Public Procurement Bill 2023

Submission of Public Comment

The Public Affairs Research Institute, University of Johannesburg

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Introduction

1. The Public Affairs Research Institute (PARI) welcomes the opportunity to contribute to parliamentary deliberations on the Public Procurement Bill. We also request permission to address this public comment to the Committee in person.

2. Section 217 of the Constitution requires that public procurement proceed in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. These values must be continuously balanced with each other. They distil, within the context of public procurement, the Constitution's basic concern with constructing a state that is efficient, honest, open, and that advances freedom, equality, and development. We stand behind this constitutional vision.

3. South Africa's public procurement system is in crisis. A number of the reforms proposed by the Bill are urgent, including stronger differentiation between types of procurement, provision for more strategic approaches to procurement methodology in some of these types, and various integrity and transparency provisions. The courts have also recently struck down preferential procurement regulatory powers once exercised by the National Treasury. The effect is to loosen national control in an especially contentious policy domain, where the necessity of ensuring appropriate balance between the section 217 values is arguably highest. Importantly, there is currently no requirement for procuring institutions to apply B-BBEE and local content, threatening jobs, industrial capacity and broad-based empowerment processes. To address this situation, and to build momentum behind broader reforms, we recognise the need to move quickly to promulgate a new empowering statute.

4. Nevertheless, we must give voice to widespread and justified anxiety within South Africa's increasingly robust public procurement policy community. PARI has had the privilege of

participating in the Joint Strategic Resource (JSR) in NEDLAC, the Procurement Reform Working Group (consisting of a range of civil society organisations) and the Special Interest Group on Public Procurement Law (a knowledge-sharing network with legal practitioners and academics). We have learnt much in these settings and we can attest to their immense value to the future of our Republic. Analysing the now tabled text of the Bill, this community has shown it to be fraught with hazards. Together with this community we have found it especially difficult to evaluate these hazards, because the Bill defers so much of its own substance to as yet unpublished subordinate instruments. The legislative process before us should move with appropriate urgency. But it should not move so quickly as to cast doubt on the extent to which it adheres to the participatory spirit of the Constitution. The Bill's sweeping assignment of legislative powers to the executive does already, eroding the prerogatives of Parliament.

5. We give voice to these concerns, but we aim, first and foremost, to be constructive. This submission does not dwell on the general crisis of South Africa's procurement system or on our overarching vision for this Bill and broader reform. These matters are addressed in publications[1] and, in this forum, our vision for what the Bill could have been is expressed in the JSR submission. We also do not set out to describe all the Bill's flaws, which we expect will be done ably by other participants in this process. Rather, this submission focuses on some of the more serious of the Bill's problems and it suggests practical ways to solve them. We begin with the constitutionality of section 17, then we move to the Bill's excessive recourse to subordinate legislation, and finally we address certain matters of integrity, transparency, and access.

The Constitutionality of s17, Preferential Procurement Policy

6. s217 of the Constitution of the Republic of South Africa reads as follows:

> 217. Procurement
> (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for —-
> (a) categories of preference in the allocation of contracts; and
> (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

[1] Among others, Jonathan Klaaren, Florencia Belvedere, and Ryan Brunette. 2021. *Reforming Public Administration in South Africa: A Path to Professionalisation*. Cape Town: SiberInk; Jonathan Klaaren, Ryan Brunette, Geo Quinot, and Ron Watermeyer. 2023. "A Strategic Public Procurement Paradigm for South Africa: Reflections on the Development of the Public Procurement Bill." A PARI Report. Johannesburg: Public Affairs Research Institute. https://pari.org.za/joint-strategic-resource-a-strategic-public-procurement-paradigm-for-south-africa/

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

Our view is that the Bill misinterprets these provisions and that this could have far-reaching, adverse implications.

