

# Public Procurement Bill 2023

## Submission of Public Comment

### The Joint Strategic Resource "JSR" Submission

11 September 2023

1. As the members of the group of experts that assisted Nedlac in its consideration of National Treasury's 2022 version of the Public Procurement Bill and became known as the Joint Strategic Resource (JSR), we welcome the tabling of the Public Procurement Bill in Parliament. We further welcome the call by the Standing Committee on Finance for comments from the public on the text of the Bill as tabled and hereby make this brief submission. *We also request permission to address the comment in person and/or by Zoom.*
2. Following this introduction, this "JSR Submission" comes in two analytical parts and a conclusion.
3. In Part One, we briefly reiterate our perspective on the Bill – a strategic contracting paradigm. This paradigm should be contrasted with the administrative paradigm which fully characterized the Treasury Bill brought into Nedlac and which still is largely presented in the version of the Bill tabled in Parliament and before your committee.
4. In Part Two, we present a high-level analysis of the Bill, focusing upon three areas which are significant in judging any public procurement legislation: constitutional compliance with section 217, statutory alignment of the Bill within the existing regulatory framework (including the PFMA), and statutory elaboration of the principles that should drive the public procurement system. While the current Bill has adopted some of our ideas and suggestions, there remain serious problems. As part of the analysis in Part Two, we point to specific provisions in the Bill which could be amended and which demonstrate problems with South Africa's public procurement system we have identified.

#### Part One

5. After approximately eight years of legislative and policy development, National Treasury introduced its version of the Public Procurement Bill into NEDLAC on 13 April 2022. In subsequent months, the NEDLAC Public Finance and Monetary Policy Chamber in collaboration with the Trade and Industry Chamber established a task team of Government, Business and Labour to engage on the Bill. The task team met 15 times between 06 May 2022 and 07 October 2022.
6. At the request of Business and Labour, early meetings of the Task Team were attended by a small number of outside individuals and organisations with expertise in public procurement. The Task Team soon formalised this function, with those individuals and organisations styled as a Joint

Strategic Resource (JSR). Coordinated by the Public Affairs Research Institute (PARI), the JSR was asked to support the process as directed by Business and Labour with research, advice, and related inputs.

7. A crucial feature for the draft legislation, agreed to in principle between all the social partners, was to provide the legal basis for moving public procurement in South Africa toward a new strategic procurement paradigm. The JSR was asked to support the Task Team by theorising this concept and suggesting how it could be embedded in practice in the Bill. As well as participating when called upon within the NEDLAC processes, the JSR prepared a proposed draft of the Public Procurement Bill, which is available as Annexure C of the Final NEDLAC Report on the Bill ("the JSR Draft").
8. South Africa's current public procurement regime follows an administrative paradigm. This paradigm emerges from and is for the procurement of basic, "off-the-shelf" goods and services, which are well-defined, easily specified, and without critical risks for public finance and service delivery. The administrative paradigm stipulates rigid rule-bound public procurement processes where the focus is on compliance rather than on procurement outcomes. Consistent with a financial procedures approach, it puts into place such rigid procedures in order to ensure legibility, compliance and expenditure control. The administrative paradigm is tightly intertwined with the current problems of the public procurement system including the lack of service delivery and accountability for procurement outcomes. This way of thinking about procurement has subjected purchasing processes to constraints that often have little reasonable relationship with delivery priorities. It has disempowered technical and operational professionals in the state. This has marginalised expert input into procurement and eroded an important check on illicit interference in the bureaucracy.
9. The JSR developed a conception of strategic procurement defined by the following three elements:
  - 9.1 First, accounting officers and authorities should ideally have freedom to develop implementation frameworks which respond to the specific purchasing environments of the procuring institutions that they lead.
  - 9.2 Second, procurement must often be located as a strategic function able to be tightly linked to specialist project and service delivery functions.
  - 9.3 Third, professionals in these functions should have the flexibility to develop purchasing strategies that tailor processes to the requirements of specific purchases.
10. These elements allowed the JSR to develop a generic idea for the subject matter of strategic procurement. What is being procured is a collection of contracts that need to function together as a project. While this fits the classic understanding of public works and of public infrastructure as a category of procurement beyond goods and services, it is not limited to the usual understanding of public infrastructure and includes the public procurement of systems such as information technology systems and can be applied to all complex purchases.
11. In this approach, we thus defined procurement as follows: "the process which creates, manages and fulfills contracts which are concluded following the application of a selection method in Part 2

of Chapter 5.” This definition is at the heart of the distinction of the strategic procurement paradigm from the existing dominant one of administrative procurement.

