PUBLIC PROCUREMENT BILL

[B18B – 2023]

COMMENTS MATRIX

LIST OF COMMENTATORS

1. **NATIONAL RESEARCH FOUNDATION**
2. **Public Affairs Research Institute (PARI)**
3. **COSATU AND SACTWU**
4. **BUSINESS UNITY SOUTH AFRICA (BUSA)**
5. **Department of Trade, Industry and Competition (DTIC)**

Commentator	Clause	Comment	Response	Proposed amendment to Bill
National Research Foundation	Clause 12(1)(b)	**Recommendation** 1. Remove the proposed addition of "of a procuring institution". 2. Review the definition of "official" in s1 to ensure that all instances in which the term "official" occurs in the draft PPB is comprehensive, consistent and clear and does not create unnecessary loopholes, or removal of same and replacement in each section with the relevant term e.g. "employee of a procuring entity" or "employee of a constitutional institution" or "employee of the PPO". **Rationale** •The definition of "official" in s1 already includes the same words "… of a procurement institution" • Research on this issue appeared to open up the possibility of further risks around the concept, provided below A search of the term "official" in the draft PPB reveals that the term is used inconsistently as a concept as well as appears too narrow in terms of scope as "official" is used of institutions which are not procuring institutions, such as the PPO. A search of the term will provide self-evident proof. Further details available upon request. •Lastly a search of the term "official" yielded what appears to be a significant omission of a particular class of officials relating to government departments, which by virtue of omission appears to create the impression that employees working for government departments are permitted by the draft PPB to bid for government work. Related areas for further research?	1. In the context, it refers to an official of a procuring institution as well as the PPO and PTs. The definition of official is limited to employees of a procuring institution. 2. In this context, official refers to an official of procuring institution, the Public Procurement Office or a provincial treasury. The def of official refers to an employee of a procuring institution. It does not include employees of Public Procurement Office or a provincial treasury. Therefore, this proposal is not supported.	

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		The use of the term “employee” in the section 1 definition as synonymous to “official” begs the question of an “official” who is not an “employee”. To illustrate, organisations often outsource work in which the successful service provider is given final decision-making powers on behalf of a procurement entity and as such has power to legally commit the procurement entity. An example may occurs in contract types in relation to large/complex/infrastructure projects where a principal-agent (read principal acting as an agent and having the power of a principal for the procuring entity), and may include forms of Design-Build contracts, or Build-Maintain-Operate contracts or in the context of Public-Private Partnerships. This point is for noting only as a possibility as insufficient time exists for the author (who is not an expert on this matter) to research further. SeCOF are advised to obtain legal advice to explore such possibilities or ignore same if a fallacious conjecture.		
	Clause 13	**Problem statement** The omission of “officials or employees of departments” in the list of automatic exclusions in section 13 creates the impression that governmental department and provincial employees are allowed to submits bids. **Recommendation** The following clause to be inserted in section 13 : “an official or employee of a department or a province” (or wording to the effect)	Cl 13(1)(c) provides for a person appointed in terms of section 9 or 12A of the Public Service Act. This refers to all employees in national and provincial departments and government components as well as special advisers to executive authorities.	

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		Deeper scope of exclusion to avoid loopholes and to be consistent with allied prescripts. Historical precedent for recommendation The draft PPB of 2019 did not contain such an omission, namely it included officials of departments in the section highlighted in yellow namely: “Automatic exclusion from procurement processes 24. The following persons by virtue of their interest or membership in an entity supplying or rendering goods or services, must be excluded from participating in procurement: (a) A bidder or supplier subject to a debarment order in terms of section 22(1); (b) a public office bearer; (c) an official or an employee of any organ of state.” **Issues and/or rationale** Our best guess is that government (and provincial) employees are excluded as there may be overlapping prescript in terms of Public Service Act regulations and associated directive/s (refer Research workings section below). If the educated guess above is correct, it does not adequately explain the omission as it begs further questions, including: 1. Different wording with implied overlap but not complete overlap		

