b) which stipulates that a procuring institution should implement an effective and efficient procurement system. • As each procuring institution have different needs and resources which must be managed appropriately, it is imperative that an Accounting Officer or Accounting Authority, as the officer accountable for the financial management of the procuring institution, should retain the authority to determine procuring institution-specific processes and procedures, aimed at addressing the specific needs and managing the resources of the procuring institution. • This matter should however be specifically addressed and clarified to eliminate any confusion. **There should not be any confusion related to the mandate of a procuring institution to develop and implement its own effective and efficient procurement system in the Bill**.

Procurement system, procurement policy, preferential procurement policy:	• It is not clear what the envisaged distinctions in the Bill are between the terms "procurement system", "procurement policy" and "preferential procurement policy" regarding a procuring institution. We propose that these terms should be defined. • The rule of interpretation is that different terms mean different things. If the different terms relate to the same thing the consistency with the use of terminology must be ensured. o For example, the heading of Chapter 4 of the Bill and draft clause 16 refers to preferential procurement but the body of the draft clause only refers to a procurement policy. It is generally understood by procurement practitioners that a procurement policy is a wider concept than a preferential procurement policy, with the former being a compulsory requirement in terms of section 217(1) of the Constitution, and the second being discretionary as contemplated in section 217(2). To eliminate the confusion, it is important that this draft clause, and the Bill generally, refers to a preferential procurement policy consistently when this is intended.
Consequences for non-compliance with the legislation:	• There are various instances where provision is made for compliance with certain requirements but there is no indication of what the consequences would be where there is non-compliance with the stipulated requirements. • The Bill should clearly provide for the consequences of non-compliance with its mandatory requirement provisions.

Criminal liability and accountability of accounting officers and other officials:	• In light of the proposal to amend various pieces of legislation, the Bill does not currently sufficiently provide for the criminal liability and accountability of accounting officers and other officials, particularly in cases of financial misconduct or negligence. It is important to provide for criminal liability and accountability of accounting officers and other officials clearly and adequately in appropriate circumstances. However, the liability must be proportional and must not be draconian and unfair, as is the case with draft clause 61(3) which provides for strict liability without a requirement for intention or significant negligence.
Decision-making authority within the National Treasury and Provincial Treasuries:	• It is submitted that the decision-making authority in respect of each treasury should be stipulated in the Bill for clarity. It is submitted that in respect of policy related matters: o The Minister, as the head of the National Treasury or his or her delegate should be empowered to take the policy decisions that are now accorded to the PPO. o The Member of an Executive Council of a province responsible for Finance in the province as the head of a provincial treasury or his or her delegate should be empowered to take the policy decisions that are now accorded to the PPO or the Minister. o Similarly, a Local Government's Council or its delegate responsible for financial policy decisions should be empowered to take the policy decisions that are now accorded to the PPO or the Minister.
Chapter 16 and 16A of the Treasury Regulations for departments, trading entities, constitutional institutions and public entities issued in terms of the Public Finance	• Chapter 16 deals with public-private partnerships and Chapter 16A provides for supply chain management. • There are provisions in the Bill, and requirements for certain regulations, which duplicate provisions in regulations 16 and 16A of the National Treasury Regulations.

Management Act, 1999 (National Treasury Regulations):	• There is no indication in the Bill that these Chapters in the National Treasury Regulations are to be repealed. • Considering the objective to create a single regulatory framework for public procurement, it is assumed that the intention is for these chapters to also be repealed. • If this is so the provisions contained in Chapter 16 and 16A of the National Treasury Regulations must be incorporated into the Bill or, where appropriate, catered for in the regulations.
Application of existing National Treasury Instructions:	• The National Treasury issued various instructions in terms of the PFMA. • Draft clause 67(2) states: "*Anything done under any law repealed by subsection (1) and which could be done under a provision of this Act must be regarded as having been done under that provision*." • In terms of the Bill only the PPO is empowered to issue instructions at a national level. • Instructions issued by the National Treasury issued in terms of section 76(4)(c) of the PFMA (which is proposed for repeal by this Bill) can surely not be regarded to have been issued by the PPO in terms of this Bill. The issuing of National Treasury Regulations is not capable of having been done in terms of the Bill. • On the proposed repeal of section 76(4)(c) of the PFMA, any instructions issued by the National Treasury in terms thereof will fall away. • Therefore, the matters addressed in the National Treasury Instructions that were made in terms of section 76(4)(c) of the PFMA must be incorporated into the Bill insofar as it is relevant, or specifically dealt with in a transitionary clause, and cannot be saved by draft clause 67(2).
Construction works:	• National Treasury Regulation 16A.6.3 states that - "*(a) bid documentation and the general conditions of a contract are in accordance with-*

	(i) the instructions of the National Treasury; or *(ii) the prescripts of the Construction Industry Development Board, in the case of a bid relating to the construction industry;…"* • The provisions in the Bill should be subject to any requirements and procedures prescribed in terms of the Construction Industry Development Board Act (CIDB Act) and regulations in respect of the procurement of construction works. It is submitted that infrastructure procurement must be read in conjunction with the Government Immovable Asset Management Act, 2007, and the Infrastructure Delivery Management System (IDMS).
Authority of the Minister to prescribe on various issues:	• There are numerous provisions in the Bill, aimed at empowering the Minister to prescribe matters. • The intention of the legislation is to create a single regulatory framework for public procurement to eliminate fragmented procurement prescripts. • This purpose will be best achieved if the relevant provisions are contained in the Bill as far as it is possible as opposed to in regulations made in terms thereof. • If the Minister prescribes on the many issues indicated in the Bill, that could be incorporated into the draft legislation, the procurement prescripts would remain fragmented. This will contradict the object of the Bill. • It is also important to note that the Bill includes very little mention of oversight over the new, broad powers which the Minister would receive in the Bill. • See also our comment above on the overreliance on PPO instructions. • The approach of leaving extensive essential aspects of the subject matter to regulation by the Minister or instruction by the PPO is open to legal challenge. In *Afribusiness*, the Court identified the purpose of regulations as being only to provide detail that

	Parliament *cannot* include in a Bill. The Constitutional Court said the following: "[U]*nderlying the concept of delegated legislation is the basic principle that the Legislature delegates because it* <u>*cannot directly exert its will in every detail*</u>. *All it can in practice do is* <u>*lay down the outline*</u>" (our emphasis).
Sector specific requirements:	It is noted that some sector specific requirements are addressed in the Bill. It is submitted that any sector specific provisions must be informed by consultation with the relevant stakeholders. Clarity is required on whether this has been done. The memorandum on the Objects of the Bill in paragraph 6 does not indicate that this has transpired. It is proposed that this is considered.
Finance lease transactions:	In terms of regulation 13.2.5 of the National Treasury Regulations, an accounting officer or accounting authority may not enter into finance lease transactions with the exception of agreements concluded in terms of Treasury Regulation 16. The Bill does not contain any provisions in this regard. It is proposed that the required clarity should be provided.
Competency and training of officials:	• In terms of the Regulation 16A.5 of the National Treasury Regulations, an institution's accounting officer or accounting authority must ensure that officials implementing the institution's supply chain management system are trained and deployed in accordance with the Framework for Minimum Training and Deployment issued by the National Treasury. • What will be the status of this Framework for Minimum Training and Deployment after the Bill is enacted? • Section 119 of the MFMA requires that the accounting officer and all other officials of a municipality or municipal entity involved in the implementation of the supply chain management policy of the municipality or municipal entity must meet the prescribed competency levels.

	• These levels have been prescribed in the Municipal Regulations on Minimum Competency Levels. Provision is also made for the training of officials. Concern is raised as to the effect of the Bill, once enacted, on these municipal regulations. • In view of the fact that the Bill is proposed to apply to all institutions, inclusive of municipalities and municipal entities, it is proposed that the Bill must expressly consider the implications that may result if the effect of the Bill, once enacted, is that the Framework for Minimum Training and Deployment issued by the National Treasury and the municipal regulations are impacted. It is therefore proposed that the responsibility of accounting officers and accounting authorities to ensure that their procurement staff are adequately trained should be included in the Bill.
Functionality:	In light of the challenges encountered with poor or inadequate performance by suppliers, it is submitted that the use of functionality for evaluation purposes must be promoted and encouraged. It is submitted that the Bill must expressly make provision that such an approach is adopted.
Unclear alignment with legislation and sector-specific requirements of certain specific areas of procurement:	It is not clear how the Bill, once enacted, will be applied to certain specific areas of procurement such as water, waste management, energy, health services and the like, and how its provisions will relate to, for example, the NHI Bill if it is adopted. The Bill does not adequately speak to sector-specific procurement and it is not clear if this will be dealt with in terms of draft paragraph 5(3)*(b)*.
Role of the Department of Public Works and the BBBEE Commission:	The Bill is unclear on what roles the Department of Public Works and the BBBEE Commission will have in the greater scheme of the Bill.
No distinction between Metropolitan, District and Local municipalities, nor	The Bill does not distinguish between Metropolitan, District and Local Municipalities, nor between municipalities performing functions delegated to it by other spheres of

between municipalities performing functions delegated to it by other spheres of government, as compared with functions reserved for its own autonomous sphere of government:	government, as compared with functions reserved for its own autonomous sphere of government. This is especially important when considering the challenges of accounting both to the PPO and PT, and their instructions, as well as to the organ of state which delegated the relevant function to it.
Consideration of the local and socio-economic constitutional objectives of provinces and local government:	The Bill does not adequately consider the local and socio-economic constitutional objectives of provinces and local government. Furthermore, no original powers are provided in the Bill to local government.
Capacity and professionalisation:	The Bill demands substantial resources for successful implementation but, at the same time, the Bill fails to address capacity needs, raising concerns about its feasibility in practice. The Bill offers no statutory basis that equips provincial and local government to fulfil their additional mandates prescribed in the Bill. Provision should be made in the Bill explicitly mandating increased capacity and professionalisation. This provision should oblige relevant departments like the National and Provincial Treasury to allocate additional resources to the new procurement functions.
Whistleblowing:	The Bill is silent on whistleblowing. To facilitate the recovery of stolen funds and the dismantling of corrupt networks, the Bill must encourage or incentivise whistleblowing. The Bill should strengthen transparency and accountability mechanisms in our law.

CLAUSE-BY-CLAUSE ANALYSIS:

Clause *(Indicate clause/ regulation Number)*	**Comment** *(State why the clause/regulation or proposed amendment is not supported or what the problem is with the provision)*	**Suggestion** *(Suggested deletion/amendment/ addition)*
Draft preamble:	The long title suggests that the Bill is intended to prescribe a framework within which preferential procurement must be implemented. There is however no reference to section 217(3) of the Constitution in the preamble. Section 217(3) is the empowering provision for the framework within which an organ of state should implement a preferential procurement policy. <u>Second paragraph</u> The words "or categories of persons" should be added after the words "advancement of persons" to align the wording to the Constitution. <u>Fifth paragraph</u> The paragraph is not a complete sentence and is poorly drafted. It appears to suggest that the Bill only regulates the procurement of goods and services from the private sector "*where necessary*", however the Bill regulates all public procurement in all circumstances, including when such procurement is expedient (and it	In addition to referring to section 216(1) of the Constitution as authority for the provisions relating to the prescribed treasury norms and standards in the Bill, the preamble should also state that its provisions aiming to prescribe a preferential procurement framework rely on section 217(3) of the Constitution.

	does not purport to determine for any organ of state when procurement from the private sector is necessary or expedient). It also regulates procurement between different organs of state. This paragraph should be removed or reworded. <u>Sixth paragraph</u> It is noted that one of the objects of the Bill is to create a single regulatory framework for public procurement to eliminate fragmented procurement prescripts. It is therefore essential that the Bill covers all aspects of public procurement to prevent further fragmentation and confusion. It is proposed in these comments that the Bill should address all matters pertaining to public procurement as comprehensively as possible.	
Draft definition of "*acceptable bid*":	The words "*specification and conditions <u>of a bid</u>*" are not correct, as the specifications and conditions which the drafter of the definition intended to refer to are not those set in the bid which is submitted, but rather are those set as minimum requirements in the invitation to bid, for the submission of a bid. In other words, the bidder does not set the minimum specifications and	The words "of a bid" should be deleted, or be changed to read along the following lines: "for bidding", "to bid", or "to submit a bid".

	bid conditions in their bid, but rather the procuring institution does in their invitation to bid.	
Proposal that a definition for definition for "asset" is inserted in the Bill:	There is no definition for "asset" in the Bill despite this word being repeatedly used in the Bill without clearly indicating in the context of its use whether the word is intended to include or excludes immovable and movable assets. The Bill only defines "capital asset" and does not make the aforesaid distinction.	It is proposed that a definition for "asset" is included in the Bill which definition should be aligned with the well-established asset management and accounting definitions of "asset". This definition would distinguish between a movable and immovable asset, among other things.
Draft definition of "*bid*":	The words "*…which is capable of acceptance*" appear to mean the same thing as "*acceptable bid*". The wording "*determined by instruction*" is not understood and appears to be unnecessary.	The words "*…capable of acceptance*" should be substituted with "*an acceptable bid*".
Draft definition of "*bid committee*":	The definition creates the impression that all bid committees are required to consider bids while this is not the case with bid specifications committees. It would be more appropriate to refer to the committees established to fulfil functions at various stages of the procurement process. It is also unclear how this definition compares with the word	The definition should be reconsidered and amended to include bid specification committees and any other committee in a procurement process which may not necessarily consider bids. If the meaning is the same as "procurement committee", the words in draft clause 28(2)(e) should be substituted with "bid committee".

	"procurement committee" in draft clause 28(2)(e), which is undefined.	
Proposal that a definition for "debarment" is included in the Bill:	In Chapter 3, reference is made to "debarment", however the term is not defined in the Bill.	Include a definition of debarment which refers to draft clause 15.
Draft definition of "emergency":	The Standard for Infrastructure Procurement and Delivery Management refers to conditions under which SANS 10845-1 may be utilised (see page 41 of that document). The standard refers to pursuing a negotiated procedure in an emergency. Negotiated procedure is defined as any procurement where: 1) a rapid response is required due to the presence of, or the imminent risk of, an extreme or emergency situation arising from: a) human injury or death; b) human suffering or deprivation of human rights; c) serious damage to property or financial loss; d) livestock or animal injury, suffering or death; e) serious environmental damage or degradation; or f) interruption of essential services.	It is proposed that the definition in the Bill align to SANS 10845.