Interpretation of s217 of the Constitution

7. s217(1) requires that public procurement proceed in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. These principles circumscribe and govern all of South African public procurement. In our view, these principles must also be read expansively to enable the inclusion of public policy goals such as redress, economic development and sustainability horizontally across procurement processes. This is implied most prominently by the presence of equitability within the five principles, but the other four principles must be understood in a similar fashion. We can speak, for instance, about the cost-effective pursuit across procurement of a strategy of national industrialisation. s217(2) continues in this vein when it asserts that s217(1) "does not prevent," in the sense that it already allows the implementation of procurement policies providing for certain public policy goals. It follows from this reading that s217(2) does not create an exception to the five principles. Rather, these principles continue to apply and s217(2) underlines and elaborates on their potential.

8. s217(2) elaborates 217(1), first, by drawing a distinction which is of central importance to our ability to advance public policy objectives through procurement. s17 must be located firmly on these grounds to withstand constitutional challenge. s217(2)(a) provides for categories of preference in the allocation of contracts. A "preference," in terms of ordinary language and international procurement practice, must be understood as a margin of advantage, which is to say points in a points system, applied to certain categories of bidders. The provision leaves open-ended the categories to which this measure might be applied. Conversely, s217(2)(b) establishes a category, persons disadvantaged by unfair discrimination, and leaves open-ended the measures that might be applied to protect and promote these persons. These measures extend beyond preferences, to include set asides, subcontracting requirements, product specifications, and so on. These measures, we argue, also need not refer directly to persons disadvantaged by discrimination, but must be related to their protection and advancement. What we mean is that people who have been affected by unfair discrimination are disproportionately impoverished, unemployed, under-employed, and subject to the ravages of environmental degradation and climate change. Addressing these issues requires comprehensive efforts to develop the economy, redistribute its benefits, and ensure that this is done sustainably. The state's trillion rand of procurement expenditure is an important lever for advancing these efforts, so s217(2)(b) must be read as including the protection and advancement of persons disadvantaged by discrimination through the application across procurement processes of broader policies of economic development, environmental sustainability, and so forth.

9. So, s217(1) of the Constitution establishes principles governing procurement. These principles frame and are elaborated through the s217(2) measures and categories. s217(2) is critical to our national project. It is also politically contentious and technically complex, and this is where s217(3) becomes significant. s217(3) declares that "national legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented." In terms of the Constitution (s239), "national legislation" includes subordinate legislation. The provision continues that this national legislation "must prescribe a framework." Since it would be superfluous for national legislation to prescribe itself, the word "framework" must have additional meaning. The Oxford English Dictionary says that a "framework" is "an essential or underlying structure" which "encloses" and "supports." This definition of the term "framework" is seen in Zondi JA's *Afribusiness* judgement when he asserts, referring to the Preferential Procurement Regulations, 2017, that "The discretion which is conferred on organs of state under regulation 4 to apply pre-qualification criteria in certain tenders, without creating a framework for the application of the criteria, may lend itself to abuse."[2] In these words, Zondi distinguishes merely enabling legislation, from an enabling *but also guiding and constraining framework*. The purpose of the framework is not simply to empower, but also to govern the exercise of that power and, thereby, to contain it within the bounds of legality. This is the sense in which, continuing with s217(3), the powers conferred under s217(2) "must" be exercised "within" the framework.

10. s17 of the Public Procurement Bill reads in full:

> 17. Preferential procurement policy
> (1) When implementing a procurement policy providing for—
> (a) categories of preference in the allocation of contracts; and
> (b) the protection or advancement of persons or categories of persons, disadvantaged by unfair discrimination,
> a procuring institution must do so in accordance with the objects of this Act, this Chapter and section 10(1)(b) of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003).
> (2) The policy envisaged in subsection (1) must include—
> (a) one or more preference point systems and thresholds;
> (b) measures regarding preference for—
> (i) a category or categories of persons or enterprises or a sector;
> (ii) goods that are produced in the Republic; and
> (iii) services provided in the Republic;
> (c) measures—
> (i) to set aside the awarding of bids to promote any of the preferences referred to in paragraph (b);
> (ii) to set subcontracting as a bid condition to promote any of the preferences referred to in paragraph (b);
> (iii) for subcontracting by suppliers awarded bids that promote any of the preferences referred to in paragraph (b);
> (iv) to advance transformation, beneficiation, industrialisation, innovation, creation of jobs, intensification of labour absorption and economic development;

[2] At [38] in Afribusiness NPC v Minister of Finance (1050/2019) [2020] ZASCA 140

(v) to balance the economic impacts of imported goods or services, unless the procuring institution is exempted by the Minister; and

(vi) to advance a sustainable environment.