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		2. Different sanctions for different categories of employees for the same offence? 3. Inability of holding government and provincial employees to the same level of accountability? 4. Inconsistency in terms of the trumping clause. The draft PPB trumps every other related Act, yet is silent on trumping the PSA (Public Service Act) and by implication the PSA regulations. 5. Perception: Employees of National and Provincial departments, including employees of the Public Procurement Office may be perceived, rightly or wrongly to be in dealt with differently and thus unfairly and unjustly. 6. Integration: The object is to have one unified piece of legislation, yet in this respect it is different. 7. Risk of error: In the absence of consolidating all exclusions in one set of legislation, it creates the possibility that some procurement practitioners outside of departments and provinces, such as numerous public entities and municipalities, may allow bids from excluded staff as they are not trained in, nor subject to, the PSA, as they will reference the PPB. It is simply easier having one source of reference in a developing country. 8. Loophole: Whilst the PPB disallows the submission of a bid, it does not disallow subsequent participation, and if so, is this a major loophole? It appears that the PSA is broader, more comprehensive. It makes sense that consistent scope is applied to the draft PPB?		

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	Clause 20(6)(b)	•This enhancement is outstanding! It promotes the constitutional requirement of efficiency in the public sector. •To consistently apply this standard of efficiency throughout is it may make sense to this "deemed"clause to other sections to include such parties as the Tribunal (as discussed last week at SeCOF) and the PPO and the Minister of Finance. •Furthermore, the addition of "giving reasons for the decision" promotes transparency.	1.A deeming provision for the Tribunal will not be possible due to the nature of its functions. 2.Consider including period in the exemption and departure clauses.	Include 30 days after receipt of all relevant documentation cl 61 and 62.
	Clause 24(1)(a)(i)	The literal reading is "strategic procurement in other countries" which appears absurd/ambiguous leading to many interpretations and may thus be void for vagueness. Examples of interpretations may include: •Promote strategic procurement in other countries •Procure strategically from other countries namely the use of international procurement •Learn best practices about strategic procurement in other countries? Grammatically the word "include" appears twice. Unclear if a problem. **Recommendation** Reword in a manner that is clear in terms of intention and to the reader. Based on the best practice interpretation above, one formulation could be: the promotion of strategic procurement—	The comment is noted and a proposal to amend clause 24(1)(a)(i) is submitted for consideration	24(1)(a)(i) the promotion of strategic procurement when procuring in other countries for use in those countries

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		(ii) **Incorporation of best practices** in other countries; Furthermore, remove one of the “includes” if it is a problem		
	Clause 24(1)(d)	Recommendation •Option 1: Replacing the phrase “without limiting” with “which encourages, where feasible”, or •Option 2: Creation of two new preference categories, namely “new entrants” and “emerging suppliers” and incorporate into the various mechanisms provided for in Chapter 4. Rationale • **Balancing performance and focusing on more effective mechanisms**: It may be prudent to draw from CIDB’s track record and system of simultaneously promoting quality and developing the supplier base as an exemplar through: o **Effectiveness (quality):** Insisting on minimum experience in various sizes of projects through the grading system which contains valuable elements to maximise quality, minimise risk and cost overruns and formalise builder reputation as an indicant of building confidence in capability and developing the construction industry; and, o **Capacity development**: In parallel, the CIDB focuses on other mechanisms to achieve the same goal including a massive enterprise and supplier development initiative which it finances through a	1.This is the correct legal drafting; therefore the proposal is not supported. 2. The various preference measures in Chapter 4 already cater for these types of suppliers by virtue of the mechanisms provided therein.	

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		compulsory levy on contracts awarded by organs of state. • **Preventing challenges**: Toning down the recommendation may substantially reduce the risk of an upset through legal challenge. No progressive wishes to further delay proposed preference initiatives by extending the delays through court action.		
	Clause 27	**Issues** It is not clear that the use of "members" aligns with "persons" in the definition of a bid committee in section 1. Is the term "technical expert" meant to imply an outsourced and thus external party, noting by illustration that the NRF has a number of internal technical experts, namely "technical expert" does not imply external/outsourced. It is unclear why "may" is used. In circumstances where a technical expert is essential, it should not be a choice, rather a requirement. To illustrate the NRF has historically made the inclusion of a domain expert, read "technical expert" a requirement for bid specification committees. The use of "may" implies such experts are not required. The use of "member" implies voting power. If external / outsourced entities/persons are provided, it is unclear whether voting rights are implied? **Recommendation**	The comment is noted and a proposal to amend clause 27(2) is submitted for consideration	Clause 27(2): A procuring institution must ensure that persons who participate in bid committees have the relevant knowledge, skills and technical expertise to achieve the intended result required during the relevant committee process.