12. Further detail and elaboration on the JSR Bill and the paradigm of strategic procurement is available in a 16-page working paper: Jonathan Klaaren, Ryan Brunette, Geo Quinot, and Ron Watermeyer. “A Strategic Public Procurement Paradigm for South Africa: Reflections on the Development of the Public Procurement Bill.” Public Affairs Research Institute, July 10, 2023. <https://pari2.wpeninepowered.com/wp-content/uploads/2023/07/PPP28-06MAINfinx-1.pdf>.

## Part Two

13. We turn now to the tabled Bill, examining it in each of these three areas of constitutional compliance with section 217, statutory alignment of the Bill within the existing regulatory framework (including the PFMA), and statutory elaboration of the principles that should drive the public procurement system.
14. **First**, we fear that the current text of the Bill, at least in part due to its lack of clarity, does not comply with section 217 of the Constitution. There are two main concerns here: the Bill’s failure in e.g. ss 8 and 18 to clearly define the key concept of public procurement system and the Bill’s failure in the current s 17 to detail the substantive policy for a targeted (or as it is most often termed “preferential”) procurement framework.
15. To begin with, the tabled Bill is not clear whether it sees procuring institutions or the National Treasury as the first mover in setting up public procurement policies for procuring institutions. This is an important constitutional question. The term public procurement system is used in s 217. This Bill at times seems to understand a public procurement system to be the system developed, owned, and implemented by a procuring institution - see section 8. This understanding of the public procurement system is comparable with our current understanding of an entity’s SCM policy. It exists at a fairly low level of abstraction and mainly serves as an implementation instrument. However, section 8 references section 18 and section 18 seems to understand a public procurement system to be set up by National Treasury in the first instance (the Minister is to prescribe a procurement system for procuring institutions) and to mean the system as a whole. The procurement system contemplated in section 18 is at a higher level of abstraction and does not serve as an implementation tool, but rather as a framework to inform procuring institutions’ implementation instruments. Rather than being clear on where authority lies or on how that authority is to be divided, the tabled Bill simply repeats the lack of clarity in the current system.
16. The very same dynamic occurs in the context of preferential procurement. Section 17 begins indirectly by referring to the implementing of a preferential procurement policy by a procuring institution without clearly locating the authority in National Treasury for making the framework for e.g. broad-based targeted procurement policy. Yet section 17 empowers the Minister to make binding regulations. Upon reading section 17, it is far from clear which entity has the power to create a preferential procurement policy to be implemented by a procuring institution. This is also a constitutional issue. The fudging of this question puts the Bill at risk for an early court challenge

along very similar lines as those that succeeded in invalidating the Preferential Procurement Regulations, 2017 made under the Preferential Procurement Policy Framework Act. But more fundamentally it does not give clear direction to procuring institutions attempting to implement the Bill on what the extent of their power to determine preferential policy is.

17. Distinct from the constitutional issue noted above re locating the competence to determine procurement policy and locating the competence to determine preferential procurement policy, in the area of preferential procurement, there is a further constitutional concern about the extent and the content of the substantive policy on preferential procurement contained in the Bill. Targeted or “preferential” policy is always about firstly measures and secondly target groups/target objectives. According to s 217(3), national legislation must establish a framework. To meet that requirement, section 17 must clearly set out requirements for a preferential procurement policy. However, section 17 is not clear, does not set out standards or concepts that could be implemented, and as currently drafted appears to fall short of the constitutional framework standard. Compare JSR Bill section 20. Section 17 has several lists of categories of target groups or target objectives as well as several lists of measures at different levels of legal force. How these can be put together into a coherent policy to be implemented by a procuring institution is not clear. These uncertainties are exacerbated by the reference to section 10(1)(b) of the Broad-Based Black Economic Empowerment Act, which subjects preferential procurement policies to any “relevant code of good practice” issued under that Act. It is far from clear in what way a procuring institution must adhere to such relevant codes, or how relevance will even be determined in this context.
18. Overall, the Bill should provide for public procurement which is developmental in economic nature and outlook, aspiring to expand the productive base of the economy and to support innovation and investment. This means that preferential procurement policies (including local content) must be part and parcel of the statute.
19. A **second** main area of concern is the statutory alignment of the Bill within the existing regulatory framework. Good alignment with existing laws and legal concepts is key to having this Bill work effectively. However, the Bill falls short in three respects: its lack of fit with the existing financial management framework, where it follows an administrative rather than a strategic approach to public procurement such as in the Bill’s reliance upon binding instructions issued by the Public Procurement Office and the provincial treasuries rather than statutory provisions, and its inadequate proposed regulation-making procedure.
20. The Bill has a poor fit with the existing financial management framework. The main reason for this is that the Bill foresees control over the content and formulation of a procuring institution’s public procurement policy – such as what procurement methods to use when – to be determined by the National Treasury rather than by the accounting officer/authority of an organ of state as envisaged in the PFMA and MFMA. The Bill requires the procuring institution to achieve value for money through a system imposed on it through regulations, instructions, standard bid documents, prohibited practices and model procurement policies. Accounting officers/authorities and procuring institutions should be allowed to develop and implement their procurement policies