(3) Regulations—

(a) must be made regarding the application of subsection (2)(a) and (b)(ii) and (iii); and

(b) may be made regarding any other provision of this Chapter.

(4) Without limiting the generality of subsection (1)(b), the policy must include preferences for—

(a) citizens and permanent residents of the Republic;

(b) small enterprises, as defined in section 1 of the National Small Enterprise Act, 1996 (Act. No. 102 of 1996);

(c) enterprises based in townships, rural or underdeveloped areas or in a particular province or municipality.

(5) Persons referred to in subsections (1)(b) and (2)(b)(i) include, but are not limited to—

(a) black people, as defined in section 1 of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);

(b) women;

(c) people with disabilities, as defined in the Employment Equity Act, 1998 (Act No. 55 of 1998); and

(d) youth, as defined in section 1 of the National Youth Development Agency Act, 2008 (Act No. 54 of 2008).

(6) Before making a regulation under this Chapter, the Minister must consult with the Ministers responsible for trade, industry and competition, small business, women, people with disabilities and youth and any other relevant Minister whose portfolio is affected by the draft regulation.

(7) Any Minister, referred to in subsection (6), may submit a request to the Minister of Finance to make regulations under this Chapter regarding a matter pertaining to the portfolio of the relevant Minister.

There are significant problems with this clause, which we detail below, following which we will make suggestions for how these can be addressed.

The discretionary language of s17 of the Bill

11. s217(1) of the Constitution asserts that "when an organ of state… contracts for goods and services," it must do so in accordance with the five principles. s217(3) goes on to assert that national legislation must prescribe a framework within which the policy referred to in (2) "must" be implemented. *s17(1) of the Bill elides these statements, applying the word "when" directly to the s217(2) policy, and thereby implying that when procuring institutions are not implementing such a policy, then s17 of the Bill does not apply to them.* The effect is for s17(1) of the Bill to lose the prescriptive "must" contained in s217(3) of the Constitution. If this holds, then our country loses its full ability to mobilise a trillion rand of annual procurement expenditure to pursue economic development and other desirable policy goals. The Bill also thereby fails to achieve one of its key objectives, to reinstate mandatory local content and B-BBEE requirements across procuring institutions.

The Bill's failure to clarify responsibility for policy formulation

12. The problem continues with the second word, which refers to procuring institutions "implementing" a procurement policy. In our view, the Constitution leaves open the question of who should "formulate" this policy. *We believe that there are strong reasons to prefer national formulation, which would strengthen national control over economic policy, limit legal fragmentation and incoherence, and constrain consequent inefficiency and corruption*. It is our understanding, however, that the government wishes to leave this formulation power with procuring institutions, which makes it surprising to see that the Bill never clearly does so. s5(2)(c) gives to the Public Procurement Office the responsibility of formulating a "model" procurement policy. s8(1)(b) gives to procuring institutions the responsibility for developing and implementing a procurement "system." s17(1), again, gives procuring institutions the responsibility for "implementing" a procurement policy. s18 then gives to the Minister the responsibility to prescribe a procurement system, which at s18(3)(a) includes a "Procurement policy." There is serious risk that these inconsistencies will lead to the same court challenges which recently invalidated the Preferential Procurement Regulations, 2017, which had to do with vague provisions for assigning powers to elaborate subordinate legislation.[3]