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		In the event that the intention is to include non-employees in the bid committees, then a definition of "technical expert" needs to be provided which emphasises the external nature of such an expert. If this is the intention, then an adequate governance framework needs to be provided in regulations as having external parties voting and thus effectively being part of a decision-making body needs to have checks and balances built in. Ideally the same term (person or member) should be used consistently within the definition in section 1 and here and replace "may" with "must" Alternatively, remove entire new amendment and ensure it is addressed within the regulations. **Rationale** SeCOF (Select Committee on Finance) members are encouraged to familiarise themselves with the controversy of employing external persons (should this be envisaged), from literature readily available, including: National Treasury's circular on Bid Committees, which if our memory is correct, is against such use and/or against allowing such experts to be members and thus have voting power SANRAL Board's suspension of its CFO and Head: SCM regarding a board policy regarding the use of such experts.		
	Clause 47	Insertion of new Section 47(4) as follows:	Amendment to Clause 47 not supported. Refer to Clause 51(3): (a) The panel for	

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		"The Tribunal must, in writing, within 60 days respond to the application for review by the bidder giving reasons for the decision, failing which rejection will be deemed to be granted to the bidder that made the request."	review proceedings, envisaged in section 47 or 48, must make an order in terms of subsection (1) within 30 days after the submission of the application for review. (b) On request by the chairperson of the panel, the Chairperson of the Tribunal may extend the 30-day period for not more than 30 days.	
	Clause 56(8)(viii)	"video graphs" to be replaced with "videos" **Rationale** Whereas videography may describe the corpus, video graph may not be a term. If one wishes to introduce a neologism, a definition is required which does not appear practical.	Support amendment.	Clause 55(8) (a) (viii): Replace "video graphs" with "videos."
	Clause 60(1)(c)	**Recommendation** Removal of the words "appointed time for the public" to be replaced with "formal" The revised formulation would therefore read as follows: **Rationale** **SeCOF deliberations during the last few days** Arising from the NRF's question regarding whether it was legitimate to have an offence for which no requirement existed, namely no section makes provision for "public" opening, SeCOF requested National Treasury to engage with this matter, namely if it did become a requirement to include **public** opening them a section needed to be	Propose wording: official public opening.	Clause (60) (1) (c): Replace words "appointed time for the public" with "official public opening"

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		included elsewhere regarding such a requirement, and by implication if this was not included, then the word “public” is to be omitted. Based on the discussion, SeCOF appeared to support a public opening. **Relationship to 2019 Draft Public Procurement Bill** In the 2019 version, it was clearly in intention of National Treasury to include a public opening of bids with the inclusion of an enabling section to this effect, namely: “36 .Opening of bids (1) A bid must be opened at the time and place indicated in the bid documents. (2) An institution may deviate from the opening of a bid as provided in the bid documents if the institution informs all bidders of such changes before the date set for the opening of bids. (3) A bidder or his or her representative is authorised to attend the opening of bid session, if applicable. (4) At the opening of bids session, the name of the bidder, the total amount of each bid, any discount or alternative offered, and the presence or absence of any bid security, if required, must be read out and recorded, and a copy of the record must be made available to any bidder on request. (5) An institution may not make a decision regarding the disqualification or rejection of a bid at a bid opening session.”		

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		This provided the context for the relevant offence, namely: “Offences 118. (1) A person who— opens any sealed bid, including such bids as may be submitted through an electronic system and any document required to be sealed, or divulges their contents prior to the appointed time for the **public** opening of the bid documents.” 2019 Draft Bill available online: https://www.treasury.gov.za/legislation/draft_bills/Public%20Procurement%20Bill%20for%20public%20comment%2019%20Feb%202020.pdf [Accessed: 2024-05-05]. **Evidence of National Treasury’s intention** The removal of section 35 arising from the public consultation process is an indication that National Treasury chose to remove, rather than amend, this clause. Furthermore, in removing same National Treasury failed to be consistent by removing “appointed time” and “public” from the offences section. Furthermore a level of transparency does exist at present in that existing prescripts do require publication of the results of the winning bidder etc. **Best practice bifurcation point** It is clear that a public opening aligns with:		