Proposal that a definition for "functionality" is included in the Bill:	It is proposed that functionality be comprehensively dealt with in the Bill and that it be defined.	Include a definition for functionality which refers to the ability of a bidder to provide goods, service or infrastructure in accordance with specifications as set out in the invitation to bid.
Draft definition of "*immediate family member*":	The definition does not include the spouse, civil partner or life partner of a child or stepchild, or sibling or step sibling. This opens the possibility that the person mentioned in draft clause 11 could abuse their relationship with the spouse, civil partner or life partner of a child, stepchild, sibling or step sibling to avoid their automatic exclusion.	The definition should include the spouse, civil partner or life partner of a child or stepchild, or sibling or step sibling.
Draft definition of "*infrastructure*":	Section 217 of the Constitution relates to the contracting of goods and services. This includes construction works as is defined in the CIDB Act as stated below. In the Bill, the proposed treatment of infrastructure suggests that it is to be considered as a separate category, when in fact it is not. It is included in the concepts "goods and services". The definition for the term "infrastructure" only refers to physical facilities and system required to provide services to the public, however there is no reason in	It is proposed that the term "infrastructure" should be substituted with the term "construction works", substantially in line with the CIDB Act definition of the term. It is proposed that when the concepts of "goods and services" and "infrastructure" are reconsidered as proposed, that these concepts are aligned with the requirements of the Government Immovable Assets Management Act, 2007, and the Infrastructure Delivery Management System (IDMS).

	logic why infrastructure should not include assets which are used to provide goods to the public. The definition should be aligned to the Infrastructure Development Act, 2014 (Act 23 of 2014), CIDB Act and other legislation related to infrastructure. The inclusion of the word "systems" may create confusion. It should be replaced with a more appropriate term.	
Proposal that definitions for the terms "goods" and "services" are included in the Bill:	It is submitted that definitions for the terms "goods" and "services" should be included in the Bill.	A draft definition for these terms should be inserted in draft clause 1.
Proposal that a definition for "invitation to bid" is inserted in the Bill:	It is crucial that a definition for this term is included.	A definition for the term should be included which refers to a procuring institution's invitation to participate in a procurement process.
Draft definition of "*limited bidding process*":	For the sake of clarity and certainty, the term "limited bidding process" should be defined in the Bill in line with National Treasury Regulations, 2005, and the Bill should deal with limited bidding processes. Although regarded as a deviation from a competitive bidding process, a limited bidding process is a method of procurement that has	

	specific requirements as to when and how it may be used. It is therefore important that it is defined to avoid ambiguity and inconsistent implementation.	
Proposal that a definition for "*misrepresentation*" is inserted in the Bill:	For the sake of clarity, the term must be defined.	It is proposed that a definition for "misrepresentation" should be included, which should include a false statement of a material fact.
Draft definition of "*official*":	The word "*official*" is used in the Bill in some contexts where it should also include officials employed by the PPO or relevant Provincial Treasury, for example in draft subclauses 11(3) and 12(1) and draft paragraph 13*(b)*.	Review and refine the definition.
Draft definition of "*procurement*":	While cognisance is taken of the decision in *Airports Company South Africa SOC Ltd v Imperial Group Ltd & Others*[4] that incurring expenditure is not a prerequisite for procurement, not all letting or disposal of assets will amount to procurement. Only letting or disposal which results in the procuring institution acquiring goods or services would amount to procurement. The abovementioned flaw in the definition is symptomatic of a wider problem with it. Section 217 of the Constitution only relates to the	The definition should be reconsidered and reworded in line with section 217 of the Constitution.

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	contracting of goods and services. The attempt in the Bill to separate "goods and services" from the other listed concepts in the Bill, such as infrastructure, incorrectly suggests either that those listed concepts are different from "goods and services", where they are not, or it includes concepts which are not the acquisition of "goods and services" and therefore should not fall within the definition.	
Proposal that a definition for "*procurement committee*" is inserted in the Bill:	It is submitted that a definition for procurement committee should be included, as it is used in draft clause 28(2)(e). If it however has the same meaning as "*bid committee*", then only one of the definitions should be retained and used.	It is proposed that a suitable definition of "*procurement committee*" should be included.
Draft definition of "*publish*":	The definition includes publication on any website, as well as any "*easily accessible central online portal that is publically available*". The definition is far too wide and notionally could include a website or central online portal which does not relate to procurement or which persons affected by such publications may not expect to look. Given the purpose and importance of publication in the Bill, the use of online portals or website should be	It is proposed that the definition should be amended to mean publication on National Treasury's centralised website, or in the case of regulations, publication in the *Gazette*.

	curtailed to a centralised website owned and run by National Treasury. Given that NT has evolved the publication requirements and implemented the e-Tender Portal, is it still intended that publication is done on the Government Gazette for more than regulations, given that publication in the Government Gazette of information other than regulations has not been viable for a lengthy period and procurement entities have not been negatively impacted and as a result thereof and are effectively utilising the NT e-Tender Portal.	
Draft definition of "*standard bid documents*":	In terms of draft clause 25(4) of the Bill, the PPO may, by instruction, determine standard bid documents. It would be more appropriate to, in draft clause 25(4), refer to the determination of standard bid documents and the issuing of such standard bid documents by instruction.	The definition should be amended to refer to both the determining and issuing of bid documents. Draft clause 25(4) should be amended to provide for the issuing of standard bid documents.
Draft definition of "*supplier*":	The supplier could be a person or an association of two or more persons. There should be consistency throughout the Bill. For example, the definition of "bidder" refers to "*any person or an association of two or more persons…*".	It is proposed that the draft definition is amended to refer to persons or associations of two or more persons awarded in terms of the Bill.

Draft definition of "*transversal contract*":	The draft definition for "transversal term contract" indicates that these contracts must be "*arranged*" by the relevant treasury or other procuring institution mandated in terms of legislation. It would be useful to get legal clarity on what "*arranged*" means. For example, does it mean that the relevant treasury or other procuring institution must procure such contracts itself or may the relevant treasury or other procuring institution support another institution to procure such contracts? The Western Cape Government's Provincial Treasury Instructions currently allow different provincial departments to procure transversal contracts in line with their respective corporate functions, legal mandate and budget appropriations. This approach is useful insofar as transversal procurement can be undertaken by institutions with the requisite capacity and expertise.	Clarity is needed on what is meant by "*arranged*". It is proposed that a definition that supports the possibility of institutions other than the relevant treasury or other procuring institution procuring transversal contracts in line with their corporate functions, legal mandate and budget appropriations is considered.
Draft definition of "*this Act*":	There are at least 36 matters which would need to be regulated in terms of draft clause 64 of the Bill, excluding instructions to be issued by the PPO and PTs. Without understanding the content of the prescripts, municipalities are not in a position to determine their capacity to implement the Bill once enacted.	See our other comments above regarding the undesirably extensive delegated authority which the Bill provides to the Minister to regulate matters. The Bill should provide for these matters in its own content.

Draft clause 1(2):	This draft subclause should not be a part of this provision as it is not part of "definitions", which is the header of this section.	This draft clause should be moved to a more appropriate part of the Bill.
Draft clause 2:	There are provisions which relate to the management, maintenance, and disposal of assets in the Bill. This should be included as part of this draft clause.	It is proposed that the management, maintenance and disposal of assets should be included as part of the objects of the Act.
Draft paragraph 2(1)*(b)*:	It is stipulated that one of the objects of the Act is to determine a preferential procurement framework for all procuring institutions which are to implement their procurement policies as envisaged in section 217(2) and (3) of the Constitution. The Bill does not clearly provide for such a framework.	The Bill ought to clearly provide for a framework (not a prescribed policy) within which procuring institutions must determine and implement their procurement policies.
Draft paragraph 2(2)*(c)*:	This paragraph provides that the uniform treasury norms and standards must, amongst other things, advance transformation, beneficiation and industrialisation. These issues should not be included as part of Norms and Standards. A clear distinction must be drawn between the Norms and Standards and the preferential procurement framework contemplated in section 217(3) of the Constitution.	This paragraph should be deleted.

Draft clause 3:	The draft clause is fragmented and confusing and must be clarified. It must also be specifically indicated why certain parts of the Bill would only apply to certain institutions. There should furthermore be alignment with other applicable laws, for example section 217(1) and section 239 of the Constitution, and the PFMA.	This draft clause must be reconsidered and redrafted.
Draft clause 3(2):	This draft clause creates the impression that the rest of the Bill is not applicable to Parliament and provincial legislatures. Clarity should be provided in this regard.	Clarity must be provided.
Draft clause 3(3):	The inclusion of donor or grant funding into the scope of this Bill can become problematic if it is not distinctly and carefully dealt with. Donor funding might come with certain conditions, which may include aspects of procurement transactions. The donor of the funding is voluntarily doing so and is therefore in a position to insist on its vision of the procurement process or to refuse to donate the funding. The Bill does not carefully consider and address this fact. It should also be borne in mind that requesting an exemption under this draft clause would result in delays.	The Bill must deal specifically and carefully with procurement through donor and grant funding, not generically. Care must be taken not to disincentivise donor or grant funding. National Treasury should consider issuing a framework or policy on the interaction between procuring institutions and donor or grant funding. Subsection (3)(c) should be reconsidered and reworded to expressly exclude subcontracting arrangements.

	The words "*on behalf of*" in subsection 3*(c)* are also vague and unclear, and it is not certain whether they include subcontracting. If so, this would introduce significant legal uncertainty into projects and the contracting space.	
Draft clause 3(4):	Parliament should consider the constitutionality of this trumping provision, especially as some of the legislation being subordinated by this draft clause, such as PAIA, PAJA and the PFMA and MFMA, is constitutionally-envisaged legislation which accords a higher status in our law than ordinary legislation. This is especially egregious when it is recalled that the Bill defines "*this Act*" as including the regulations, codes of conduct, instructions and notices under the Bill (once enacted). The effect of this is that, for example, a code of conduct or instruction by the PPO or a Provincial Treasury would trump principal legislation, including constitutionally-envisaged legislation. The constitutionality of this should be considered. We do not recommend that this draft clause provide for the Bill, once enacted, to trump the PFMA, MFMA	This draft clause should exclude constitutionally-envisaged legislation such as PAIA, PAJA, the PFMA and the MFMA.

	PAIA, POPIA and other constitutionally-envisaged legislation when there is a conflict. Importantly, the PFMA and MFMA both have trumping provisions of their own, equally if not more strongly worded than the Bill, and as indicated in our other comments (including our general comments) it is not possible to separate procurement from fiscal and financial matters, so it is entirely unclear how these trumping provisions would apply in practice, leading to legal and practical uncertainty.	
Draft clause 4(1):	It is important to ensure that section 216 of the Constitution (which deals with Treasury control) is adhered to. **We are concerned that the powers of the National Treasury, as contemplated in section 216(2) of the Constitution and the PFMA, is usurped by the PPO.** See our general comments above in this regard.	We propose that clarity should be provided in respect of the matters addressed in the left column.
Draft clause 4(2):	There is no indication in the Bill as to who would be the Head of the PPO. We only noted one reference in the Bill to the Head of the PPO.	The draft clause should be reconsidered and reworded, and provision should be made for the powers and duties of the Head of the PPO, if this position is to be retained in the Bill.

	It is not clear who would be responsible or accountable to fulfill the functions of the PPO. There is therefore no reference in the Bill to the establishment of this position or to the how an appointment is to be made to this position. Issues that must be addressed include the following: (i) How will the Head of the PPO be appointed? (ii) What will be considered when such person will be appointed? (iii) What would the authority and functions of the Head of the PPO be? The term "officials" in this clause also does not align with the defined term "*official*" which does not include an official of the PPO.	
Draft clause 5:	In the past, instructions received from National Treasury and the OCPO have proven problematic, as the National Government sphere is very removed from the actual service delivery work being done by, and market dynamics relating to, the other spheres of government, and at provincial level the requisite	This draft clause should be reconsidered and reworded.

	capacity from a skills perspective has not been available. It is important to note that there are no bodies similar to the PPO within provincial treasuries. The proposal in the Bill to empower the PPO to issue binding instructions on other spheres of government, especially local government, is not constitutionally sound as it does not respect the constitutionally envisaged autonomy of the other spheres of government from National Government and exceeds the constitutional mandate provided to National Treasury.	
Draft clause 5 read with draft clause 6, 25, 30 and 31:	Currently, National Treasury instructions are legal instruments despite being created at the administrative level rather than the executive level. All of these instruments appear to be at the same level of binding legal status, thereby creating confusion and mayhem in operational practice. The proposed draft clauses appear to perpetuate this same problem.	It is proposed that these provisions be reconsidered.

Draft paragraph 5(1)*(a)*:	The National Treasury is responsible for expenditure control in each sphere of government. Each accounting officer or accounting authority is responsible for the financial management of their respective procuring institutions. How is it envisaged that draft clause 5(1) is to be reconciled with the PFMA and the MFMA in that regard? See our general comment on the institutional structure of the PPO in this regard.	It is proposed that this provision is reconsidered.
Draft subparagraph 5(1)*(c)*(ii):	How would this be done? The provision must be clarified.	Clarity should be provided.
Draft paragraph 5(1)*(f)*:	Draft clause 31 states that procuring institutions must, to the extent possible, use technology for the implementation of the Act. Given the possibility that this clause may be construed as requiring widespread use of technology, this clause should be limited to appropriate use and support. What is appropriate will depend on the unique circumstances of each procuring institution. The PPO should, instead of promoting the use of technology in	It is proposed that the provision should be to require the PPO to support (rather than just promote) the use of technology and innovation and learning towards modernisation of the public procurement system.

	procurement, provide the necessary support to institutions to use technology. The capability to accurately capture, analyse and act on information in the procurement space is critical. The capabilities of the Central Supplier Data base, if it to be retained, should be expanded to include information on: • more in-depth geographic location with a verification procedure; and • suppliers' history of contracting with institutions.	
Draft paragraph 5(1)*(h)*:	The PPO must, in terms of this provision intervene by taking appropriate steps to address a material breach of the Act by an procuring institution "*as may be prescribed*". What constitutes a material breach of this Act is not clear. This not only introduces legal uncertainty but permits the Minister to determine, without much limitation and without guidance, what constitutes a material breach of this Act. Section 6(2)*(f)* of the PFMA is aligned to section 216(2) of the Constitution and empowers the National Treasury to intervene by taking appropriate	It is proposed that this provision is reconsidered and redrafted to be aligned with the PFMA and the Constitution, and clarity must be provided as to what steps may be taken and what must be prescribed.

	steps to address a serious or persistent material breach of the PFMA by an institution. How is it envisaged that the role of the PPO in this draft clause is to be reconciled with the role of the National Treasury in terms of the PFMA. See our general comment on the institutional structure of the PPO in this regard. Such power cannot be conferred on the PPO in the Bill as this would not be aligned with the applicable provisions of the PFMA and Constitution. It is furthermore not clear what steps may be considered to be appropriate to address a material breach of the Act by a procuring institution. It is also not clear what would be prescribed, that is, if it would be the steps that may be taken or the material breach which may result in the intervention or the intervention itself.	
Draft clause 5(1)*(i)*:	As it currently reads it appears that the PPO would be creating and maintaining more than one database.	It is proposed that the provision should be amended as follows: "*(j) create, maintain and publish ~~one or more databases~~ a*

	Reference is however only made to the database for prospective suppliers in the Bill. It is proposed that the provision specifically refers to the database for prospective suppliers. Clarity is required on what will happen with the current databases that are used. More specifically, does the draft clause envisage the disestablishment of the current Central Supplier Database and the establishment of a new supplier database? Clarity is required in this regard.	*database of prospective bidders ~~as envisaged in this Act~~*."
Draft paragraph 5(2)*(a)*:	We have a concern with the PPO issuing binding instructions. Such instructions should be issued by the Minister as the Head of the National Treasury.	Delete the draft subclause.
Draft clause 5(2)*(c)*:	What is its purpose of the model policy and what is its legal status? Is the model policy simply a recommended procurement policy? The Western Cape Government is certainly opposed to it being a mandatory policy.	
Draft paragraph 6(1)*(b)*:	A provincial treasury must, in draft paragraph 6(1)(b), take appropriate steps to address a material breach of the Act by an institution within its province "*as may be prescribed*".	It is proposed that the Bill provides guidance on what should be taken into consideration, on an objective basis, when determining whether

	The term "material breach" is not defined in the Bill. Given the governance arrangements determined in terms of the PFMA, it is unclear what is envisaged by requiring a provincial treasury to "intervene by taking appropriate steps". Although this authority is conferred on a provincial treasury in terms of section 18(2)(g) of the PFMA, clarity is required in respect of what would be considered as "a serious or persistent material breach", "intervene" and "appropriate steps". This not only introduces legal uncertainty but permits the Minister to determine, without much limitation, what these terms mean. It is not clear what would be prescribed, that is, if it would be the steps that may be taken or the material breach which may result in the intervention or the intervention itself. It should also be specified how this provision interrelates with draft clause 5(1)(*h*), that is, when the PPO would be empowered to intervene and when a provincial treasury would be able to so intervene.	conduct constitutes *"a serious or persistent material breach"*. It is proposed that the Bill must provide clarity on what is meant by *"intervene"* and "*appropriate steps*", and should be clear on the interrelation between interventions by provincial treasuries and interventions by the PPO or National Treasury. In this regard, the prescripts for interventions contemplated in sections 100 and 139 of the Constitution must be respected.