The unclear constitutional foundations of s17 categories and measures

13. More generally, s17 of the Bill is unclear about how it locates its policy goals within s217 of the Constitution. A close, and in our view appropriate, reading of s217 (elaborated in para. 6-9 above) suggests that s217(1) already enables the pursuit of those policy goals, that preference (i.e. a margin of advantage) is merely one among many measures available under both s217(1) and (2), and that goals such as economic development and a sustainable environment can be pursued by a range of other measures under s217(2)(b). s17 of the Bill confuses these distinctions and thereby comes unanchored from the Constitution. We see this in the fact that a key purpose of the Bill is to reinstate the designation of thresholds for local production and content, but s17(2)(b) undercuts this objective when it suggests that local goods and services can only be promoted through preferences, in effect confining it to the points system. These issues of lack of clarity regarding constitutional foundations riddle s17, promising a future of incoherent elaboration of procurement policies, under constant threat of litigation.

Failure to meet the constitutional standard of a national legislative framework

14. These issues bleed into a further issue. s17 attempts (see para. 13 above) to throw vague and open-ended procurement policy powers into the hands of procuring institutions. The Bill proposes that procurement policies must include the promotion of citizens and permanent residents, black people, women, people with disabilities, youth and small enterprises. The Bill continues to advantage enterprises based in townships, rural areas, underdeveloped areas, specific provinces

[3] Minister of Finance v Afribusiness NPC (CCT 279/20) [2022] ZACC 4

and municipalities, but also any other category conceivable within the broad terms of the Constitution. Persons or enterprises within these categories can be advanced through the application of preference points, set asides, subcontracting conditions on suppliers, or basically any other measures concerned with such matters as transformation, beneficiation, industrialisation, innovation, creation of jobs, intensification of labour absorption and economic development. The permutations are practically infinite.

15. The Bill offers no substantive guidance or constraint regarding how these new powers are to be exercised. It asserts only that this must be done "in accordance with the objects of this Act, this Chapter and section 10(1)(b) of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003)." These provisions cannot do the work that is required of them. The objects of the Act reiterate the principles of s217(1) of the Constitution, which cannot count as the additional framework required of national legislation under s217(3). s17 is the only section in the chapter and it contains little by way of further specification. Notably, it only obliges the Minister to make regulations for the points systems and the promotion of local goods and services, and leaves to the Minister's discretion whether regulations are required more broadly. s10(1)(b) of the B-BBEE Act requires procuring institutions to include B-BBEE codes in their procurement policies, *but s17 of the Bill gives no guidance regarding how to do so*.

16. Many procuring institutions will not know what to do with their new powers. Few will be able to discern their constitutional limits. The corrupt will find ample room to abuse them for personal gain. Procurement processes that fail to meet constitutional principles of fairness, equitability, transparency, competition and cost-effectiveness will pervade the system. The result will be increasing litigation, all pointing to a critical constitutional shortcoming in the Bill, which is that it does not meet the constitutional standard of a national legislative framework.

Implications and proposed changes to s17

17. There are, therefore, a series of grounds from which aggrieved parties might launch an early challenge of s17 itself. The future that we are here inaugurating could be one of excessive litigation, associated pressure on the courts, gathering legal uncertainty and operational disruption, and persisting hesitancy and malaise in public administrations and businesses across a fifth of our country's economy. s20 of the JSR version of the Bill developed in Nedlac represented an ambitious attempt to address these issues. A more limited and imperfect attempt would need to clarify the constitutional grounds of s17, linking it to the s217(1) principles themselves, expanding it through s217(2) categories and measures, and then instructing the Minister to develop a guiding and constraining framework in terms of s217(3). The grounds of this latter instruction would be s239 of the Constitution, which suggests that the national legislative framework can be elaborated in subordinate law.

18. We make the following proposed changes to s17, where **[ ]** indicates an omission and _____ indicates a new inclusion:

17. Preferential Procurement

(1) **[When]** Procuring institutions must develop and implement**[ing]** a procurement policy providing for—

(a) the fair, equitable, transparent, competitive and cost-effective promotion of public goals through procurement;

(b) categories of preference in the allocation of contracts;**[and]**

[(b)](c) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination**[,]**; and

[(c)](d) measures related to the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination, including the promotion through procurement of social and economic development and a sustainable environment.