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		The constitutional requirement of "transparency" in terms of Section 217(1), and International best practice. The problem facing SeCOF in the implementation of same is: It would be adding a significant new item at the close of the consultation process and Putting back the withdrawn clause without consideration of the rationale National Treasury had to withdraw same, may result in an inadequate formulation if done in haste. SeCOF simply appears to have run out of time in terms of its own timelines. Accordingly, it may make sense to keep this best practice alive through another mechanism, namely through inclusion in the proposed Report. Practically this may entail: a. Promoting the idea of having a public opening at a later stage b. . SeCOF may wish to consider the inclusion of such a recommendation in the draft Report, namely that at the two year review, that National Treasury add such a section. c. Such a section will encompass a reformation of the prior section 35 taking into account the 2019 consultation input as well as present and proposed prescripts that may be related		
	Clause 61	Insertion of new Section 61(4) as follows: (4) "The Minister must, in writing, within 60 days respond to the application for exemption by the	Proposed the inclusion of 30 days after receipt of all relevant documentation.	Clause 61: Proposed the inclusion of 30 days after receipt

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		procuring institution giving reasons for the decision, failing which exemption will be deemed to be granted to the procuring institution."		of all relevant documentation.
	Clause 62	Insertion of new Section 61(4) as follows: "(5) The Public Procurement Office must, within 5 working days, respond in writing, to the application for departure by the procuring institution, giving reasons for the decision, failing which a departure will be deemed to be authorised to the procuring institution.	Proposed the inclusion of 30 days after receipt of all relevant documentation	Clause 62: Proposed the inclusion of 30 days after receipt of all relevant documentation
	Clause 65	**Recommendation** National Treasury to target additional critical activities, if any, which require writing, in addition to those six sections which contain such a requirement, and limit this requirement to such sections. Delete this clause **Rationale / observations/ views** The draft PPB contains at least six instances where writing is required, plus at least one verbal allowance The unintended consequence appears at least twofold: •Loopholes: Failure to provide in writing hamstring legitimate functions e.g. search and seizure – any request to be in writing such as a request for an "explanation".	The purpose of the provision is to have a written record of, amongst other, requests made in terms of the Act, i.e. where the term "request" is used. This is to have proof, calculate periods (where applicable) and avoid disputes in this regard. Verbal is used in two instances to deal with unlawful actions.	

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		•Bureaucracy: Normal, namely most functioning conducted verbally, is now to be done in writing. Examples, to mention a few: o Market research “request” o Due diligence “request” o Supplier briefings “request” o Competitive dialogue consistent dialogue relating to “request” and “direction” o Negotiation including emergency situations o Staff: Ongoing management of procurement staff, including training and ad hoc requests for guidance o Audits (Internal and External): Substantial requests for clarification, interpretation, direction and so on. o Project/contract management: Ongoing requests, direction, clarifying and reporting on progress during site visits and so on. o Informal requests for clarification internally, externally, from National Treasury and so on. o Failure to respond: Insisting that every request be put in writing may result in non-responsiveness e.g. National Treasury where no obligation is in place to respond timeously, if at all. •Efficiency: Reducing virtually everything to writing reduces turnaround times •Economy: Compliance costs, which are unfunded, skyrocket.		

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Public Affairs Research Institute (PARI)	Clause 5	We recognise municipality claims for autonomy and concerns about being inundated with disruptive instructions, but we believe that a blanket exclusion from the reach of instructions may have serious unintended consequences especially with regard to municipalities that do not meet appropriate standards of compliance, performance, and capacity. On this view, it may well be that rather than a blanket exclusion from instructions, this should be regulated through the differentiated regulations clause. To do so would enable the Minister to differentiate whether or not certain classes of municipalities are subject to instructions or not and with what conditions. It is notable that such regulations would activate consultation with organised local government under section 63(2)(b). Proposal: Our proposed wording is as follows, where **[ ]** indicates a deletion and _____ indications an addition: 5. Functions of public procurement office (partially reproduced) (2) The Public Procurement Office may, in accordance with this Act— (a) in relation to procuring institutions, **[except municipalities and municipal entities]** <u>subject to section 63(7)(a) of this Act</u>, issue, by notice in the Gazette, binding instructions as provided for in this	These amendments are not supported. The proposed amendments, contained in the D-Bill, in clause 5 and 6, were to address constitutional concerns about infringing on constitutional powers of local government. It is important to note that the regulations made under cl 63 will apply to municipalities and municipal entities.	