Draft paragraph 6(2)(a):	Clarity is required as to which institutions are intended to be bound by the instructions mentioned in this draft clause. This draft clause has the effect of limiting the autonomy of a provincial treasury to issue instructions in terms of the PFMA. The draft clause is problematic in this regard because it leads to the conclusion that a provincial treasury must abide with instructions issued by the PPO and cannot deviate from those instructions since the provincial instructions are required to be consistent with the instructions issued by the PPO. It is submitted that, like in the case of the PPO, a provincial treasury should be empowered to issue instructions that are not inconsistent with the Act rather than with the instructions of the PPO. The powers and functions of a provincial treasury in terms of section 18 of the PFMA in so far as procurement is concerned have been redefined by this draft clause without including all of the powers that provincial treasuries currently have under section 18 of the PFMA. If the intention is for this draft clause to prevail over the PFMA, as purportedly provided in draft	It is proposed that draft paragraph 6(2)(a) is reconsidered.

	subclause 3(4) of the Bill, then the effect of this draft clause is to limit the power of a provincial treasury to issue instructions. What is the rationale for this? If that is not the intention, then clarity must be provided as to how the disjuncture between this draft clause and section 18 of the PFMA is envisaged to be reconciled.	
Draft clause 6(3):	The Minister responsible for Public Works is empowered to issue regulations regarding any matter that is required or permitted to be prescribed in terms of the CIDB Act or in relation to any power granted or function or duty imposed by the CIDB Act. Any provincial treasury instructions issued must be cognisant of the need to be consistent with the CIDB Act and any regulations made by the Minister for Public Works in terms thereof in order to avoid any potential conflict between the two instruments.	It is proposed that this provision should be amended as follows: "*(3) A provincial treasury may issue different instructions in terms of subsection (2)(a) for—* *(a) different categories of procuring institutions; and* *(b) different categories of procurement, subject to the Construction Industry Development Board Act*."
Draft clause 8:	An accounting officer and accounting authority must ensure that officials working within the Supply Chain Management office are suitably skilled, qualified and trained. This obligation of an accounting officer or accounting	It is proposed that the draft clause is reconsidered and redrafted accordingly.

	authority should be included in the draft clause.	
Draft paragraph 8(1)*(d)*:	At the moment, National Treasury and Provincial Treasuries are not always consistent in terms of the issuing of requirements as it relates to providing procurement information, which creates audit challenges for departments.	The procurement information to be provided should be standardized by each provincial treasury.
Draft paragraph 8(1)*(e)*:	This draft paragraph repeats what has been stipulated in draft clause 27(a) to a large extent. It is not clear what steps may be taken and whose non-compliance should be prevented. It is assumed that this refers to officials of a procuring institution and any bidder participating in procurement processes of a procuring institution. Clarity should however be provided in this regard. The draft paragraph is also unclear on what counts as a step preventing non-compliance with the Act, and whether this would also include steps taken after a non-compliance has been identified, to manage its consequences and hold those responsible accountable. Disconnecting procurement from the construct of financial management in the PFMA creates	The duplication should be deleted.

	anomalies that must be taken up in the Bill as a separate system of controls and risk mitigation. We again reiterate our previous comments regarding the undesirability of amputating procurement from the systems relating to financial matters governed under the PFMA and its regulations.	
Draft clause 8(2):	Draft clause 8(2) empowers a procuring institution to reconsider its own decision after it has already been taken, without resorting to an application to court to have the decision set aside. This is a statutory exception to the *functus officio* doctrine, which holds that an empowered official or body who takes a decision in terms of that power is not lawfully empowered to reconsider and change that decision, as it has exhausted its function. It is acknowledged that, in law, a statute may authorise departure from the *functus officio* doctrine. However, one of the main goals underlying this doctrine is to provide certainty for affected parties who are relying on that decision and require that certainty to conduct their affairs in accordance with the decision.	This draft clause should either be deleted or significantly curtailed, in line with section 62 of the Local Government: Municipal Systems Act 32 of 2000, to provide that no variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

	It is submitted that this draft clause will result in affected persons who relied on the procuring institution's decision, potentially to their detriment and prejudice, being left without the protection of that legal certainty, in circumstances which may not be their fault. For example, a successful bidder who relies on the award to conclude a contract and spend resource and effort to implement the contract, would be left with wasted time and costs if the award was reconsidered and rescinded on the basis of an error of fact or law in the procurement process, which is likely not the fault of the bidder. Furthermore, a rescinded award would result in the subsequent contract becoming invalid or its legal status being very uncertain, which is not always in the public interest, especially where a contract has already been materially implemented, such as a half-constructed building project. See our comment on draft paragraph 11(2)*(b)* for comparison.	
Draft clause 9(1):	The word "code" must be plural as separate codes of conduct will be drafted for separate entities.	The provision must be amended as follows:

	Clarity is required on whether the code is envisaged to be issued as part of the standard bid documents. It is submitted that a code of conduct should not be issued for suppliers and bidders. The reference to "suppliers and bidders" should thus be deleted for the following reasons: • What would the consequences be if they do not comply? • A code of conduct is generally binding on, for example, employees of an organisation, members of an organisation or community, learners of a school, etc, and cannot be imposed on non-employees, persons who are not part of the organisation or community or school. • The basis on which an institution is willing to award a bid, enter into a contract and addresses non-compliance with a procuring institution's requirements should be set out in the invitation to bid. Draft clause 15 of the Bill sets out the grounds on which a debarment order may be issued against a supplier or bidder. This is adequate sanction against a bidder or supplier.	"An accounting officer or other official, a member of an accounting authority, a bid committee or the Tribunal,~~ a bidder or a supplier~~ or any other person, involved in procurement in terms of this Act,~~ must comply with the prescribed code of conduct.~~ must comply with the ~~prescribed~~ codes of conduct prescribed in terms of this Act." The Code of Conduct should be supplemented with additional guidance documents, or the code should include sufficient detail including application guidance on safeguards to be implemented when threats are identified. The Bill should include measures to be taken in relation to the procurement transaction which has been reported as an unlawful act by an affected person.

Draft clause 9(2):	It is unclear what "*the applicable procedure*" means in this draft clause and whether the details of the procedure will be prescribed in the code of conduct or by other regulation. It is also unclear why draft clause 9(2) excludes bidders and suppliers, but draft clause 9(1) includes them.	This draft clause should be reconsidered and redrafted. The Bill should stipulate that the procedure will be prescribed in the Code of Conduct.
Draft clause 11(2):	What mechanism will be provided to departments to verify such information? Will the PPO conduct the verification of all bidders and suppliers prior to registration on the database? What mechanism will be provided by the PPO to determine if a declaration is false or not? What is the recourse should a bidder or supplier submit a false declaration?	
Draft paragraph 11(2)*(b)*:	It is not recommended that a bid which has already been awarded be treated as invalid as a result of the submission of a false declaration, if this is not in the public interest. It is not in the procuring institution's power to ensure that every declaration is true. A procuring	The paragraph should be reconsidered and redrafted to provide that a bid is invalid if the bidder submitted a false declaration, but a contract which was awarded as a result of the bid remains valid and binding on the parties despite the false

	institution may only discover that a declaration is false towards the end of a contract and after significant efforts and resources have been used by all parties in implementing it. It would not be in the public interest for that awarded contract to be invalid in law. Furthermore, the effect of the bid's invalidation would be that the contract would be legally void from the outset, and therefore the procuring authority may be at risk of a finding of an audit finding of irregular expenditure despite the failure to conclude a valid contract being solely the supplier's fault.	declaration unless a court decides otherwise in the public interest.
Draft paragraph 11(2)*(b)* read with draft clause 11(1):	Given that subsection (1) places the broad and onerous duty on procuring institutions to take steps to identify automatically excluded persons in terms of draft clause 13, their immediate family members, what mechanisms are available to test whether the declaration contemplated in draft subclause (2) is true or false?	Clarity is required on what mechanisms will be available to ensure that procuring institutions can achieve the onerous burden placed on them by subclause 11(1) read with draft subclause 11(2)(b). National Treasury should consider enhancements to the Central Supplier Database (CSD) for bidders to also complete the declaration of interests on the system given that the CSD interfaces amongst other with SARS, CIPC, Department of Home Affairs, Banks and other institutions.

Draft clause 11(3):	Draft clause 11(3) refers to a "*person related to…*" These words appear multiple times elsewhere in the Bill. This is too vague. More detail should be provided in this regard. The words "*direct or indirect personal interest*" are too restrictive and may be interpreted to exclude other interest that are of a financial nature. Clarify is required that this provision applies to a decision related to a procurement process.	It is proposed that the draft clause 11(3) is reconsidered and redrafted. It is proposed that draft clause 11(3) is amended to refer to "a direct or indirect personal or financial interest". A definition for a "*person related to*" should be included in draft clause 1.
Draft paragraph 11(3)*(a)*:	Provision must be made that the disclosure must be in writing. The same comment applies to draft clause 11(4). The words "*on notification of a matter being brought to the attention of the bid committee*" is confusing.	It is proposed that draft clause 11(3)(a) is reconsidered and redrafted to provide that the disclosure must be in writing, that disclosure must be brought to the attention of the bid specification committee as well, and to provide clarity on what is meant by "*on notification of a matter being brought to the attention of the bid committee*".
Draft paragraph 12(1)*(a)*:	It is submitted that the words "*interfere with, or*" must be deleted because it is permissible to interfere based on good reason or to raise valid concerns.	It is proposed that draft clause 12(1)(a) is redrafted.
Draft clause 13:	Officials of national and provincial procuring institutions are governed by the Public Service Act, 1994. Regulation 13(c) of the Public	Draft clause 13 must be reconsidered and redrafted to take into account the exceptions

	Services Act Regulations, 2016, (PSR), prohibits any employee from conducting business with an organ of state, or holding a directorship in a public or private company doing business with an organ of state unless the employee is a director (in an official capacity) of a company listed in schedule 2 and 3 of the PFMA. Draft clause 13 fails to consider the exclusions provided for in the PSR. None of the provisions of the Public Service Act, 1994, are proposed for repeal. There is clearly a disjuncture between the Bill and the PSR in that draft clause 13 precludes all officials or employees of organs of state from submitting bids whilst the PSR makes provision for exceptions. Despite draft clause 3, it is not clear how this disjuncture will be practically resolved since the Public Service Act, 1994, is the specific legislation on human resources rules regarding officials in the public service and the issue at hand is clearly a human resources issue as opposed to a procurement issue.	provided for in the Public Service Act, 1994, and its regulations.
Draft clause 13(1)(j):	The words "*controlling body*" are vague and unclear.	This draft clause should either be reconsidered and redrafted or a definition of "controlling body" should be inserted in draft clause 1.
Draft clause 13(2):	This draft clause is strict and does not allow for any instance where the	Consideration should be given to providing suitable exemptions for

	non-executive member contemplated in these draft clauses declares and discloses all information necessary for the procuring institution to determine, after a full due diligence process, that no conflict of interest or other good reason exists to reject that person's bid.	the non-executive member contemplated in these draft clauses where the procuring institution completes a full due diligence check and determines that no conflict of interest or other good reason exists to reject that person's bid.
Draft clause 15:	In draft paragraph 15(3)(c) only the action "*connive to interfere*" is included - the word "interfered" should be added as well. The word "*connive*" should be "conspired". Additionally, because debarment will affect the rights of bidders and suppliers, it is proposed that the period for which the PPO may debar is carefully considered and subjected to limitations so that the period of debarment is proportionate to the offending conduct, that is, only severe cases of offensive conduct on the part of a bidder or supplier must be sanctioned with the longest period of debarment.	Draft paragraph 15(3)(c) should be amended to include both conspiring to interfere and interfering. Draft clause 15 must be amended to make it clear that the actions and decisions taken by the PPO are subject to section 3 of the PAJA.

Draft clause 15:	Clarity is required as to whether this process replaces the current Register of Restricted Suppliers? Also, will the debarment order be available on the CDS or E-Portal? These draft clauses seemingly require a more manual process to be followed and it appears as though processes are regressing, instead of progressing.	
Draft clause 15:	This draft clause does not deal with the overlap between the conduct in draft clause 15(3) and the related rights and duties of role-payers in the debarment process, and conduct which engages the jurisdiction of the Competition Commission and Competition Tribunal.	These draft clauses should be reconsidered and redrafted to clarify their overlap with the jurisdictions of the Competition Commission, Competition Tribunal and the Prevention and Combating of Corrupt Activities Act.
Draft clause 15(3):	We are concerned about the obligation placed on the procuring institution to debar a bidder or supplier in the listed circumstances. We propose that the word "*must*" should be deleted and replaced with the word "may". The relevant circumstances and reasons must be taken into account. Certain of the listed circumstances should also not result in the debarment of a supplier or bidder as doing so would be unfair.	The word "*must*" in this draft subclause should be changed to "may".

