

## National Research Foundation (NRF)

### Submission to the Western Cape Provincial Parliament

#### Relevance of the National Research Foundation (NRF) submission

The NRF's legislative mandate includes supporting and developing the national science system. Departments and municipalities in the Western Cape play a key role in the national science system. The **Western Cape Smart Cities and Smart Townships programmes are two examples of the role in advancing science and innovation.**

#### Points of feedback:

1. Additional functions, powers and obligations have been assigned to the Western Cape in the bill. Section 35 of the PFMA therefore applies. Multiple cost implications have been identified (Section 12 of Prof Geo Quinot Legal Opinion can be provided). The Western Cape, and other provinces, have not been "*provided with projection of the financial implications ... to the province*" as required by Section 35 of the PFMA. **Non-compliance with PFMA Section 35 must be corrected before the Bill is passed.**
2. The preamble states "*RECOGNISING the need to increase the capacity of organs of state...*" yet the Memorandum states "*No substantial financial implications for the State are envisaged*". **Capacity cannot increase without funds.**
3. s 1 in definitions. There are **over 40 terms that have not been defined** in the Bill making it difficult for provincial departments and municipalities to understand the intent and hence the provisions in the Bill. These include **significant definitions such as "complementary goals" (s 17(5)(d) et al); "functionality" (s 17(5)(b)); "feasible" (s 19(1)); "sustainable development" (s 2(2)(g), 22); "beneficiation" and "innovation" (s 2(2)(g), 5(1)(f), 23); and "type of procurement methods" (25(1)(b)).**
4. Procurement is defined inappropriately too widely: "*Procurement means: ... the construction, repair or maintenance of infrastructure or capital assets*". The **Western Cape has whole Departments mandated to construct, repair or maintain infrastructure.** It's impractical that entire Departments fall within the definition of procurement. The **definition of procurement must be revisited.**
5. s 2(2)(d) states an objective of the Act is to promote local economic development, but limits to the Republic. This does not recognise the **constitutional obligations to advance local and socio-economic objectives in the Provinces and at a local government level.** Innovation programmes at a **grassroots and community level** will not receive provincial or municipal focus.
6. s 3(3)(a), provides that Donor funding must adhere to the Act unless exempted (s 62). Western Cape departments and municipalities rely on donor funding for important projects. Donor funding often advances innovation and localisation of technologies.

## National Research Foundation (NRF)

### Submission to the Western Cape Provincial Parliament

**Donor funding will be at risk if procurement legislation is contrary to the requirements of the funders.**

7. Provinces are assigned responsibilities but are not granted the equivalent “Office” capability as is granted at a national level to the Public Procurement Office (PPO). **This will compromise the capability at a provincial level** to advance the procurement of innovation. Province will need to assist departments and municipalities in “*building their capacity for efficient, effective and transparent procurement*”, particularly for the procurement of innovation.
8. Statement in s 25(1) that the “*strategic approach to procurement ... to promote innovation*” is **welcomed** as innovation is recognised as a distinct objective.
9. Departments and municipalities are assigned duties (s 8(1), 25 and 28) but there is **no organisational framework as to the personnel requirements and/or competencies and/or its positioning**. This will be important to ensure departments and municipalities in the Province are clear on the requirements. There is no reference to regulations in this regard either.
10. s 17(1) provides for a powerful set-aside mechanism, but there is overreach if “(2)(a) *The Minister must ... prescribe targets for set-aside ...*”. Departments and municipalities in the Western Cape have very different procurement categories and supplier communities. There **cannot be a one-size fits all approach to set-asides**. This should be at the prerogative of the procuring institution and not set by the Minister.
11. On set-asides in s 17(3)(g), why should the geographic option be limited to small enterprises “(g) *small enterprises within a particular geographical area;*” and **why not all enterprises in a geographic area?** This is again contrary to the local socio-economic objectives of the province and its municipalities.
12. The **limitations on functionality in s 17(5) will counter innovation and service delivery** and restrict the use of different methods. There is research supporting that the “*minimum threshold for functionality*” is a risk to service delivery. There are at least five other procedures that can be used (and which are used by the World Bank) which are more appropriate to innovation. This procedure-level statement (s 17(5)) does not belong in primary legislation and should be deleted.
13. s 18(1) only allows for prequalification on the basis of B-BBEE level and by way of subcontracting. This is a limitation **that does not allow for prequalification for example against black women in the province** or geographic area.

## National Research Foundation (NRF)

### Submission to the Western Cape Provincial Parliament

14. On prequalification subcontracting in s 18(3) there is a **significant limitation to only one of the categories listed s 18(1)(c)**. Western Cape departments and municipalities will not be able to encourage subcontracting to black women-owned organisation in the Western Cape for example.
15. s 19(2) requires subcontracting as a **condition of bid**. Subcontracting as a condition of bid has been a major contributor to construction mafia and radical business forums in the Western Cape. Must be changed to “subcontracting as a **condition of contract**”.
16. The focus on local production and content in s 20(1)(a) is only at a national level and does not allow for a regional focus. This must be changed.
17. There is no indication on the nature of the “*prescribed conditions*” that will “*provide for measures to advance ... innovation ...*”. **This is a vague statement**. Clarity is needed.
18. There is some flexibility in current legislation on the use of different methods for different circumstances that are not prescribed. This flexibility has assisted Departments and municipalities in the Province to advance innovation and transformation. Methods such as panels; framework agreements; design contests; challenges; two-stage bidding; and requests for proposals / competitive negotiations have been critical in advancing innovation (and are not prescribed in legislation). There is no mention of these methods in the Bill (only transversal contracts). Given that **the Minister must prescribe all methods, there is a significant risk that these methods may not be prescribed and hence cannot be used. This will retard innovation and transformation.**
19. In s 41(2)(a) forcing a “(a) *A single platform ... to all procurement related services; ... uniform procurement procedures and processes*” will be a risk in the Western Cape where investment in multiple systems have already been made to accommodate the different requirements of different institutions. **A one-size-fits-all approach will no work in the Western Cape’s diverse public sector.**
20. The PPO is not positioned as a separate structure. The PPO therefore does not have the oversight required to ensure its’ independence. The Province requests **an oversight function be established to involve representation from provinces.**

Finally, there is a concern that the **Bill did not meet the constitutional requirement of public participation**. If passed, the Bill would be open to constitutional challenge on the basis of a failure in public participation. This will leave public procurement in the Western Cape in a turmoil and would set back service delivery in the Province.