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		Act and on any other procurement matter for the effective implementation of this Act; **[(b) in relation to municipalities and municipal entities, issue non-binding circulars, on the subject of an instruction, provided for in this Act, and any other matter for the effective implementation of this Act;]** **[(c)]**(b) issue guidelines to assist procuring institutions with the implementation of this Act and any other procurement related matter; **[(d)]**(c) after consultation with the relevant category of procuring institutions, determine a model procurement policy for different categories of procuring institutions and different categories of procurement, which a procuring institution may adopt, with or without amendments, or not adopt; and **[(e)]**(d) exercise other powers conferred by this Act. (3) The Public Procurement Office may issue different instructions in terms of subsection (2) for— (a) different categories of procuring institutions; and (b) different categories of procurement. **[(4) A circular referred to in subsection (2)(b) will be binding on—** **(a) a municipality, if adopted by its council; or** **(b) a municipal entity, if adopted by the council of the entity's parent municipality.]**		

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	Clause 6	In relation to changes made to section 6, we are similarly concerned about a blanket exclusion of provincial treasuries with regard to an enforcement role over municipalities, which may have unintended consequences in relation to both procurement and broader issues of financial control and transparency. On this view, we believe that rather than a blanket exclusion from instructions, this should be regulated through the differentiated regulations clause, which would enable the minister to differentiate whether or not certain classes of municipalities are subject to instructions or not. It is notable that such regulations would activate consultation with organised local government under section 63(2)(b). **Proposal** 6. Functions of provincial treasuries (1) A provincial treasury must— (a) within its province— (i) monitor and oversee the implementation of the procurement function by a procuring institution; (ii) promote effective management and transparency in respect of the procurement function of procuring institutions; and (iii) enforce effective management and transparency in respect of the procurement function of procuring institutions **[except municipalities and municipal entities]** <u>subject to section 63(7)(a) of this Act</u>;	These amendments are not supported. The proposed amendments, contained in the D-Bill, in clause 5 and 6, were to address constitutional concerns about infringing on constitutional powers of local government.	

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		(b) intervene by taking appropriate steps to address a material breach of this Act by a procuring institution**[, except a municipality or municipal entity,]** within its province as may be prescribed subject to section 63(7)(a) of this Act; (c) provide any information required by the Public Procurement Office in terms of this Act; and (d) perform other duties imposed by this Act. (2) (a) A provincial treasury, within its province, may, **[in relation to]** subject to section 63(7)(a)**[—** **(i) municipalities and municipal entities, issue non-binding circulars; and** **(ii) other procuring institutions,]** issue, by notice in the Provincial Gazette, binding provincial instructions, on procurement matters for the effective implementation of this Act and not inconsistent with an instruction issued by the Public Procurement Office; (b) issue guidelines to assist procuring institutions with the implementation of this Act or any other procurement related matter; (c) assist procuring institutions in building their capacity for efficient, effective and transparent procurement management; and (d) exercise other powers conferred by this Act. (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. **[(4) A circular referred to in subsection (2)(a)(i) will be binding on—**		

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		(a) a municipality, if adopted by its council; or **(b) a municipal entity, if adopted by the council of the entity's parent** **municipality.]** **[(5)]**(4) The head of a provincial treasury performs the duties and exercises the powers of the provincial treasury on behalf of the provincial treasury.		
	Chapter 4	It may be pertinent to note that Chapter 4 currently makes no reference to open competition to be adjudicated through a preferential points system. In other words, it appears that if section 17, 18, and 19 do not apply, then the framework in Chapter 4 does not enable evaluation on the basis of preference points, and procuring institutions could only lawfully consider cost-effectiveness, capability, functionality and technical requirements.	The evaluation criteria will be prescribed to read together with cl 24(1)(d), therefore there is no need for a preference point system at this stage.	
	Clause 24(1)(d)	In relation to section 24(1)(d),if evaluation is construed as including all processes through which the appropriateness of a supplier is considered, we submit that cost-effectiveness, capability, functionality, and technical requirements must all be evaluated to maintain adherence to section 217(1) of the Constitution. **Proposal** (d) the criteria for evaluation of bids, which **[may]** <u>must</u> include, but are not limited to, cost-effectiveness, capability, functionality and technical requirements, without limiting new entrants or emerging suppliers or both.	Supported.	Include amendment in cl 24(1)(d).