Draft clause 15(3)*(d)*:	This draft clause does not clarify whether the commission of the offence must have resulted in a conviction in a court of law, or whether the procuring institution is empowered to determine by itself whether the allegation is true.	It is proposed that the words "*committed any offence*" should be replaced with "is convicted of committing any offence".
Draft clause 15(3)*(e)*:	This draft clause requires the procuring institution to debar a supplier that fails to discharge a material contractual obligation not due to circumstances beyond the control of the supplier. The Bill does not define what constitutes a "*material contractual obligation*". In the absence of such definition, the procuring institution will have a discretion to determine what constitutes a material contractual obligation. Clarity is required on the conduct that a bidder or supplier must conform with to comply. The phrase "*circumstances beyond the control of the supplier*" are wide and vague, which in the past has led to confusion in the practice of debarment. This sentence is also written in the double negative, which is avoidably confusing.	Draft clause 15(3)(e) must be reconsidered and should be amended to provide clarity and be supported by a clear definition of a "material contractual obligation" so that it is foreseeable what would result in a debarment. The phrase "circumstances beyond the control of the supplier" could be reconsidered and reworded to give guidance on what would amount to such circumstances. The draft paragraph should also be reworded as it is written in the double negative, which is avoidably confusing.

Draft clause 15(5):	It is unclear why the procuring institution is not also empowered to reduce or revoke the debarment order of its own accord, rather than only on application by an affected person. If it is not empowered by law to do so, it will be forced to initiate a self-review of the decision in Court.	Draft clause 15(5) should provide that the procuring institution may of its own accord reduce or revoke the debarment order.
Draft clause 15(8):	This draft clause does not provide for minimum periods of debarment.	Consideration should be given to empowering the Minister to set minimum periods of debarment for certain categories of misconduct.
Draft clauses 16 to 24:	From the heading of draft clause 16, it appears that this clause is intended to create the framework contemplated in section 217(3) of the Constitution. The draft clause however contemplates implementing preferential procurement "*in accordance with the objects of this Act and the framework in this Chapter*." Draft clause 25 stipulates that the "*Minister must prescribe a framework within which procuring institutions must implement the procuring system, referred to in section 8(1)(b)…*" . There is thus confusion in the Bill regarding whether the preferential	

	procurement framework is provided for in Chapter 4 or whether the Minister is to prescribe such framework. It must be clearly provided in the Bill that an organ of state is permitted but not obliged to implement preferential procurement, unless in the particular circumstances of that procurement the requirements of section 217(1) of the Constitution require it. The framework contemplated in section 217(3) of the Constitution must be appropriately and adequately provided for. The Bill currently perpetuates the inflexible, rule-driven approach previously taken in the Preferential Procurement Regulations, 2017, which does not set a framework and is therefore unconstitutional. The Bill should clearly state that the determination of a preferential procurement policy lies with each procuring institution. The heading of Chapter 4 of the Bill and draft clause 16 refers to preferential procurement but the body of the draft clause only refers	

	to a procurement policy. To eliminate the confusion, it is important that the draft clause refers to a preferential procurement policy consistently.	
Draft clause 16(1):	Section 217(3) of the Constitution contemplates a framework, created by national legislation, within which a preferential procurement policy may be implemented. The wording in the draft clause must be aligned to section 217(3) of the Constitution.	The wording in the draft clause must be aligned to section 217(3) of the Constitution.
Draft clauses 17, 18, 19 and 21:	The impact of these draft clauses would be the exclusion of certain population groups from participating in public procurement opportunities. This is contradictory to the spirit and purport of the constitutional provisions, which permit preferential procurement as a mechanism to remedy the impact of Apartheid through empowerment, without excluding any person or group of our population from participating in economic opportunities. Another impact of these clauses would be that preferential procurement would be prioritised to such an extent that effective service delivery may be at risk, for example through clause 18, which provides for prequalification criteria for	The draft clauses must be removed and replaced with a framework in which a procuring institution may, at its discretion, determine its own preferential procurement policy.

	preferential procurement. Competent service providers, who do not comply with such prequalification criteria, would not be eligible to participate in the procurement process. It is also important to note that the compulsory use of subcontracting for purposes of preferential procurement has proven to produce enormous risks, including legal risks, for infrastructure projects and procurement. While the constitutional imperatives of preferential procurement and redress must be adhered to, it should not be done in isolation and without also considering other important constitutional provisions, such as– 1. section 217(1) of our Constitution, which requires that a system within which an organ of state (or any other institution identified in national legislation) contracts for goods or services must be fair, equitable, transparent, competitive and cost-effective; and 2. section 9 of our Constitution, which guarantees everyone's equality before the law and equal protection and benefit of	

	the law. Although fair discrimination is permissible in certain circumstances it is highly questionable that the Bill's exclusion of certain people and population groups would be a justifiable form of fair discrimination. For these reasons, reasons given elsewhere in this document and those stated in the general comments, these draft clauses are unconstitutional and must be removed.	
Draft clause 17:	From a practical perspective, it is unclear what evidentiary proof will be requested from suppliers to evaluate whether they meet the criteria. This was already an issue regarding the implementation of the Preferential Procurement Regulations, 2017. Furthermore, the draft clause now refers to "complementary goals", however it is not clear what this term refers to and how it would apply in practice.	This draft clause must be removed.
Draft clauses 18, 19 and 20:	These draft clauses also refer to "complementary goals", however it is not clear what this term refers to and how it would apply in practice.	This draft clause must be removed.

Draft clause 20:	Any envisaged criteria relating to the determination of what would constitute local production should serve to enable the localisation of supply chains so as to capacitate geographic specific areas and to utilise local economic resources, while transparently balancing these concerns with critical value for money imperatives. While the criteria should be crafted in conjunction with the Department of Trade and Industry (DTI) to align with the local content designations as determined by DTI, the Bill must carefully and transparently balance this approach with affordability and value for money concerns. It is unclear what the Bill considers to be local. Although the term local production refers to the whole of South Africa, consideration should be given to apply discretion to geographic specific areas within certain localities should an empowerment impact assessment determine the need and opportunity for local economic empowerment and this is transparently justifiable and affordable relative to value for money. This will provide the opportunity for procuring institutions	

	to stimulate economic activity within a specified geographical area.	
Draft clause 22 to 25:	The intention of the Bill is to create a single regulatory framework for public procurement to eliminate fragmented procurement prescripts. This purpose will be best achieved if the relevant provisions are contained in the Bill as far as it is possible as opposed to in regulations made in terms thereof. If the Minister prescribes on the issues referred to in the draft clause, the procurement prescripts would still be fragmented. This will contradict this object of the Bill. Empowering the Minister to prescribe on all these matters also places too much power in the hands of the Minister.	
Draft clauses 22 and 23:	The words "sustainable development", "beneficiation", "innovation" and "geographical area" are not defined in the Bill. It is not clear how the relevant provisions will be applied in practice.	The words mentioned in the comments should be defined, or adequate detail regarding their meaning should be included in the Bill.
Draft clause 25(3):	It is submitted that clarity must be provided on the difference between an institution's supply chain management system and the procurement policy.	Provide clarity on the difference between an institution's supply chain management system and the procurement policy.

Draft clause 25(3):	There are other matters that an accounting officer may also wish to include into a Department's supply chain management system and provision should be made to empower an accounting officer or accounting authority to have such a discretion. In respect of draft paragraph 25(3)*(d)* it is submitted that procurement planning and budgeting is discussed and provided for in Part 3 of the chapter on demand management and should not be listed separately in this draft clause as it forms part of demand management. Additionally, the categories provided for in draft clause 25(3) include aspects which relate to supply chain management, rather than just procurement. The words are not interchangeable as "supply chain management" is wider than "procurement".	It is proposed that the provision should be amended not only to require certain categories of matters to be included in the procuring institutions' procurement system, but also to empower the accounting officer or accounting authority to include any relevant additional matter.
Draft paragraph 25(3)*(k)*:	The word "*procurement*" must be substituted with the words "supply chain".	It is proposed that the provision should be amended to read: "*(k) monitoring and assessment of ~~procurement~~ supply chain performance;*"

Draft clause 25(4):	In terms of draft clause 25(4) of the Bill, the PPO may, by instruction, determine standard bid documents. No clarity is provided in this draft clause as to what extent the standard bid documentation can be altered by the procuring institution to suit its specific needs and to allow for desirable innovation. For example, the standard bid document should not prevent a procuring institution from inserting a draft contract into the invitation to bid (so that all bidders are aware of the terms of contract which they will be expected to abide by and to price accordingly) which contains provisions specific to that procurement institution's needs.	The Bill should also explicitly provide for some discretion for the procuring institution where necessary or desirable.
Draft clause 25(6):	Municipalities currently have their own databases. How is it envisaged that these current databases fit into the envisaged database in this clause? Municipalities maintain their own databases to promote previously disadvantaged individuals and small undertakings. How will the database envisaged in this clause assure that that objective is achieved? Clarity must be provided.	

Draft clause 26:	This draft clause is not aligned to the Government Immovable Asset Management Act, State Land Disposal Act and provincial land administration legislation in respect of the acquisition and disposal of state land, and does not ensure that the regulations will also align with those laws.	This draft clause must be reconsidered and redrafted to align with relevant laws.
Draft paragraph 27*(a)*:	This draft clause repeats what has been stipulated in draft clause 8(1)*(e)* to a large extent. It is not clear what steps may be taken and whose non-compliance and abuse should be prevented. It is assumed that this refers to officials of a procuring institution and any bidder participating in procurement processes of a procuring institution. Clarity should however be provided in this regard. The draft paragraph is also unclear on what counts as a step preventing non-compliance with the Act, and whether this would also include steps taken after a non-compliance has been identified, to manage its consequences and hold those responsible accountable. Disconnecting procurement from the construct of financial management in the PFMA creates anomalies that must be taken up in the Bill as a separate system of	The duplication provided in this draft paragraph when read with draft paragraph 8(1)*(e)* should be deleted. The draft paragraph should also provide for clarity on what steps may be taken and whose non-compliance and abuse should be prevented.

	controls and risk mitigation. We again reiterate our previous comments regarding the undesirability of amputating procurement from the systems relating to financial matters governed under the PFMA and its regulations.	
Draft clause 27*(b)*:	The word "*interferes*" must be clarified.	It is proposed that the draft clause is redrafted to clarify what "interferes" means in its context.
Draft clause 27*(c)*:	The paragraph imposes an obligation on the accounting officer or accounting authority of a procuring institution to investigate any allegation against an official or other role player of corruption, improper conduct or failure to comply with the supply chain management system. Accordingly, even scurrilous, and vexatious allegations which have no factual or legal basis whatsoever must be investigated if this section is to be retained. It is submitted that, as per the case of *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty)Ltd and Another 2011 (1) SA 327 (CC),* allegations which give rise to a <u>reasonable suspicion</u> of corruption, improper conduct or	It is proposed that the provision should be amended to set the standard of reasonable suspicion as the basis to trigger the requirement for an investigation.

	failure to comply with the supply chain management system should be required to be investigated. This will guard against unfounded accusations being made by unsuccessful bidders simply for obstructive purposes.	
Draft clauses 27*(d)* and *(e)*:	The recommended bidder must also be given an opportunity to make representations in line with the requirements of the PAJA.	It is proposed that the following wording should be included at the start of the provisions: "*subject to the provisions of the Promotion of Administrative Justice Act…*"
Draft clauses 27 *(d)* and *(e)*(i):	Concerns are raised that these draft subclauses could result in accounting officers or accounting authorities being compelled to reject a bid or cancel a contract based on misrepresentation notwithstanding that such misrepresentation may be immaterial. It is proposed that the term "*misrepresentation*" is defined so that it precludes representations which are not material in nature and, if a higher standard is required, which are made in good faith.	It is proposed that the definition for the term "misrepresentation" as proposed is provided for in draft clause 1.
Draft clauses 27*(d)* and 27*(e)*(i):	There is growing awareness and concern about the importance of the reputations of procuring	Draft clauses must be introduced to expressly empower procuring institutions to reject bids and

	institutions in ensuring, among other things, the "buy-in" of ratepayers and communities into that institution and its objectives. In *Minister of Police and others v Silvermoon Investments 145 CC and others [2020] 3 All SA 250 (KZD)*[5] the Court cited an article in the *Dalhousie Law Journal*[6] which explains that a government organisation's poor reputation may cause a decrease in "buy-in" from its subjects, which may cause a decrease in cooperation or increase in resistance to that organisation, making it harder for them to carry out their objectives. This appears to be judicial recognition of the notorious reality that public bodies have a now critical interest in protecting and improving their reputations in order to facilitate meeting their service delivery objectives. It is therefore critical that procuring institutions be empowered to reject bids and cancel contracts which pose objective, material risks to those procuring institutions' reputations. Examples include bids and contracts where the bidder is owned or controlled by gang members.	cancel contracts which pose objective, material risks to those procuring institutions' reputations, after following a procedurally fair process. If this is not supported, the draft clause should at least empower a procuring institution to approach a court to obtain a court order setting aside the bid or contract in the public interest, on the basis that it poses a reputational risk to the institution.

[5] *Minister of Police and others v Silvermoon Investments 145 CC and others* [2020] 3 All SA 250 (KZD)
[6] Hilary Young "Public Institutions as Defamation Plaintiffs" (2016) 39 *Dalhousie Law Journal* at 249.

Draft clause 27*(e)*:	A distinction should be drawn between irregularities that occurred during the procurement process (which would fall within administrative law) and irregularities that occurred during the implementation of a contract (which would fall within contract law).	This draft clause should be reconsidered and redrafted.
Draft clause 27*(e)*:	This draft subclause stipulates mandatory grounds for cancellation. Subparagraph 21(e)(ii) refers to dishonest actions by "employees or other role players". It may however be possible that such actions had absolutely no impact or influence on the tender or contract. If so, what is the rationale for providing that it is obligatory to cancel even under those circumstances? The draft clause also does not distinguish between material and immaterial conduct by the supplier, and therefore could have the effect of compelling a procuring institution to cancel a contract due to, for example, an immaterial misrepresentation.	This draft clause should be reconsidered and redrafted to ensure that the duty to cancel the contract only arises where a supplier has committed material and relevant misconduct justifying the cancellation.

Draft clause 27*(e)*(i):	Clarity is required on whether the cancellation of the contract on the circumstances envisaged in this draft clause is in respect of any contract like in paragraph (e) or is it in respect of the particular contract that is the product of the award. This draft clause refers to the "particular" contract whereas paragraph (d)(ii) refers to "any contract". The Memorandum on the Objects of the Bill provides no insight in this regard. A procuring institution should have the authority to seek a court order preventing the cancellation of a contract, even if there has been a misrepresentation, falsified document, or fraudulent act by the supplier. This is important because sometimes a misrepresentation may only be discovered towards the end of a contract, after significant time and resources have been invested by all parties. Cancelling such a contract, especially if it has serious implications for service delivery, health, or other areas, would not be in the public interest. It's worth noting that the term 'false' in this context lacks clarity, as it could refer to fraudulent documents, untrue copies, inauthentic authorship, or documents containing false information.	It is proposed that draft clause 27(e)(i) is reconsidered and redrafted to, among other things, clarify what is meant by "false documents" and what is meant by "particular". This draft clause should provide that a procuring institution need not cancel the contract if it obtains a court order on the basis that it is not in the public interest to do so.