(2) The policy envisaged in subsection (1) must be developed and implemented**[a procuring institution must do so]** in accordance with the objects of this Act, this Chapter and section 10(1)(b) of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003).

[(2)](3) The Minister must make regulations facilitating and determining the polic**[y]**ies envisaged in subsections (1) and (2), **[must]** includ**[e]**ing—

(a) one or more preference point systems and thresholds;

(b) measures **[regarding preference for]**promoting—

(i) a category or categories of persons or enterprises or a sector or sectors;

(ii) goods that are produced in the Republic; and

(iii) services provided in the Republic;

(c) measures—

(i) to set aside the awarding of bids **[to promote any of the preferences referred to in paragraph (b)]**;

(ii) to set subcontracting as a bid condition **[to promote any of the preferences referred to in paragraph (b)]**;

(iii) for subcontracting by suppliers awarded bids **[that promote any of the preferences referred to in paragraph (b)]**;

(iv) for the Minister responsible for trade and industry to designate and stipulate, and provide exemptions from applying, a minimum threshold or thresholds for local production or content of goods and services, which must be met by all bidders under all methods of procurement;

(v) to advance transformation, beneficiation, industrialisation, innovation, creation of jobs, intensification of labour absorption and economic development;

[(v)](vi) for the Minister responsible for trade and industry to balance the economic impacts of imported goods or services, **[unless the procuring institution is exempted by the Minister]** including through offset measures and exemptions from these measures; and

[(vi)](vii) to advance a sustainable environment.

[(3) Regulations—

(a) must be made regarding the application of subsection (2)(a) and (b)(ii) and (iii); and

(b) may be made regarding any other provision of this Chapter.]

(4) Without limiting the generality of subsection (1)(b), the **[policy]** regulations must include **[preferences for]** measures promoting—

(a) citizens and permanent residents of the Republic;

(b) small enterprises, as defined in section 1 of the National Small Enterprise Act, 1996 (Act. No. 102 of 1996);

(c) enterprises based in townships, rural or underdeveloped areas or in a particular province or municipality.

(5) Persons referred to in subsections (1)(b) and **[(2)]**(3)(b)(i) include, but are not limited

to—

(a) black people, as defined in section 1 of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);
(b) women;
(c) people with disabilities, as defined in the Employment Equity Act, 1998 (Act No. 55 of 1998); and
(d) youth, as defined in section 1 of the National Youth Development Agency Act, 2008 (Act No. 54 of 2008).

(6) Before making a regulation under any other provision of this Chapter, the Minister must consult with the Ministers responsible for trade, industry and competition, small business, women, people with disabilities and youth and any other relevant Minister whose portfolio is affected by the draft regulation.
(7) Any Minister, referred to in subsection (6), may submit a request to the Minister of Finance to make regulations under this Chapter regarding a matter pertaining to the portfolio of the relevant Minister.

Excessive recourse to subordinate legislation

19. Recourse to subordinate legislation is far from ideal and this issue pervades much of the Bill. Government argues that public procurement is essentially an operational activity and that it must, therefore, be responsive to rapid and nuanced changes in its operational environment and practice. We agree on this point. The government argues, however, that statutory law is associated with excessive rigidity and so subordinate instruments offer desirable flexibility. We feel that this argument misses the point that a well-crafted statute can optimise on competing imperatives, providing operational flexibility in appropriate spheres and constructing guardrails around these. The Bill tabled in Parliament does very little of this.