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	New Provision	The Bill already establishes a requirement of review of implementation and amendment in relation to regulations as per, for example, section 17(2). The Committee has agreed that this Act as a whole should have a review of implementation and supplementary amendments after a period of time, and we believe this agreement can be entrenched in the Act as follows: **Proposal** Review and supplementary amendment of the Act (1) The Minister must after 18 months after the commencement of this Act submit a review of implementation of this Act and supplementary amendments to NEDLAC for deliberations. (2) The Minister must after 24 months after the commencement of this Act submit a review of implementation of this Act, supplementary amendments, and a NEDLAC consultation report to Parliament (3) Parliament must after 30 months pass supplementary amendments to this Act.	Hard-coding such processes into legislation is not advisable. The regulation-making process and their implementation need to take place first before there would a clear picture about amendments to the Act that should be initiated. Thereupon, the proposed amendments to the Act must go through the required executive processes including public consultation and Nedlac. It is submitted that the proposed (3), compelling Parliament to pass supplementary amendments to the Act, would be unconstitutional.	
COSATU AND SACTWU	General comments	Comment: We welcome the decision of the Committee to consider this Bill a temporary, transition Bill and that the Committee Report will propose that the Bill is reviewed in 24 months at Nedlac. Nevertheless, it is	Hard-coding such processes into legislation is not advisable. The regulation-making process and their implementation need to take place first before there would a clear picture about amendments to the Act that	

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		our understanding that National Treasury is not bound by the recommendations contained in a Committee Report, and we are mindful of the fact that there will shortly be a new political administration which could produce a new Finance Minister and new members of Parliament. This means that while we appreciate the agreement by the Committee to call for the review of this Bill in 24 months at Nedlac, there is no guarantee that this will call will be heeded, and there is no obligation on actors in the State to do so. **Proposal**: We therefore propose a two-step solution. • As a first step, that the Bill includes a "review clause" - something to the following effect: "The Minister must, within 24 months after the commencement of this Act review the implementation of this Act and the need for any amendments to this Act. This review shall be done by referring the Act to Nedlac within 24 months for social dialogue consultation". We believe the principle of review is established in other legislation, such as Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (see Chapter 7 for example), as well as the Consumer Protection Act 68 of 2008 • As a second step, that the Committee Report still makes this recommendation.	should be initiated. Thereupon, the proposed amendments to the Act must go through the required executive processes including public consultation and Nedlac. The Minister should review the Act and, if amendments are proposed, all stakeholders must be consulted including Nedlac.	

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		Comment: Much of the substance of engagement on the Bill - both at Nedlac and in Parliament - was deferred to Regulations. Hence the drafting of the Regulations will be particularly important. **Proposal**: We also believe the Regulations must be brought to Nedlac and not simply opened for public comment, and this should be drafted into the Bill.	Regulations will be consulted with stakeholders including Nedlac. It is therefore not necessary to include such a provision in the Bill.	
	Clause 5(2)(a)and (b)	We are concerned by 5(2)(a) and (b) which exempt municipalities from being bound by provisions of this Act. This principle of exemption is also found in other places like 6(1)(a)(iii) and (6(2)(a)(i) and elsewhere. •Municipalities must be bound by the same rules as the rest of the Stat regarding procurement rules, otherwise there will be multiple tender markets, and this could have severe consequences – not only for development of a common rules based system, but also for ensuring there is compliance and a high standard of ethics within municipal procurement. Proposal: All clauses exempting municipalities must be removed.	It is important to note that municipalities and municipal entities are bound by the provisions of the Act including regulations made under cl 63. The only instruments that would be subject to adoption by Council are circulars. The proposed amendments, contained in the D-Bill, in clauses 5 and 6, seek to address constitutional concerns about infringing on constitutional powers of local government. Therefore, the proposed amendments are not supported.	
	Chapter 4	**Comment**: It is still not necessarily clear from the Bill that S17, S18 and S19 are mutually exclusive and cannot be applied simultaneously (i.e. layered on top of one another). If they are layered, this could cause enormous complications for procurement.	The provisions in chapter 4 are meant to be implemented in a staggered manner, within the context of the prescribed thresholds. The set-aside provisions are meant to achieve representation of the economically	