Draft clause 27(e)(ii):	There should be a link between an official or other role-player and a successful bidder. It would otherwise be unfair to a successful bidder to cancel a contract as a result of an offence on the part of an official or other role-player where there was no link or involvement with the successful bidder.	
Draft paragraph 28(1)*(a)*:	This draft paragraph does not provide for the minimum organisational requirements, competencies and location within the procuring institution. It is impossible for procuring institutions to determine the impact of the requirements in this draft clause without further detail in the Bill, especially because of the extensive list of matters which are left to be determined in regulations.	Details should be provided on the minimum organisational, financial, competency and operational requirements of this draft paragraph, as well as the impact of this clause on the PPOs and PTs which will need to support procuring institutions with the implementation of the Bill
Draft clause 28(2)(c):	The words "*procurement system*" should be replaced with "supply chain management system". The provision stipulates that the official in an institution must report <u>to the procuring institution.</u> Clarity should be provided in respect of who the official should report to, for example accounting officer or	Provide clarity in respect of who the official must report to by redrafting the draft clause to refer to the accounting officer or accounting authority instead of the institution.

	accounting authority. It is submitted that the official should regularly report to the accounting officer or the accounting authority because it is those functionaries that have the responsibility to ensure that the supply chain management system is effective and efficient.	
Draft clause 28(2)(e):	The term "procurement committee" is not defined. It is proposed that the term should be defined. Is the intention that this term was meant to refer to "bid committee"? It is submitted that the procurement unit should provide support rather than advice to a procurement committee on request.	A definition for "procurement committee" is required, or if the intention is to refer to "bid committee", this must be corrected. The word "advice" must be replaced with "support".
Draft clause 29(2)(c):	This draft clause prohibits a committee member from being appointed if they have a conflict of interest, however at the time of the appointment the conflict of interest might not be apparent to the procuring institution or the committee member. The draft clause conflicts with the approach in draft clause 11, which is to require the member to step aside from the committee if the conflict arises, whereas draft clause 29 renders the appointment unlawful at the outset.	Draft clause 29(2)(c) should be reconsidered and redrafted to ensure that appointments with unforeseeable and inapparent conflicts of interest (in other words, appointments which accidently and innocently involve a person who has a conflict of interest) are not unlawful, but rather remedied as contemplated in draft clause 11.

Part 2: use of technology in procurement Information and communication technology-based procurement system	While we support the use of technology in procurement, this may prove to be stifling as well as limiting flexibility and highly technical for the purposes of the Bill.	It is proposed that the Bill addresses technology at a high level and change the "*must*" provision to "may", affording procurement institutions with the ability to be flexible and innovative in this space. Lessons learnt from the IFMS, cost implication and lack of implementation must be considered when shifting control to a central level and its impact on procurement and service delivery.
Draft clause 30:	It appears that the procurement system would be used by all procuring institutions at a national, provincial and local government level. This would require such system to be stable and big enough to accommodate all the users. If such centralised system crashes, nobody in the country would be able to procure, which is a big concern. It may be more advisable to allow for such system at national, provincial and local government level, or in another diversified manner, which may have to be	

	aligned or integrated into the PPO's procurement system.	
Draft clause 30(2)(a):	Will the platform be ready for implementation by the time the Bill is enacted and this draft clause is implemented, bearing in mind that the IFMS is still not available after almost 20 years.	
Draft clause 30(2)(d):	National Treasury's previous instructions require various reporting requirements. If these reporting requirements are to continue under the Bill and subordinate regulations, these reporting requirements ought to be automated and digitised as much as reasonably possible.	
Draft clause 31:	This draft clause is very confusing, especially when read in conjunction with draft clause 30(2)(b). Technical ICT terminology is introduced without being defined. Is this necessary and is it not covered within the SITA Act and regulations?	It should be simplified and clarified.
Draft clause 31:	The procurement of information and communication technology presently resides with SITA. National Treasury should consider voluntary transversal systems for procuring institutions to use in respect of ICT procurement. The impetus to move towards the use of technology in procurement is	This draft clause should allow for flexibility for procuring institutions to tailor their use of ICT to their conditions, in line with the guidance given to them by their Department of the Premier. National Treasury should consider making participation in the transversal systems voluntary.

	a welcome inclusion, however it fails to take into consideration the roles of the Departments of Premiers at provincial levels who are empowered, in terms of the Public Service Act and its regulations, to be custodians of ICT enablement in a Province. Similarly, the role of SITA has not been considered. The provisions in this draft clause stifle the ability and autonomy of provinces to implement ICT mechanisms suitable to their own respective procurement needs. Fast-tracking of e-procurement and IFMS is supported.	
Draft clause31(1):	The draft clause requires procuring institutions to use technology for the implementation of the Act "*to the extent possible*" and to use the different components of the procurement system "*when available*". This creates uncertainty. The following is unclear: o How would it be determined when it would be possible to use the technology or not? o Who would make such determination? o What must happen if it is not possible to use the technology? o Who needs to ensure when the technology would be available?	

	What would happen if the technology is not available?	
Draft clause 31(1):	This draft clause requires procuring institutions to "*when available*" use the compulsory components of the national procurement system. If the national system turns out to be unreliable or regularly unavailable, procuring institutions will face significant challenges in dealing with this uncertainty.	It is recommended that participation in the national transversal ICT system be voluntary.
Draft clause 31(1):	The use of technology should not only be limited to the implementation of procurement methods but the implementation of an institution's supply chain management system. It is submitted that the provision is inappropriately included in the Bill. What technology must be used, with what objective in mind and what are the implications if it is not used? It is proposed that the draft clause is deleted and provided for perhaps in a subordinate instrument.	It is proposed that the draft clause is deleted.
Draft clauses 32 and 33:	PAJA makes provision for fair administrative processes. PAIA provides for access to information held by the State. POPIA must be complied with to protect personal information.	These provisions must be deleted.

	These pieces of legislation must be applied/implemented to allow for access to information, protect personal information, ensure lawful decision-making processes and provide reasons for decisions that were made. In our view, the regulations contemplated in these draft clauses are not required and it would, in fact, aid in promoting corruption, result in the undue influence of officials and inhibit candid deliberations.	
Draft clause34:	All repealed documents should be placed in a specific folder on the website, in a timeous manner, with specific information as to when the document was issued, when it was applicable and when it was repealed.	
Draft clause 35:	The PPO and Provincial Treasury should inform an affected party or procuring institution before information pertaining to the affected party is reported to any of the listed institutions. What is the intent of reporting to the institutions when the Bill does not address what the institutions must do with all the information. This is an administrative burden.	If this draft clause is retained, it should provide for prior notice to the affected party before the information is reported to the listed institutions.

	Noteworthy in this context is the reporting of "deviations" to the Auditor-General, where such documents are still requested at the time of audit from auditees and only to be then assessed at an audit process. Also worth noting that despite the reporting serving no purpose, the AGSA notes non-compliance in the audit reports.	
Draft clause 36:	There may be instances where the public interest may require that the information should be made available to the public in general.	This draft clause should be reconsidered to consider whether provision for public disclosure of certain information should be mandatory in certain circumstances.
Draft clause 36:	The protection of personal information is regulated by various pieces of existing legislation. The applicable legislation will specify how access to the information may be requested and granted.	It is proposed that the draft clause should be deleted.
Chapter 6: General Comments	Please see the general comment with regard to the reconsideration and review of decisions and the proposal in that regard. Section 62 of the Local Government Municipal Systems Act, 2000, is not proposed for repeal. In terms of that section, aggrieved parties have the right to apply for an appeal of a decision by the accounting officer	

	or accounting authority of a municipality. How is it envisaged that the processes of reconsideration and review as provided for in Chapter 6 is to be reconciled with the appeal process in section 62?	
Draft clause 37:	Please see our general comments on the reconsideration process. Without derogating from the general comments, the following concerns are raised in respect of draft clause 37: • All the structures and arrangements for the reconsideration process will place tremendous strain and burden on the public sector to make sound procurement decisions and will inadvertently hamper service delivery. • A delay in procurement does not give effect to the strategic intent of where and how the Western Cape Provincial Government intends to use procurement as an enabler and not as a stumbling block to delivery and accountability. • Apart from a compliant SCM system what is required is a performing one that has business savvy. Over-regulation will not achieve that objective.	It is proposed that this draft clause is reconsidered in line with the proposal contained in the general comments submitted, read with these comments. If the proposals in the general comments are not accepted, then we propose that procuring institutions should have a discretion whether or not to opt into the Tribunal system, to adopt their own system or to retain the *status quo*, after assessing their own circumstances and requirements. We oppose the central, compulsory control the Bill imposes.

	• The proposed Tribunal will also result in increased costs in circumstances where the aim of the Procurement Bill, 2023 is to streamline and simplify the processes at reduced overall cost. • Dispute resolution processes differ for provincial departments and municipalities. Chapter 6 of the Bill is not aligned to the current processes of departments and municipalities and the changes proposed by the Bill may cause confusion. • The reconsideration in terms of draft clause 37 applies to all institutions which, as defined, includes municipalities and their entities. • It is also very concerning that the Bill does not provide for any transitional arrangements if the Bill persists in requiring the establishment of the Tribunal, given that it would take a number of years to be established.	
37 (and all provisions relating to the reconsideration of decisions):	A decision-maker should not be allowed to reconsider a decision that was made.	All provisions pertaining to the proposed reconsideration process should be deleted.
Draft clause 37:	This draft clause will undermine the efficiency of the procurement	This draft clause should be reconsidered.

	process and will require procuring institutions to source additional capacity.	
Draft clause 37 (3):	This draft clause will prevent a contract from commencing until the cooling-off period, which will impact on service delivery especially in instances where the commencement of the contract is critical.	Draft clause 37(3) should be reconsidered.
Draft clause 37(3) and (4):	Regarding subsection (3), if the applicant lodges a PAIA request for information necessary to justify their application for reconsideration, the prescribed timelines in PAIA for this request to be resolved will be far longer than 10 days. It may also take more than 10 days to identify the basis for the reconsideration, take legal advice and formulate the application. These concerns effectively leave the right of reconsideration vacuous. This renders the draft clause vulnerable to legal challenge on the basis that the period is not rationally connected to the purpose of the draft clause, by rendering the right to apply for reconsideration impractical.	Remove this section.
Draft clause 38:	The envisaged decision-making power of the Tribunal is not aligned with what was presented at the PFMA Conference. The review	

	process that was discussed was presented as a means to curtail lengthy court processes and streamlining uniformity and standardisation in procurement processes and decision making.	
Draft clause 38:	Please see our general comments regarding the proposed establishment of the Tribunal and the administrative and financial burdens associated with the proposal. Nothing in the Memorandum of Objects provides clarity on what problems in the existing dispute resolution regime for procurement decision were identified which justify the creation of the Tribunal. It is unclear why the existing dispute regime is not sufficient, and whether the costs and delays associated with the Tribunal can be justified.	The Memorandum of Objects should explain in detail why there is a need for the tribunal and how the adverse effects of its introduction, including cost implications, are justified. It is proposed that the establishment of the Tribunal be reconsidered.
Draft clause 49:	We have expressed our view that the provisions related to the reconsideration process contemplated in draft clause 37 should be deleted. It follows that the Tribunal should not also review such reconsidered decisions.	The provision should be reconsidered in line with our general comments regarding the Tribunal.
Draft clause 49(1):	The impact of the ten-day period provided in this draft clause read with draft clause 55 on service delivery must be considered, especially as this period will apply to	The establishment of the Tribunal must be reconsidered.

	any decision to refuse an application to reconsider in terms of draft clause 37, and will effectively delay the implementation of the contract for a minimum period of 20 days (excluding the time taken to do the reconsideration and for the Tribunal to adjudicate the dispute).	
Draft paragraph 52(1)(c):	Regarding legal representation at the Tribunal, who will be liable for the cost of this representation and how will it be funded? Regarding the costs which the procuring institution and the Tribunal would incur, those implications within current fiscal constraints must be considered.	The establishment of the Tribunal must be reconsidered.
Draft paragraph 53(1)(b):	Decisions falling within the scope of draft clause 37 would conceivably involve decisions of an institution to cancel the procurement process, given the proposed definition of "*decision*". Currently, in terms of the PFMA, the accounting officer may decide to cancel the procurement process. This draft paragraph now empowers the Tribunal to set aside a decision of an accounting officer or an accounting authority. How is this envisaged to be reconciled with the power of an accounting officer or	This draft paragraph must be reconsidered in line with the proposal contained in the general comments submitted.

	accounting authority in terms of the PFMA when the accounting officer and accounting authority is accountable for the decisions of the institution yet their decisions can be set aside on review?	
Draft clause 55:	If a decision does not relate to an award of a bid, but otherwise relates to an ongoing procurement process (for example a dispute regarding the advertised bid specifications or the content of the advertisement), it is not clear whether this draft clause allows for the procurement process to continue while the dispute is resolved.	This draft clause should also address requests to reconsider, or applications to the Tribunal, regarding decisions in ongoing procurement processes.
Draft clause 55:	The stand still process is problematic in that it stops the conclusion of the contract except in emergency situations which are unspecified in the Bill but rather left to determination in regulations, and which are likely to result in extensive litigation as to whether the circumstances in question are an "emergency" as defined in the Bill and comply with the contemplated regulations. Whether or not to allow the contract to continue is better administered through court proceedings, as is currently the case.	It is recommended that this draft clause be removed.
Draft paragraph 55(1)(a):	This draft clause has the effect of delaying the conclusion of an	It is proposed that this draft clause is reconsidered in line with the

	awarded award contract until after the expiry of 10 days after the completion of a reconsideration process where the procurement is subject to a reconsideration pursuant to draft clause 37. The procurement may only be ripe for conclusion of the contract after the expiry of the applicable bid validity period, arguably rendering the offer to contract invalid at the time of acceptance. This may be remedied by including a provision that states that the bid validity period is suspended for the duration of the reconsideration process. This could assist to avoid a situation where the successful bidder is requested to agree to successive extensions of the bid validity period. Successive requests for bid validity period extensions may not always be agreed to by the successful bidder where, for example, the pricing quoted in that bidder's bid is no longer feasible or viable beyond a specific period (for example, where the pricing is influenced by price fluctuations caused by exchange rates and other market forces).	proposal contained in the general comments submitted.
Draft paragraph 55(1)(b):	This draft clause has the effect of delaying the conclusion of an awarded contract until completion	

	of a review where the procurement is subject to a review pursuant to draft clause 49. This could mean that a procurement is only ripe for conclusion of the contract after the expiry of the applicable bid validity period, arguably rendering the offer to contract invalid at the time of acceptance. This may be remedied by including a provision that states that the bid validity period is suspended for the duration of the review process. This could assist to avoid a situation where the successful bidder is requested to agree to an extension of the bid validity period. Requests for bid validity period extensions may not always be agreed to by the successful bidder where, for example, the pricing quoted in that bidder's bid is no longer feasible or viable beyond a specific period (for example, where the pricing is influenced by price fluctuations caused by exchange rates and other market forces). The net effect of possible delays due to conclusions of awarded contracts being made pursuant to reconsiderations or reviews, will be a significant slowing down of government's procurement machinery. Consideration should	