The risk of unconstitutional and unprocedural elaboration of subordinate law

20. The process for promulgating statutes is arduous, but this is because it is relatively procedurally rigorous. Excessive reliance on subordinate law foregoes this virtue. This produces increased risk that procurement law and operations will become unmoored from the constitutional principles of s217(1). We have already raised a version of this issue in the context of s17 (para. 15-17), but this issue continues across the Bill's threadbare provisions for procurement systems and methods. These systems and methods are essential to the construction of procurement processes that meet the constitutional principles of fairness, equitability, transparency, competition, and cost-effectiveness, but the Bill says very little about them, with clear potential for drift from constitutional grounds.

21. The procedural rigours of parliamentary legislative processes are also important as a guarantee of rights. The Constitution grounds a requirement of participation in decisions affecting people's lives and Parliament constitutes the participatory centre of our system. The National Economic Development and Labour Council Act, No. 35 of 1994, also requires consultation on all significant changes to social and economic policy, which certainly includes the subject matter of this Bill and

its subordinate instruments. Nedlac's role is more strongly entrenched in the domain of statute, and so the Bill's sweeping reliance on subordinate law risks legislative processes that fall foul of the Nedlac Act. More broadly, the courts have interpreted constitutional requirements for participation broadly, flexibly, and proportionately to impact, so the creation of highly impactful subordinate instruments without participation procedures in this Bill threatens to undermine participation rights and to produce future litigation.

The potential for legal fragmentation and incoherence

22. The loss of the procedural rigour associated with statute relates to a second issue. A key purpose of the Bill is to consolidate the currently fragmented and often incoherent legislative landscape, but excessive reliance on subordinate legislation works at cross-purposes with this objective. The Bill provides for a series of subordinate instruments, including regulations, instructions, prohibitions, models, and policies. These tend to cover overlapping domains. The power to issue them is provided variously and sometimes unclearly to the Minister, the Public Procurement Office, provincial treasuries, and procuring institutions. The potential for ad hoc and incoherent elaboration of law is therefore considerable. Introducing procedural rigour in the crafting of subordinate instruments may be essential to checking this possibility.

23. Another purpose of the Bill is to reduce operational rigidity. Excessive recourse to subordinate legislation may simply reintroduce this rigidity, through the proliferation of ad hoc, overlapping and incoherent instruments at the subordinate level. The associated legal complexity will add to the costs of operational decision-making and personnel training. Legal inconsistency will produce confusion, uncertainty and associated operational disruption. A proliferation of subordinate instruments will make it harder for the public to locate the legal prescripts applicable to specific processes and institutions, increasing the costs of doing business with government and undermining democratic oversight and accountability.

Implications and proposed statutory procedures for the promulgation of subordinate law

24. The Bill, therefore, creates considerable potential for procurement processes to fall foul of the s217(1) principles. This in itself may come with significant costs in terms of corruption, inefficiency and ineffectiveness in procurement. The creation of a series of subordinate instruments, with overlapping jurisdictions, issued by different authorities, may reproduce contemporary issues of legal complexity, fragmentation, and incoherence, with consequences for operational rigidity and litigation. The JSR version of the Bill moved to address all of these issues. In a series of provisions, it closely aligned with and mobilised the Constitution. In the process, it developed clear, statutory standards for the establishment, management and evaluation of procurement methods. These created guardrails around new operational flexibilities, which were to be enforced, *inter alia*, through more detailed transparency and whistleblowing provisions. The JSR Bill also reduced the range of subordinate instruments available, it avoided overlap between them, and it clearly assigned powers to issue them.

25. We strongly recommend the adoption of the approach outlined in paragraph 24 above. Failing that, we suggest below new procedural mechanisms for regulations, instructions, and prohibitions. These will bolster rigorous legislative deliberations, fortify the protection of existing rights, and work to avoid the litigation that will likely follow should these rights not being adequately considered:

> 58. Regulations (partially reproduced)
> (2) The Minister must, before complying with subsection (3), consult with the relevant Minister on a draft regulation affecting the portfolio of that Minister.
> (3) The Minister must, before complying with subsection (4), consult with the National Economic Development and Labour Council established by section 2 of the National Economic, Development and Labour Council Act, 1994 (Act 35 of 1994).
> **[(3)]** (4) Before making a regulation the Minister must publish—
> (a) a draft of the regulation;
> (b) a statement explaining the need for and the intended operation of the regulation;
> (c) a statement of the expected impact of the regulation; and
> (d) a notice inviting submissions in relation to the regulation and stating the form and manner in which submissions are to be made.
> **[(4)]** (5) The Minister must submit regulations to be made to Parliament for parliamentary scrutiny at least **[30]** 90 days before their promulgation.