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		To be clear, the same does not apply for S20 (designation for local content), which we expect to be layered given that it would be a cross-cutting preference. We welcome addition of 16(6)	active population of the Republic by providing an entry point to economic activities within the public sector (government) as the biggest spender. Clause 17 is intended to operate within a certain prescribed threshold (which is envisaged to be the lowest threshold of the three provisions, namely, clause 17, 18 and 19). As indicated previously, clause 17 is then meant to accommodate and facilitate ease of entry to the market, without disproportionately skewing the market. Clause 18 will operate at a higher threshold than the set-aside provisions. It is about encouraging previously advantaged and / or empowered bidders to partner with government in advancing transformational objectives, either by how that bidder has procured from disadvantaged persons or categories of persons; or by how the bidder is going to subcontract to any of the disadvantaged persons or categories of persons. So, the preference in the prequalification clause is two-pronged: 1. giving preference to persons willing to adhere to the prequalification criteria, that is, by procuring from persons previously disadvantaged by unfair	

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			discrimination, or by subcontracting to such persons; and 2. giving preference to previously disadvantaged persons or categories of persons by virtue of these persons of being subcontracted to. The provisions relating to subcontracting in clause 19 are then envisaged to operate within the context of high-value tenders, to ensure participation and exposure of small businesses to high-value and complex bids / tenders. In a nutshell, the staggering approach to these provisions can simply be stated as follows: the set-aside provision is for lower-value contracts; the prequalification criteria for preferential procurement for contracts with a value higher than set-asides; and the subcontracting as a condition of bid for high-value contracts, which typically could even be awarded to previously advantaged persons.	
	Clause 24	**Comment**: We welcome the inclusion in S24 of a framework of elements against which to judge procurement relating to price (amongst other things).	Proposal supported.	Clause 24 (1)(d): 24(1)(d) should be compulsory and include the term "must" and not "may".

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		Proposal: However,we believe the obligations to assess or evaluate contracts in 24(1)(d) should be compulsory and include the term “must” and not “may”.		
	Clause 28(2)(a)	Clause 28 (2) (a) be amended as follows (addition of the terms “online” as well as “and information”): (2) “A single online platform that at least provides access for officials, bidders, suppliers and members of the public to all procurement related services and information;”	The ICT system will be an online system in any way. Secondly, cl 28(2)(f) does provide for information to be accessed. Therefore, it is not necessary to add the term ‘and information’ in cl 28(2)(a).	
	Clause 31(2)(v)	We welcome the changes to 31(2)(v) amongst others. Nevertheless we are concerned that some of the Bill’s clauses might remain ambiguous and could be open to misinterpretation. (See proposal on comment on clause 28.)	See previous response to comment on cl 28.	
Business Unity South Africa (BUSA)	Clause 1	Chapter 1, Definitions, which is a correction to what is contained currently in this version; The current version is not correct. The definition of “procurement”, paragraph (a): This definition is a repeat of the next one. It should have been “...the acquisition of general and strategic goods and services” so that it covers both other strategic goods and services not related to construction or infrastructure as well as general goods and services as the latter falls within the same definition but is different from what is contained in the one that follows.	Par (b) applies where goods or services are acquired for constructing, repairing or maintaining infrastructure or capital assets. See proposed amendment in the next column.	‘‘**procurement**’’ means — a. the acquisition of goods or services for construction, repair or maintenance of infrastructure or capital assets; b. the acquisition of goods or services, other than goods or services referred to in paragraph (a);