	instead be given to introducing measures to remove obstacles to speedy procurement processes.	
Draft clause 55(2):	As mentioned in the comment below regarding draft clause 64(1)(a)(xi), the concept of emergency procurement is too narrow to address all circumstances where procurement is urgently required and must not be postponed by the reconsideration and review processes mention in subsection (1). It must also be recalled that the impact of not concluding the contract and delivering the services can be the loss of grant funding or donor funding which may severely impact service delivery, and the delay may also result in the need for more costly solutions.	The Bill should reintroduce the concept of lawfully deviating from an ordinary procurement process, especially when the procurement is delayed by protracted reconsideration and review processes. The focus should instead be on risk mitigation and internal control processes to ensure that such deviations are legally justifiable and comply with section 217 of the Constitution. It may suffice in some circumstances to apply corrective actions or consequence management for the abovementioned deviations where they are not required for emergencies as defined.
Draft clause 56:	We are concerned about whether the PPO would have the required capacity to attend to such investigations. We are furthermore concerned about the extensive powers that will be allocated to the PPO to attend to these investigations.	
Draft clause 57:	This is draconian and unconstitutional insofar as it exempts the PPO from having to obtain a warrant before searching premises	

	held by procuring institutions. Also, the draft clause purports to empower the PPO to do so without having any reasonable cause to suspect that the procuring institution has contravened any laws. This draft clause leaves open the door for biased conduct by the PPO against one or another institution, as it does not adequately constrain the PPO's powers to enter and search premises. We are of the view that the South African Police Service should be approached to provide the required services, which they are mandated to fulfill by legislation. The Bill cannot contain provisions aimed at circumventing other existing legislation.	
Draft clause 57:	The PPO is given the authority to perform search functions at the private premises, which is a function normally vested within the criminal justice system. This opens up very significant legal risk for the PPO, which the limitation of liabilities in draft clause 60 does not cover.	This draft clause, read with draft clause 60, should be reconsidered.
Draft clause 59:	The Bill does not stipulate who would be authorised to act as the Head of the PPO or who would be	

	mandated to fulfill the function or act on behalf of the PPO. There is thus no functionary identified who may be able to delegate powers or functions.	
Draft subparagaphs 59 (1)(b)(i) and (ii) and 59(3):	A power may in terms of these provisions be delegated to an official. For practical reasons, a power should be delegated to a holder of a post instead of a specific official.	It is proposed that the draft paragraph is reconsidered and redrafted.
Draft clause 59(3):	It is submitted that an accounting officer or accounting authority should not be permitted to delegate the authority to conclude PPP contracts.	It is proposed that this exclusion should be specifically provided for in the provision.
Draft clause 59(4):	Given the general comment regarding the institutional structure of the PPO and the concerns regarding the confusion that the institutional structure creates, it is submitted that this draft clause is problematic in the following aspect: If the PPO is to be considered as impartial and therefore independent, the PPO, or preferably, the head of a procuring institution, as a holder of an office, would be entitled to delegate powers and assign functions, as the Bill in this draft clause proposes. However, if the PPO is to be	It is proposed that this provision must be reconsidered.

	regarded as a component within the National Treasury, it cannot then be held that the PPO is the delegator. As a component, the delegator in that case is the National Treasury.	
Draft subclauses 59(6) and (7):	It is proposed that draft subclauses 6 and 7 should be combined.	It is proposed that draft subclauses 6 and 7 should be combined.
Draft clause 61(1):	It is submitted that the last portion of draft clause 61(1) which allows for a court order "*that the amount of loss incurred by the complainant be compensated….*" must make reference to draft clause 60 so that it is clear how the provisions relate to each other.	It is proposed that the draft clause must be reconsidered and redrafted.
Draft paragraph 61(1)(b):	This draft paragraph should also refer to the PPO.	This draft paragraph should be amended to refer to the PPO.
Draft paragraph 61(1)(b):	The term "official" is already defined under draft clause 1 as an employee <u>of a procuring institution</u>. It is therefore not necessary to include the words "of an institution" after the word "official" in this draft clause. It is submitted that the draft paragraph should provide that it should not only be a person who interferes with any official of an institution but also of the PPO, that	It is proposed that the provision should be amended to remove the words "of an institution" .

	should be targeted by this provision. This draft paragraph should be reconsidered and redrafted.	
Draft paragraph 61(1)(c):	The phrase "any document required to be sealed" is very broad and could refer to any document whatsoever, whether or not it is <u>in law</u> required to be sealed. Furthermore, it should be noted that there is no other reference in the Bill to any requirement that a document must be sealed. It is submitted that, since the latter part of this draft subparagraph refers to bid documents, consistency should be maintained by: (i) replacing the phrase "sealed bid, including such bids…" with "~~sealed~~ bid <u>documents</u>, including such bid <u>documents</u>"; and (ii) deleting the words "and any document required to be sealed".	It is proposed that the provision should be amended to refer to the intentional opening of bid documents.
Draft paragraph 61(1)(d):	The term "conspire" is more commonly used and incorporates both "connive" and "collude". It is therefore proposed that the words "connives or colludes" should be replaced with "conspires". The first "or" in the paragraph should be removed and replaced with a comma.	It is proposed that the provision should be amended to replace the words "connives or colludes" with "conspires"

Draft clause 61(2):	It is proposed that the word "*excuse*" be replaced with "explanation".	It is proposed that the provision should be amended as proposed in the comment.
Draft clause 61(3):	The proposed offence is so wide that it is draconian, irrational and unreasonable. It is not circumscribed, for example, to intentional or malicious refusal to take reasonable steps to implement the procurement system in accordance with this Bill (once enacted). No prospective Accounting Officer would accept appointment to the position given the personal risk they are exposed to with this offence.	The subclause must be reconsidered
Draft clause 62:	It is strange that an exemption granted in terms of this provision would need to exclude an instruction issued in terms of the Act. The definition of the term "this Act" in draft clause 1 of the Bill includes regulations, codes of conduct, instructions and notices made in terms of the Act. What would be the reason for such exclusion? Would each instruction provide for the exemption from its requirements? Or would an exemption from instructions not be possible?	
Draft clause 62(1):	It is submitted that the exemption must be published in both the	It is proposed that the provision should be amended to cater for

	Gazette and (not or) on the website of the National Treasury.	publication in the Gazette and on the website of National Treasury.
Draft clause 63:	The instrument which prescribes on a matter should also provide for any departure if applicable.	
Draft paragraph 63(1)(b):	The word "effective" should be removed from the provision.	It is proposed that the provision should be amended as proposed in the comment.
Draft clause 64:	This draft clause empowers the Minister to make regulations on a plethora of areas which could instead be catered for in the Bill. This is problematic because the range of matters which need to be regulated are vast, which creates uncertainty. This approach is also problematic because the context of this Bill is that it is intended to focus on procurement at a strategic level, but the unintended consequence of leaving the listed areas to regulation is that it leans towards a more rule driven approach through subordinate legislation. For example, subparagraphs 58(1)(b)(v) requires regulations on the retention of procurement data. This could change from time to time and would require a change in regulations each time changes occur. Similarly, the Minister may issue regulations in terms of subparagraph	The Act should focus on governance principles and frameworks and this goal should not be undermined by prescribing process and administrative procedures through further rules in cumbersome regulations.

	(vi) regarding any procedural or administrative matters that are necessary to implement this Act. Whilst guiding parameters and frameworks may be necessary, procedure is inflexibly set in regulations and becomes very difficult to change. This approach also stifles any attempt at innovation from any procuring institution.	
Draft clause 64: General comments	The matters on which the Minister must and may make regulations on are numerous. Many of these matters should be addressed in the Bill itself. One of the objects of the Bill is to create a single regulatory framework for public procurement to eliminate fragmented procurement prescripts. If the Minister is to make so many regulations on numerous aspects, it will defeat this object of the Bill because the rules of procurement would probably reside in numerous sets of regulations. Many of the items listed in draft clause 64(1) are vague.	

Draft subparagraph 64(1)(a)(vi):	It is proposed that the provision should be deleted. Due to market fluctuations it would not be practical or feasible to set price ceilings. Concerns are raised that this may result in overpricing or price fixing. Price ceilings may furthermore be unfair and inequitable by undermining preferential procurement goals, as they may exclude bidders which qualify for preferential points if they cannot price under the ceiling, effectively preferring bidders with lower prices who might not be able to achieve preferential points. Additionally, setting price ceilings at a national level would not factor in regional prices and related implications, which would have serious implications for service delivery.	The provision should be deleted.
Draft subparagraph 64(1)(a)(iii):	This is the first time that reference is made to the terms "*security vetting*" and "*officials employed by the PPO*". The Minister cannot make regulations if there is no substantive	The Bill should include the requirement to conduct security vetting for officials "employed" by the PPO, the Tribunal, a Provincial Treasury and a procurement institution's supply chain management unit.

	foundation for such regulations in the Bill. It is submitted therefore that the Bill should include the requirement to conduct security vetting for officials employed by the PPO, the Provincial Treasury and an institution's supply chain management unit. If the PPO is to be considered as a component in National Treasury, it is not clear how the PPO could be viewed as an employee of persons in its service. That role would certainly be that of the National Treasury in terms of the Public Service Act, 1994. It is proposed that this should be addressed in Chapter 3 of the Bill, which deals with procurement integrity. The Tribunal and managers involved in the supply chain management process should also undergo such security vetting process.	
Draft subparagraph 64(1)(a)(ix):	It is crucial that bidders are not given an unfair advantage through such pre-qualification criteria and process. In addition, the same criteria cannot be used to give a bidder an advantage more than once.	It is proposed that the provision must be amended so that, if the Minister makes a regulation in respect of pre-qualification criteria, the procuring institution must be given a discretion as to whether it wishes to apply such pre-qualification criteria.

	Although pre-qualification criteria will allow the procurement authority to target socio-economic objectives, it should be carefully applied to ensure that it does not result in the exclusion of other factors, such as price, competitiveness and cost-efficiency as this may result in an increased risk of encouraging fronting, collusion by tenderers and inflated pricing, which inadvertently affects value for money. It may not always be possible or in the best interest of a procuring institution to apply such pre-qualification criteria. If the Minister makes a regulation, and a procuring institution is not given a discretion to make use of pre-qualification criteria by such regulation, it will impinge on the authority of an accounting officer or accounting authority. The Constitutional Court made it very clear in the case of *Minister of Finance v Afribusiness*[7] that the Constitution directly empowers procuring institutions, not the Minister, to determine and pursue its preferential procurement policy and goals.	

[7] 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.

Draft subparagraph 64(1)(a)(xiii):	Percentages for what? Should "percentages" not be replaced by "thresholds" for consistency? Clarity must be provided.	It is proposed that the provision must be clarified or deleted.
Draft subparagraph 64(1)(b)(v):	The National Archives and Records Service of South Africa Act, 1996 (Act 43 of 1996) regulates the retention of data unless there is provincial legislation in place. Section 17(4) of the National Archives and Records Service of South Africa Act, 1996 (Act 43 of 1996) provides that : "*Until such time as a provincial legislator promulgates provincial legislation in terms of which a provincial archives service is established for that province, every provision of this Act shall apply in that province.*" The Provincial Archives and Records Service of the Western Cape Act, 2005 (Act 3 of 2005) deals with the retention and archiving of documents in the Western Cape Province. Given the overarching national legislation on the retention of data, it is submitted that this draft paragraph is unnecessary.	It is proposed that this provision should be deleted.
Draft paragraph 64(7)(b):	It is unclear why this paragraph is separated from 64(1)(a).	This provision should be deleted.

	The Minister of Public Works is empowered to make regulations regarding any matter that must be prescribed in terms of the CIDB Act. The Construction Industry Development Board is empowered to determine best practice standards and guidelines for the construction industry. The Minister of Finance is mandated to make regulations related to the procedure for infrastructure procurement. This provision is not supported. It should be deleted.	
Draft paragraph 64(1)(a)(viii):	Clarity is required as to whether this draft paragraph encompasses local production and content where the procuring institution procures directly from the manufacturer.	
Draft paragraph 64(1)(a)(xi):	Emergency procurement should be addressed in the Bill with sufficient detail, rather than it being dealt with in the regulations. It will most likely also be very difficult to address, through the concept of emergency procurement, all situations where a deviation from the ordinary prescribed processes is required for one or another procurement. It is proposed that the concept of lawfully deviating from	This provision should be deleted.

	an ordinary procurement process be reintroduced into the Bill. The focus should instead be on risk mitigation and internal control processes to ensure that such deviations are legally justifiable and comply with section 217 of the Constitution.	
Draft paragraph 64(3)(b):	It is not clear what is meant with "*intended operation*".	The provision should be clarified.
Draft clause 64(5):	This draft clause is unnecessary. Provision is made accordingly in the Interpretation Act.	It is proposed that the draft clause is deleted.
Draft paragraph 64(6)(b)(i):	Concerns are raised that the "*general account of the issues raised*" may include the Minister's subjective view on the issues raised. It is important that the report should include the actual issues raised. It is therefore proposed that the words "general account" should be replaced with "summary".	It is proposed that the provision should be amended as proposed in the comment.
Draft clause 65:	The proposed consultation process in this draft clause should mandate specific consultation with local government via SALGA and CoGTA.	
Draft clause 67(2):	The National Treasury issued various instructions in terms of the PFMA. draft clause 67(2) states: "*Anything done under any law repealed by subsection (1) and which could be done under a provision of this Act*	The queries raised in the corresponding column must be resolved in the Bill.

	must be regarded as having been done under that provision." In terms of the Bill the PPO is empowered to issue instructions. Instructions issued by the National Treasury issued in terms of section 76(4)(c) of the PFMA (which is to be repealed by this Bill) can surely not be regarded to have been issued by the PPO in terms of this Bill. On the repeal of section 76(4)(c) of the PFMA, any instructions issued by the National Treasury in terms thereof will therefore fall away because it cannot be saved under draft clause 67(2). The matters addressed in the National Treasury Instructions that were made in terms of section 76(4)(c) of the PFMA must be incorporated into the Bill insofar as it is relevant and where no equivalent is provided for in the Bill. The National Treasury Regulations are comprehensive, and it would not be immediately clear which remain valid once the Bill is enacted. Clarity would be required. It may be useful to include a schedule in this regard. The repealed regulations must be incorporated into the Bill insofar as it is relevant and where no equivalent is provided for in the Bill.	