The new ss3 above is modelled precisely on the regulations clause, s208, of the Labour Relations Act, No. 66 of 1995, and it is justified on similar grounds.

26. In relation to instructions and prohibitions, we suggest a new provision immediately after the regulations provision:

> 58A. Instructions and prohibitions
> (1) The Public Procurement Office must, after complying with subsection (1) and before making an instruction or prohibition, publish—
> (a) a draft of the instruction or prohibition;
> (b) a statement explaining the need for and the intended operation of the instruction or prohibition;
> (c) a statement of the expected impact of the instruction or prohibition;
> (d) a notice inviting submissions in relation to the instruction or prohibition and stating the form and manner in which the submissions are to be made.
> (2) (a) with each instruction or prohibition, the Public Procurement Office must publish a consultation report.
> (b) a consultation report must include—
> (i) a general account of the issues raised in the submissions made during the consultation; and
> (ii) a response to the issues raised in the submissions.

This proposed section is modelled on the prior s58.

Integrity, Transparency and Access

27. The integrity, transparency, and access provisions of the Bill introduce important advances, but there remain significant gaps and problems. We suggest minimal rewrites to address these.

Expanding automatic exclusions

28. The Bill correctly includes a long list of automatic exclusions from participation as suppliers in procurement. Persons who exercise public powers, who are expected to commit their full-time to the performance of associated functions, and who are compensated by the state with a livelihood in order to do so, should not be allowed to then trade with the state on the side. When they do so, they inevitably fall into contradiction, with this trade detracting from their official duties, and raising the risk of self-dealing and corruption. s13 of the Bill wisely moves to address this, but it could go further. The same grounds justify exclusion of other political party office-bearers and officials and employees of legislatures, as follows:

> 13. Automatic exclusion from procurement
> (1) The following persons may not submit a bid:
> (a) A public office bearer;
> (b) a leader **[of]**, chairperson, deputy chairperson, secretary, deputy secretary, **[or]**treasurer, deputy treasurer or any person holding an equivalent position in a political party registered in terms of the Electoral Commission Act, 1996 (Act No. 51 of 1996);
> (c) a person appointed in terms of section 9 or 12A of the Public Service Act, 1994 (Proclamation No. 103 of 1994);
> (cc) an official or employee of a legislature;
> (d) an official or employee of a constitutional institution listed in Schedule 1 to the Public Finance Management Act;
> (e) an official or employee of a public entity listed in Schedules 2 and 3 to the Public Finance Management Act;
> (f) an official or employee of a municipality or municipal entity;
> (g) any entity in which a person mentioned in paragraphs (a) to (f) is a director or has a controlling or other substantial interest;
> (h) a bidder or supplier debarred in terms of section 16;
> (i) an entity in which a bidder or supplier debarred in terms of section 16—
> (i) has a controlling interest; or
> (ii) is a director or a member; and
> (j) an executive member of a controlling body of a procuring institution.
> (2) A non-executive member of a controlling body of a procuring institution may not submit a bid in that institution.
> (3) A person related to a person referred to in paragraph (a), (c), (d), (e) or (f) of subsection (1) may not submit a bid in the institution in which the person is a member or employed.