Commentator	Clause	Comment	Response	Proposed amendment to Bill
				c. the acquisition of infrastructure or capital assets; or d. the letting or disposa l of assets;
	Chapter 4	Chapter 4, See note at the beginning of the Chapter for consideration, which is a possible omission premised on an inadvertent lack of knowledge of all of the scoring elements as contained in BBBEEE Codes. Whilst we understand that not all companies that fall within the set aside category may be at a level of development to be able to afford to make this investment and whilst small companies may be exempted from this skills development obligation, medium and large companies that are black owned and beneficiaries of set asides should be obliged to make such a contribution which could form part of the eligibility criteria as well as the multiplier effect of this has generational life changing benefits. Note on the draft Bill: Whilst the combined elements in the BBBEE Codes are being deconstructed under this chapter, as separate provisions in setting aside bids, it is noted and concerning that no provision has been made for preferences and evaluation for companies making a concerted efforts towards skills development, which is key to address the unemployment challenges we face. We would argue that even companies for whom such bids are being set aside, have an	The important issue here is that the Bill makes provision for the B-BBEE Act in the Preamble and in chapter 4 which then aligns the Bill and the B-BBEE Act. Further clarification will be provided in regulations where necessary. The provisions in the Bill are drafted in the manner that provides for direct empowerment of the person or categories of person, including youth, black people who are youth and youth in geographical areas and black youth in geographical areas. These preference measures are aligned with the objectives of Youth Employment Service (Y.E.S) Initiative which is to promote job creation.	

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		obligation to contribute to the deliberate investment in skills development as is the case in the Construction Sector Codes. This element is contained in the BBBEE Codes of Good Practice and one wonders why it has now been totally omitted. The YES Programme launched by the President and other skills development programmes for youth not employed in a particular company would be severely and adversely affected by this omission.		
Department of Trade, Industry and Competition (DTIC)	Clause 16(3)	This section provides a perverse incentive for some procuring institutions not to implement government objectives embedded in sections 17, 18 or 19. The only requirement that this section provides is for procuring institutions record and report the reasons for deviations to the Public Procurement Office and the relevant treasury. (i) When must that happen – before or after the tender/bid? (ii) What if the reasons are frivolous and there is a disagreement on them. (iii) What is the role of the Public Procurement Office and the relevant treasury in that regard? (iv) It must be noted that some of the requirements are constitutional and procuring institutions are obliged to implement them.	Clause 16(3) is drafted in recognition of the fact that it may not always be possible for these preference measures to be applied, for example, there may not be suppliers in the market for particular goods or services that are being procured. It is similar to the provision in the subcontracting clause that recognizes that it may not always be feasible to subcontract. The requirement to report is intended to ensure that where these preference measures cannot be applied, the PPO or the relevant treasury would then be in a position to guide and support officials and procurin g institutions to ensure compliance with thi s Act.	

Commentator	Clause	Comment	Response	Proposed amendment to Bill
	Clause 18(4)	It must be noted that legally, the word '**must**' has a peremptory meaning requiring an exact compliance. The interpretation of this clause is that if an organ of state does not conduct market research and industry analysis, it won't be in a position to identify sectors and industries that may be eligible to bid in line with the transformation requirements. **(i)** What happens if the study is not there? **(ii)** Is that requirement per tender? **(iii)** Please consider redrafting this clause and provide **an option** for procurement institutions to follow a rational process to support transformation. It must be remembered that in **ACSA SOC Ltd v Imperial Group Ltd & Others** case, the SCA found that in order to implement preferential procurement policies, section 217(3) of the Constitution envisages that this may only be done within the boundaries prescribed by national legislation. In this instance, the procurement legislation and the B-BBEE Act were enacted to fulfil the obligations set out in section 217(3) of the Constitution. The SCA held that in setting pre-qualification criteria in the bids/tenders that deviates from those prescribed in the B-BBEE codes, ACSA's decision to publish the tender cannot be said to be informed by **reason or rationality.** Therefore, B-BBEE generic codes and sectoral codes can fulfil the requirements of **market research and industry analysis.**	The comment is noted and a proposal has been submitted for consideration.	(4) Procuring institutions m ust identify procurement opportunities, in a parti cular sector, industry or commodity, s upply market, and the availability of small enter prises or co-operatives or both, that may be eligible to bi d to support sectors or indust ries that are not sufficiently transformed where any prequalification criteria r eferred to in subsection (1) could b e applied.