SCHEDULE: AMENDMENTS AND REPEALS:	Parliament should consider whether other pieces of legislation also require amendments, such as, amongst others - • National Strategic Intelligence Act, 1994 (Act 39 of 1994) (see for example s2(2)(e)); • National Ports Act, 2005 (Act 12 of 2005) (s74(1)); and • Nursing Act, 2005 (Act 33 of 2005) (s29).	
SCHEDULE: AMENDMENTS AND REPEALS: State Tender Board Act:	Although it is understood that the State Tender Board has been defunct since about 2008 and that regional tender boards are similarly no longer functional, it is submitted that, for certainty, it should be provided that "the State Tender Board established under section 2 of the State Tender Board Act, 1968 and any regional tender board established in terms of section 2A of the State Tender Board Act, 1968 shall cease to exist". Not all the consequential amendments resulting from the proposed repeal of the State Tender Board Act, 1968, seems to have been considered. In this regard section 1 of the PFMA refers to the State Tender Board Act, 1968. It is proposed that the consequential amendments of the proposed	• It is proposed that an item 2 be added to the third column of the Schedule in respect of the State Tender Board Act, which item should read along the following lines: "*2. On the date of the repeal of the State Tender Board Act, 1968, the State Tender Board (established under section 2 of that Act) and any regional tender board (established in terms of section 2A of that Act) shall cease to exist.*"

	repeal are considered, and the necessary amendment made.	
SCHEDULE: AMENDMENTS AND REPEALS: National Supplies Procurement Act, 1970:	It is noted that many of the powers granted to the relevant minister in terms of the National Supplies Procurement Act have not been replaced with similar powers under the Bill. For example, the power to prohibit the manufacture, production, acquisition disposal or use of goods or the supply or use of any service; the power to demand goods or services; the power to seize goods and use certain facilities or property and the power to confiscate illegally acquired goods and suspend certain services are not included in the Bill. Whilst it is understood that the Act was promulgated before the Constitution and accordingly contains many draconian provisions which could offend against the Constitution, we propose that a paragraph be included in the Memorandum on Objects of the Bill setting out the reasoning behind the repeal of the National Supplies Procurement Act for the sake of transparency; Careful consideration should be given to whether any of the provisions in this Act should be included in the Bill for situations, such	It is proposed that: • A paragraph be included under paragraph 4 of the Memorandum on Objects of the Bill setting out the reasoning behind the repeal of the National Supplies Procurement Act for the sake of transparency; • Clarity be provided as to what will become of the monies paid into the National Supplies Procurement Fund; • The Bill should stipulate that the National Supplies Procurement Fund, established in terms of section 12 of this Act (the National Supplies Procurement Act) would cease to exist when this Act is repealed. • Careful consideration should be given to whether any of the provisions in the National Supplies Procurement Act should be included in the draft Public Procurement Bill for situations, such as procuring during an event like the Covid-19 pandemic.

	as procuring during an event like the Covid-19 pandemic. In addition, there is no clarity as to what will become of the National Supplies Procurement Fund established under the Act. Clarity must be provided in this regard. The Bill should further stipulate that the National Supplies Procurement Fund, established in terms of section 12 of this Act would cease to exist when the Act is repealed and regulate how monies in that Fund, if any, should be managed after repeal.	
SCHEDULE: AMENDMENTS AND REPEALS: Housing Act, 1997:	<u>Item 3 (item numbers used in comments below are the numbered paragraphs in the last column of the schedule)</u> The definition for the term 'procurement' in the Housing Act should be aligned to the definition of the term in the Bill. In terms of section 3(2)(cA) of the Housing Act, the Minister must determine a procurement policy, by not later than April 2002, which is consistent with section 217 of the Constitution in relation to housing development. The Minister has however not yet determined such policy.	This Item should be reworded.

	The Bill proposes that the wording of section 3(2)(cA) of the Housing Act should be amended to provide for the review of the procurement policy on housing development and to determine a new policy by no later than a date set by the Minister. If the procurement policy contemplated in section 3(2)(cA) has not been determined, it cannot be amended. The wording of this provision should thus be amended accordingly. It is also important that a date should be specified for compliance with the requirement. It should not be up to the Minister responsible for housing to determine a deadline for the policy which he or she must determine.	
SCHEDULE: AMENDMENTS AND REPEALS: National Water Act, 1998:	Both sections 26(1)(n) and 45(2)(f) of the National Water Act are to be amended by the Bill. In both of these sections, the words "public tender" are to be replaced by a reference to "a bid". The Bill fails to underline "bid" in respect of section 26(1)(n) to indicate that it has been inserted.	We propose that the third column of the Schedule in respect of the National Water Act, 1998 be amended as follows: *4. The substitution in section 26(1) of paragraph (n) of the following paragraph:* *"(n) prescribing procedures for the allocation of water by means of a* ***[public tender]*** *<u>procurement method envisaged in the Public</u>*

	We are concerned that the reference to a bid may be too limiting. Consideration must be given as to whether further references, or a wider reference, must be used. A different phrase is proposed as a recommendation next to this comment. The comments below apply if the phrase is not adopted. In addition, section 26(1)(n) is specifically made "*subject to the Public Procurement Act, 2020*". However, provision is not made for a definition of the term "bid" to be included in the amended National Water Act. It is further submitted that the "(as defined in the Public Procurement Act, 2023)" must be inserted after the references to "bid" for the sake of certainty. The word "bid" should be preceded with the words "award of a", since allocation of water would be done by means of awarding a bid in terms or a procurement process. It is noted that the last part of section 45(2)(f) has been deleted, which should not be the case. If such regulations are made, it should be	*Procurement Act, 2023, or auction;*" *5. The substitution in section 45(2) for paragraph (f) of the following paragraph:* "*(f) allocated to every other applicant by means of a procurement method envisaged in the Public Procurement Act, 2023, or auction, subject to any regulation made under section 26(1)(n).*" In addition, a definition for "public Procurement Act, 2023" must also be inserted

	considered when such allocations are made. There may be a need to review those regulations so that it may align with the Bill.	
SCHEDULE: AMENDMENTS AND REPEALS: State information Technology Agency Act, 1998:	Section 7(8)(c)(iv) of the State Information Technology Agency Act refers to the Preferential Procurement Policy Framework Act, 2000 (Act 5 of 2000). The reference should thus be replaced with a reference to the Public Procurement Act, 2023 as the Preferential Procurement Policy Framework Act, 2000 is to be repealed by the Public Procurement Act, 2023.	• It is proposed that the provisions in the State information Technology Agency Act should be amended as follows (where no comments or proposed amendments have been made in respect of this item, the amendments proposed in this item of the Bill are supported): **Section 7(1)** *"(a) must, insofar as it is able to, on behalf of a department, and may, on behalf of a public body, which so requests in terms of subsection (4) or (5)—"* *"(b) may, insofar as it is able to, on behalf of a department or public body, which so requests in terms of subsection (4) or (5), provide –"* *Section 7(8)(c)(v)* • *the ~~Preferential Procurement Policy Framework Act, 2000 (Act No. 5of 2000)~~ Public Procurement Act, 2023".*

SCHEDULE: AMENDMENTS AND REPEALS: Public Finance Management Act, 1999:	It is important to note that the PFMA deals with procurement within a different context to the Procurement Bill, 2023 (see our general comments in this regard). Items 9 and 11 • The Bill proposes an amendment of section 38 by the deletion of section 38(1)(a)(iii) of the PFMA and the amendment of section 51 by the deletion of section 51(1)(a)(iii) of the PFMA - o We note that the intention appears to be that the Minister will prescribe a uniform procurement system for all procuring institutions and that Accounting Officers/Accounting Authorities should no longer have the legislative mandate to ensure that their procuring institution has and maintains its own procurement and provisioning system.	The Bill should provide that expenditure arising from non-compliance with its provisions amounts to irregular expenditure, in the same way that the Bill amends the MFMA's definition of irregular expenditure. It is proposed that section 38 (1)(a)(iii) and section 51(1)(a)(iii) of the PFMA should not be deleted but amended as follows: "*(iii) an appropriate ~~procurement and provisioning~~ supply chain management system, as contemplated in the Public Procurement Act, 2023*." Ensure that the cross-referencing is correct.
	Section 38(1)(a)(iv) and section 51(1)(a)(iv) of the PFMA requires an accounting officer and accounting authority to ensure that the institution has and maintains a system for properly evaluating all major capital projects prior to a final decision on a project. These sections in the PFMA have not been proposed for repeal by the Bill.	

	It is not clear why these sections would not be repealed if the aim of the Bill is to create one single regulatory framework.	
	It is agreed that section 76(4)(c) should be deleted from the PFMA. All the relevant information contained in instructions and regulations already issued in terms of section 76(4)(c) should be included into the Bill.	Before the repeal of section 76(4)(c) of the PFMA, all the relevant information contained in instructions and regulations already issued in terms of the provision should be included in the Bill insofar as they are relevant and no equivalent provision has been made in the Bill.
Road Traffic Management Corporation Act, 1999:	Item 14 Section 43 of this Act provides that any procurement under the Act must be undertaken in terms of the prescribed procedures. We note the proposal to amend the provision, which would mean that this would impact the authority of the Minister of Transport.	It must be considered whether, and to what extent any procurement procedures prescribed in terms of section 43 of this Act should be incorporated into the Bill.
Chapter 16 A of the Treasury Regulations for departments, trading entities, constitutional institutions and public entities issued in terms of the , 1999 (National Treasury Regulations):	This Chapter provides for supply chain management. There is no indication in the Bill that this Chapter in the National Treasury Regulations is to be repealed. Considering the objective to create a single regulatory framework for public procurement, it is assumed	

	that this Chapter would also be repealed. If this is so, the provisions contained in Chapter 16A of the National Treasury Regulations must be incorporated in the Bill.	
SCHEDULE: AMENDMENTS AND REPEALS: Preferential Procurement Policy Framework Act, 2000:	Item 15 It appears that the Bill aims to provide for the framework for preferential procurement contemplated in section 217(3) of the Constitution. Chapter 4 (that is, section 17) of the Bill however does not provide sufficiently for such preferential procurement framework.	If the Preferential Procurement Policy Framework Act is to be repealed, it is imperative for the Bill to sufficiently provide for a framework within which procuring institutions must implement their preferential procurement policies.
SCHEDULE: AMENDMENTS AND REPEALS: Local Government: Municipal Systems Act, 2000 (Systems Act):	Item 16 The Bill proposes the substitution in section 83(1) for paragraph (a). Section 83(1)(a) of the Systems Act states the following: "*(1) If a municipality decides to provide a municipal service through a service delivery agreement with a person referred to in section 80(1)(b), it must select the service provider through selection processes which-* *(a) comply with Chapter 11 of the Municipal Finance Management Act;*"	It is proposed that section 83(2) of the Municipal Systems Act be amended as follows: "*(2) Subject to the provisions of the ~~Preferential Procurement Policy Framework Act, (Act No. 5 of 2000)~~ Public Procurement Act, 2023…* Section 84 of the Act may be more appropriately placed in the Public Procurement Bill.

	We agree with the proposed amendment by replacing the reference to Chapter 11 of the MFMA with a reference to the Public Procurement Act, 2023, to read as follows: "*(a) comply with* ***[Chapter 11 of the Municipal Finance Management Act]*** *the Public Procurement Act, 2023*;" Section 83(2) however refers to the Preferential Procurement Policy Framework Act. This reference should be amended to the Public Procurement Act, 2023. Section 84 of the MFMA deals with the negotiation and agreement with prospective service providers after a prospective service provider has been selected. This negotiation entails the final terms and conditions of the service delivery agreement. Furthermore, outlining the process to follow if negotiations fail, and the municipality may negotiate with the next-ranked prospective service provider. It is recommended that this section be incorporated into the Public Procurement Bill.	

	It is important to stipulate that negotiations should be a tool to ensure that pricing is aligned to market related prices and the budget allocated for purposes of a contract. Negotiations may not be used as a tool to amend any other aspect of the bid documents, such as the scope of the goods or services as such changes would contravene section 217(1) of the Constitution.	
SCHEDULE: AMENDMENTS AND REPEALS: Broad-Based Black Economic Empowerment Act, 2003 (B-BBEE Act):	The purpose of the B-BBEE Act is to *inter alia* establish a legislative framework for the promotion of black economic empowerment; to empower the Minister to issue codes of good practice and to publish transformation charters; The B-BBEE Act defines the term broad-based black economic empowerment. This definition includes the strategy of **preferential** procurement from enterprises that are owned or managed by black people. Preference can thus also be given in terms of the B-BBEE Act.	The proposed amendments must be reconsidered in line with our comments.
	The Minister of Trade and Industry may, to promote the purposes of the B-BBEE Act, in terms of section 9(1) thereof issue codes of good practice on black economic empowerment that may include-	

	(b) qualification criteria for preferential purposes for procurement and other economic activities. At item 23 (a) of the Schedule to the Bill it is proposed that the words "preferential purposes for procurement and other" should be deleted from section 9(1)(b) of the B-BBEE Act. It could certainly not have been the intention for codes of good practice to include qualification criteria for economic activities. This would be the wording once the proposed amendment is enacted. This does not make sense. "Economic activities" is a very broad term which could conceivably include procurement in any event. This term (economic activities) is also not defined (in the Bill or the B-BBEE Act) to provide clarity on what it is intended to mean. If section 9(1)(b) of the B-BBEE Act is amended as proposed in the Bill, which is not recommended, what will be the status of any Code of Good practice pertaining to preferential procurement, already issued in terms of this provision?	

	At 23 of the Schedule it is also proposed that section 9(5) of the B-BBEE Act must be substituted with the proposed subsection. It appears that numbering for this Item was accidently omitted. Considering the content of the proposed amendment, the reference to section 9(5) should have been to section 9(6). The Minister may, in terms of section 9(6) of the B-BBEE Act, if requested to do so, permit organs of state or public entities to specify qualification criteria for procurement and other economic activities which exceed those set by the Minister in terms of section 9(1). At item 23 of the Schedule to the Bill, it is proposed that the words "procurement and other" be deleted from this provision in the B-BBEE Act. As indicated above, the term "economic activities" is not defined. It is unclear why the Minister is to permit organs of state and public entities to specify qualification criteria for economic activities which exceed those set by the	

	Minister in terms of section 9(1) if it does not also relate to procurement activities.	
	Section 10 of the B-BBEE Act states that an organ of state and public entity must apply any relevant code of good practice issued in terms of that Act in developing and implementing a preferential procurement policy. Item 24 of the Schedule to the Bill proposes to add the words "subject to the Public Procurement Act, 2023". Item 24 of the Schedule does not align to the amendments proposed in item 23, which appear to propose the deletion of "procurement" and "preferential procurement" from the B-BBEE Act. We are in agreement that any preference given should be subject to the legislation contemplated in section 217(3) of the Constitution.	It is supported that any preference given should be subject to the legislation contemplated in section 217(3) of the Constitution.
	Section 13A of the B-BBEE Act refers to the cancellation of a contract or authorisation awarded on account of false information knowingly furnished by an enterprise in respect of its broad-based black economic empowerment status which may be cancelled by the organ of state or public entity without prejudice to any other remedies that the organ of state or public entity may have.	• This section must be considered in light of the provisions of the Bill. • It may be more appropriately placed in the Bill.

	<u>Item 25</u> It is proposed that section 13P(1) of the B-BBEE Act should be substituted with the following subsection: "*(1) Any person convicted of an offence in terms of this Act may not, for a period of 10 years from the date of conviction, contract or transact any business with any organ of state or public institution and must for that purpose be entered into the debarment register* **[of tender defaulters which the National Treasury may maintain for that purpose]** <u>*established in terms of section 16 of the Public Procurement Act, 2023*</u>." This section must be considered in light of the provisions of the Bill.	
	We note that a single register (debarment register) will be established [refer to draft clause 15)] The Bill does not stipulate what would happen to the suppliers currently listed on the register for tender defaulters and the register for restricted suppliers.	The necessary transitional provisions should be included.
SCHEDULE: AMENDMENTS AND REPEALS: Local Government: Municipal Finance	General (refer to Items 26, 28, 30 and 33) Various proposals are made to substitute or amend provisions of the Act by replacing the term "supply chain management policy" with "procurement system" or "procurement policy" and by including a reference to the "Public Procurement Act, 2023" into the provisions.	