around the objectives of the Bill, the principles embedded in the Bill, and the various overarching procedures that it establishes. They should be sure that their decisions and actions will be scrutinised, with data and document disclosures at specified points within the procurement cycle on an open online platform.

21. The Bill continues to follow an administrative rather than a strategic paradigm in numerous instances. For instance, the Bill relies upon administrative instruments from the Public Procurement Office (PPO) within National Treasury to implement numerous provisions of the Bill. These instructions may be supplemented at provincial level by binding provincial instructions issued by Provincial Treasuries and only applicable within that province. This only contributes to the confusing detail and diversity of “law” to follow in this field, leading contradictorily to less compliance with law and the democratic policy determined by the legislature and fundamentally undermining one of the core objects of the Bill, viz. to create a single, coherent regulatory framework. The Bill should not rely on regulations and PPO instructions to interpret the intent of the legislation. Instead, the Bill needs to establish clear procurement principles, allowing for effective and strategic action by procuring institutions, and facilitating across-government coordination.
22. Another example of the administrative paradigm is in the Bill’s specification in section 24 of an information system that is to be determined by the PPO, which does not appear to consider the wide range of methods, standards, and practices required to support procurement of a strategic nature.
23. Relating to the inadequate regulation-making procedure proposed, it is clear that the Bill has extensive risks and implications for the economy, business and labour. It arguably falls within the statutory requirement for consultation contained within the Nedlac Act. These consequences entail that the need for consultation in its implementation through legally binding instruments be regulated in the Bill. This will also foreclose court challenges of the regulations on these grounds. A subsection in place of s 58(3) should be inserted modeled upon the regulations clause of the Labour Relations Act and justified on similar grounds. PARI has suggested specific rewording in its submission for s 58 to this end.
24. The **third** main area of concern is the near complete failure of the Bill to begin from the constitutional text and democratically elaborate on the specific principles and ideas that should drive South Africa’s public procurement system.
25. In our view, the Public Procurement Bill should create a single regulatory framework consistent with the Constitution. This should be an Act of Parliament that defines and articulates a public procurement system as envisaged in section 217 of the Constitution and interpreted in light of section 33 and section 195. The Bill should embed statutorily the principles for procurement and establish checks and balances framed around section 217 of the Constitution. Having clear procurement principles at the level of statute enables effective and strategic action by procuring institutions and additionally facilitates whole-of-government coordination. The placement of specified principles in the Bill (see section 2 of the JSR Bill) allows for the flexible, strategic, and

effective pursuit of policy objectives which redress the imbalances of the past and simultaneously commit to sustainable procurement and economic development.

26. In addition, while the procurement system should not be over-determined by the objective of anti-corruption, the Bill should advance transparency and combat corruption. It should adopt the principle of open contracting in order to advance these objectives as well as efficacy and cost-effectiveness. We note that several civil society organisations have raised concerns about section 26, viewing it as a secrecy clause. The use of a secrecy regime in procurement is unlikely to pass statutory or constitutional muster. To avoid any risk of abuse and costly litigation, this clause should be revised to only establish rights to information that are additional to and not in substitution or derogation of rights contained in other parts of the Bill or any other law.

## **Conclusion**

27. As members of the JSR, we repeat our standing offer to organs of state, now and hereby including this standing committee as well as Nedlac, National Treasury, the Department of Trade Industry and Competition and other bodies. This offer is to provide our services of analysis and drafting in this field of public procurement. This may include the further elaboration of legal instruments, the analysis of the public comments and the drafting of indicative regulations in order to assist Parliament and to progress the urgent work of reforming South Africa's public procurement system.

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