Management Act, 2003 (MFMA):	It is however not clear from the Bill what the distinction is between the procurement system, procurement policy and preferential procurement policy of a procuring institution. These terms must first be defined before a proposed amendment for this section can be adopted. It is also important that the appropriate term should be referred to in order to ensure consistency.	
	Item 26 It is proposed to substitute section 1(d) of the definition of "irregular expenditure" of the following paragraph: "(d) expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, the Public Procurement Act, 2023, a requirement of the **[supply chain management policy]** procurement system of the municipality or entity or any of the municipality's by-laws giving effect to such policy, and which has not been condoned in terms of such policy or by-law," The latter part of the section reads as follows: "giving effect to such policy, and which has not been condoned in terms of such a policy or by-law," with emphasis of the use of the term 'policy'. The proposed amended section would not be consistent.	Section 1(d) must be amended to ensure that the latter portion also speaks to a "system" where it currently speaks to a "policy".

	Item 26 of the Schedule proposed the repeal of Chapter 11 (sections 110-120) of the MFMA. This Chapter in the MFMA deals with goods and services and comprises two parts, that is, Supply Chain Management and Public-private partnerships. The Bill does not adequately address all the matters provided for in Chapter 11 of the MFMA. These matters should be incorporated into the Bill insofar as they are relevant and where no equivalent provision has been made in the Bill.	• The matters addressed in Chapter 11 of the MFMA must be appropriately incorporated into the Bill.
	<u>Items 28 and 33</u> The term "cost-effective" should be included to ensure alignment with section 217 of the Constitution.	We propose that the term "cost-effective" be included in the amendment for completeness with reference to section 217 of the Constitution: *"fair, equitable, transparent, competitive, <u>cost-effective</u> and consistent with the…"*
	<u>Item 29</u> It is proposed to delete section 33(4) which reads as follows: "*(4) This section may not be read as exempting the municipality from the provisions of Chapter 11 to the extent that those provisions are applicable in a particular case.*"	We propose that the provision should be amended as follows: "(4) This section may not be read as exempting the municipality from the provisions of **[Chapter 11]** <u>Public Procurement Act, 2023</u> to the extent that those provisions are applicable in a particular case."

	Section 33 of the MFMA refers to contracts having future budgetary implications and the purpose of section 33(4) is to stipulate that the section may not be read as exempting the municipality from the provisions of Chapter 11 of the MFMA to the extent that those provisions are applicable in a particular case. We however suggest that the section 33(4) of the MFMA be amended by replacing the reference to Chapter 11 (of the MFMA) with a reference to the Public Procurement Act, 2023 instead of deleting the provision.	
	<u>Item 34</u> The deletion of section 99(2)(h) is proposed. The provision reads as follows: "*(2) The accounting officer must for the purpose of subsection (1) take all reasonable steps to ensure –* … *(h) that the entity has and implements a supply chain management policy in accordance with section 111 in a way that is fair, equitable, transparent and cost-effective.*" It is encouraged that there is an oversight role maintained by the	We propose that the provision should be amended as follows: "*(2) The accounting officer must for the purpose of subsection (1) take all reasonable steps to ensure –* … *(h) that the entity* ***[has and implements a supply chain management policy]*** *<u>procures</u> in accordance with* ***[section 111]*** *<u>the Public Procurement Act, 2023</u> in a way that is fair, equitable, transparent<u>, competitive</u> and cost-effective.*"

	accounting officer of the municipality to ensure that procurement and the management of the municipal expenditure is in accordance with the Public Procurement Act.	
	<u>Item 35</u> The repeal of Chapter 11 (sections 110-120) of the MFMA is proposed. Chapter 11 in the MFMA deals with goods and services and comprises two parts, that is, Supply Chain Management and Public-private partnerships. The Procurement Bill does not adequately address all the matters provided for in Chapter 11 of the MFMA. These matters should be incorporated into the Public Procurement Act as it may be required to justify the repeal of the Chapter in the MFMA.	The matters addressed in Chapter 11 of the MFMA must be appropriately incorporated into the Public Procurement Act before it can be repealed.
	<u>Item 35 continued:</u> In terms of section 112, the supply chain management policy of a municipality must comply with the prescribed framework. The matters that must be included in such framework is set out in section 112.	If Chapter 11 of the MFMA is to be repealed, the Municipal Supply Chain Management Regulations must also be incorporated into the Public Procurement Act. This would necessitate a repeal of the Municipal Supply Chain Management Regulations.

	The Municipal Supply Chain Management Regulations would need to be repealed.	
	In terms of section 112, the supply chain management policy of a municipality must comply with the prescribed framework. The matters that must be included in such framework is set out in section 112. The Bill does not refer to the repeal of the Municipal Supply Chain Management Regulations, which contains such framework and provide for other matters pertaining to supply chain management.	• If Chapter 11 of the MFMA is to be repealed, consideration should be given to the implications it has and any consequential amendments that may have to be made to those regulations or the Bill. It is proposed that the Municipal Supply Chain Management Regulations are incorporated into the Bill insofar as they remain relevant and where no equivalent provision has been made in the Bill in respect of matters regulated by those regulations.

	Paragraph 35 continued: In terms of section 119 of the MFMA, the accounting officer and all other officials of a municipality or municipal entity must meet the prescribed competency levels. Resources or opportunities for such training must be provided to ensure compliance with the prescribed competency levels. The Public Procurement Bill does not contain a similar provision or contain such requirements. The Municipal Regulations on Minimum Competency Levels sets out the required competency levels and requirements that must be complied with to attain or ensure such competency levels at municipalities. These provisions must be considered and incorporated into the Public Procurement Bill.	Section 119 of the MFMA and the Municipal Regulations on Minimum Competency Levels must be considered and incorporated into the Public Procurement Act. The inclusion of these requirements should be applicable, not only to officials at local government level but to all officials involved in procurement at all institutions.

	In terms of section 119 of the MFMA, the accounting officer and all other officials of a municipality or municipal entity must meet the prescribed competency levels. Resources or opportunities for such training must be provided to ensure compliance with the prescribed competency levels. The Bill does not contain a similar provision or contain such requirements. The Municipal Regulations on Minimum Competency Levels sets out the required competency levels and requirements that must be complied with to attain or ensure such competency levels at municipalities. These provisions must be considered for incorporation into the Bill.	• Section 119 of the MFMA and the Municipal Regulations on Minimum Competency Levels must be considered for incorporation into the Bill. • The inclusion of these requirements should be applicable, not only to officials at local government level but to all officials involved in procurement at all institutions.
	Paragraph 35 continued: All references to Chapter 11 (and the provisions contained in this Chapter, that is, sections 110 to 120) must be considered and dealt with appropriately. Examples of such provisions which have not been addressed in the Public Procurement Bill include the following: section 62(1)(f)(iv) and section 73(a).	The references in the MFMA to Chapter 11 and provisions contained in this may have to be replaced with references to the Public Procurement Act, 2023 or it should be otherwise dealt with more appropriately.

	All references to Chapter 11 (and the provisions contained in this Chapter, that is, sections 110 to 120) must be considered and dealt with appropriately: Examples of such provisions include the following: section 62(1)(f)(iv) and section 73(a).	• The references in the MFMA to Chapter 11 and provisions contained may have to be replaced with references to the Public Procurement Act, 2023 or it should be otherwise dealt with more appropriately.
	Paragraph 36 The deletion of section 173(1)(a)(ii) is proposed. Section 173(1)(a)(iv)(bb) refers to the municipality's "supply chain management policy", however this section has not been included in the extent of repeal or amendment as contained in the Public Procurement Bill. Section 173(2)(a)(iii) refers to "supply chain management system", however this section has not been included in the extent of repeal or amendment as contained in the Public Procurement Bill. Section 173(4)(e) refers to the provisions of section 115(2) of the MFMA, however section 115(2) is contained in Chapter 11 of the MFMA which the Public Procurement Bill proposes to repeal.	Chapter 15 of the MFMA and the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings, which applies to alleged financial misconduct, must be considered and incorporated into the Public Procurement Act as it may be necessary. insofar as it relates to supply chain and asset management.

	It is recommended that these sections be amended to be in line with the subsequent changes once the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings has been considered. Chapter 15 of the MFMA and the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings, which applies to alleged financial misconduct, must be considered and incorporated into the Public Procurement Act as it may be necessary. insofar as it relates to supply chain and asset management. We note that draft clause 60 speaks to the limitation of liability. The Bill must clearly and adequately provide for criminal liability and accountability of accounting officers and other officials.	
	Paragraph 36 The deletion of section 173(1)(a)(ii) is proposed. Section 173(1)(a)(iv)(bb) refers to the municipality's "supply chain management policy", however this section has not been included in the	Chapter 15 of the MFMA and the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings, which applies to alleged financial misconduct, must be considered and incorporated into the Public Procurement Act as it may be

	extent of repeal or amendment as contained in the Public Procurement Bill. Section 173(2)(a)(iii) refers to "supply chain management system", however this section has not been included in the extent of repeal or amendment as contained in the Public Procurement Bill. Section 173(4)(e) refers to the provisions of section 115(2) of the MFMA, however section 115(2) is contained in Chapter 11 of the MFMA which the Public Procurement Bill proposes to repeal. It is recommended that these sections be amended to be in line with the subsequent changes once the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings has been considered. Chapter 15 of the MFMA and the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings, which applies to alleged financial misconduct, must be considered and incorporated into the Public Procurement Act as it may be necessary. insofar as it relates to	necessary. insofar as it relates to supply chain and asset management.

	supply chain and asset management. We note that draft clause 60 speaks to the limitation of liability. The Bill must clearly and adequately provide for criminal liability and accountability of accounting officers and other officials.	
	Section 163(2)(b) of the MFMA refers to the liabilities and risks payable in foreign currencies and states that "*the procurement of goods or services denominated in a foreign currency but the Rand value of which is determined at the time of procurement, or where this is not possible and risk is low, at the time of payment*".	This section must be considered in light of the provisions of the Public Procurement Bill. It may be more appropriately placed in the Public Procurement Act.
	Chapter 15 of the MFMA deals with financial misconduct. Section 171 sets out what would be considered as an act of financial misconduct. Section 173 deals with offences. The section relates to various matters. Including matters pertaining to the supply chain management and asset management. For example, the failure to take reasonable steps to implement the municipality's	• In light of the intention to repeal Chapter 11 of the MFMA, Chapter 15 of the MFMA and the Local Government: MFMA (56/2003): Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings, which applies to alleged financial misconduct. must be considered for incorporation into the Bill insofar as it is relevant, and no equivalent provision has

	supply chain management policy constitutes an offence in terms of this section. Section 175 empowers the Minister of Finance to make regulations on financial misconduct procedures and criminal proceedings. Chapter 15 of the MFMA and the Local Government: MFMA (56/2003): Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings, which applies to alleged financial misconduct must be considered for incorporation into the Bill insofar as the provisions are relevant and no equivalent provision has been made in the Bill.	been made in the Bill in respect of supply chain and asset management.
SCHEDULE: AMENDMENTS AND REPEALS: Electricity Regulations Act, 2006:	The name of the Act is incorrect. It should be the Electricity Regulation Act, 2006. The Minister of Minerals and Energy is responsible for the administration of the Electricity Regulation Act, 2006. Section 34 of the Electricity Regulation Act, 2006 refers to new generation capacity. Section 34(4) of the Electricity Regulation Act, 2006 specifically stipulates that, in exercising the powers under this section (section 34), the Minister is not bound by the State Tender Board Act, 1968 (Act No. 86 of 1968).	This item should be deleted.

	It Is therefore submitted that the Minister should also not be bound by the Bill when the Minster exercises the powers under section 34 of the Electricity Regulation Act, 2006.	
Construction Industry Development Board Act, 2000:	The Bill does not address the procurement of works. The procurement of works should thus be addressed primarily in the CIDB Act and not also in the Bill. However, certain principles in the Procurement Bill may be applicable to the processes to be undertaken in accordance with the CIDB Act. The latter Act may, for example refer to these principles in the Procurement Bill.	The CIDB Act should incorporate the relevant principles provided for in the Public Procurement Bill.
	At paragraphs 17, 18 and 19, the Bill proposes that the Construction Industry Development Board would be required to fulfill certain functions in or after consultation with the PPO. This would have an impact on the authority of the Board as it places a limitation on the independence and discretion of the Board.	The Bill should not be used to usurp the authority of the Construction Industry Development Board.
	At paragraphs 20 and 21, the Bill proposes that the Minister of Public Works would be required to obtain the concurrence of the Minister of Finance when making regulations regarding the stipulated matters.	Each Minister has a particular mandate for a specific reason. It is imperative that decision-making authority should not be vested in one decision-maker. There is great value in ensuring and maintaining the segregation of powers.

		It is furthermore important to ensure that Ministers or decision-makers should be allowed to exercise their authority without the interference of any other Ministers or decision-makers.
Armaments Corporation of South Africa, Limited Act, 2003:	Paragraph 22 The entire section 2(4) cannot be made subject to the Public Procurement Act, 2023, as is proposed.	• Section 2(4)(a) should be subject to the Armaments Corporation of South Africa, Limited Act, 2003, and the Public Procurement Act, 2023, insofar as it is relevant (the Bill does not apply to the acquisition, holding and disposal of immovable property). • Section 2(4)(b) should remain subject only to the Armaments Corporation of South Africa, Limited Act, 2003. • Parliament should consider further amendments, for example to section 4(2)(a), (e), and (3)(a), and section 17(1).
Infrastructure Development Act, 2014:	Care should be taken to ensure that this Act, the Bill (once enacted) and the CIDB Act are aligned with each other.	
Paragraph 5 of the Memorandum on the objects of the Bill:	This paragraph states that the Bill has no financial implications for the State. The statement cannot be correct. Many of the proposals in the Bill require capacity building and support to municipalities that entail strengthening their supply chain management and procurement	It is proposed that a consideration should be given to a partnership between the PPO and provincial governments to finance capacity building. A proper cost analysis is required, including quantification of the cost

	function. Other examples include additional procurement costs and knock-on costs. We have noted concerns about the cost implications for the running of the Tribunal and the reimbursement of the incidental costs contemplated in draft clause 52(4)(c). We have grave concerns about the financial and other capacities of National Treasury, provincial government and local government to comply with the requirements imposed on them by the Bill.	implications mentioned in the comment, and the information pertaining thereto should be accurate (and therefore not misleading). Consultation on this version of the Bill, especially regarding its financial implications, was not done by the NA. Such consultation would need to be comprehensive. The NCOP must appreciate the fact that the NA did not do such consultation, and that the consultation is critical for many reasons, especially regarding the feasibility of implementing the Bill.

MIREILLE WENGER

PROVINCIAL MINISTER OF FINANCE AND ECONOMIC OPPORTUNITIES

WESTERN CAPE PROVINCE

DATE: 08 MARCH 2024