Publication of automatically excluded persons, family members, and related persons doing business with the state

29. It is our view that the Bill could also do more to align with burgeoning regulation of prominent influential persons under recent amendments to the Financial Intelligence Centre Act, No. 38 of 2001 (FICA). A number of procuring institutions, often because they issue debt on the Johannesburg Stock Exchange, are classified as accountable institutions under FICA. Many have already embarked on the regulation of prominent influential persons (PIPs), family, and known close associates, including in their procurement operations. At least on paper, they conduct enhanced due diligence when entering into relationships with such persons. They reserve the right to exclude them from business where the risks exceed their tolerance. They require business partners to disclose the roles of PIPs, family, and known close associates in their operations. When contracting, they also establish consent to publish the names of PIPs who are disclosed by suppliers.

30. These measures are provided for in various ways under the Bill, but the Bill would be enhanced if it were to also facilitate the publication of the names of automatically excluded persons, family, and related persons who conduct business with the state. This is justified by a profound public interest in uncovering and regulating conflicts of interest and corruption in state contracting. It could be achieved through a minimal rewrite of s11, which already provides for the identification of such persons:

> 11. Due diligence and declaration of interest regarding persons involved in procurement (1) A procuring institution must take steps in accordance with prescribed procedures to identify—
>
> (a) automatically excluded persons as envisaged in section 13 and their immediate family members; and
>
> (b) related persons as envisaged in subsection (3).
>
> (2) (a) The steps envisaged in subsection (1) include the prescribed declaration of interest to be made by—
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> (i) all bidders, in the case of bids; and
>
> (ii) all applicants, in the case of applications for registration on a database created by the Public Procurement Office in terms of section 5(1)(i).
>
> (b) A failure to submit a declaration or submitting a false declaration renders a bid invalid.
>
> (3) If a person related to an accounting officer or other official or a member of an accounting authority, a bid committee or the Tribunal involved in procurement in terms of this Act, has, or intends to acquire, a direct or indirect personal interest in a procurement matter, the accounting officer or other official or a member of an accounting authority, a bid committee or the Tribunal—
>
> (a) must disclose such interest, immediately after receiving the agenda of the meeting of a bid committee of the procuring institution regarding a procurement, or on notification of a matter being brought to the attention of the bid committee or at any time during the consideration of the bid when the official or other person becomes aware of the interest; and
>
> (b) may not be present at or participate in the deliberations or decision-making process of the procuring institution in relation to the agenda item or the matter in question.
>
> (4) A disclosure of interest made in terms of subsection (3) must be recorded in the minutes of the meeting at which it is made, or it relates to or any document seeking a decision.

(5) The Public Procurement Office must maintain and publish a register of all automatically excluded persons, immediate family members and related persons who contract as suppliers, including the procuring institutions with which they are contracted.

Protection and promotion of whistleblowers

31. The Zondo Commission recommended measures to protect and promote whistleblowers in public procurement. We understand that these measures are presently being addressed under the provisions of the Protected Disclosures Act, No. 26 of 2000, by the Department of Justice and Constitutional Development. The outcomes of these deliberations, however, remain uncertain. We have long argued that whistleblowing in procurement has special features that justify expression in the Procurement Bill specifically. South Africa also has an existing tradition of enabling whistleblowing measures in legislation dealing primarily with other matters, which we see especially in environmental legislation.

32. We feel that Parliament should show its commitment to protecting and promoting whistleblowing, by empowering the Minister of Finance, after consultation with the Minister responsible for justice and constitutional development, to make whistleblowing regulations. This could be provided for as follows:

58. Regulations (partially reproduced)
(1) The Minister—
…
(b) may make regulations—
(i) permitted by this Act to be prescribed;
(ii) regarding negotiations with a preferred bidder or bidders before the award of the bid;
(iii) regarding requirements for bidders to comply with specified legislation;
(iv) regarding lifestyle audits of persons automatically excluded in terms of section 13 and their immediate family members and related persons, if an immediate family member or a related person is awarded a bid or bids above a threshold stipulated in the regulations;
(v) after consultation with the Minister responsible for justice and constitutional development, regarding the protection and promotion of whistleblowers in procurement;
[(v)](vi) regarding the retention of procurement data; and
(vii) regarding any procedural or administrative matters that are necessary to implement this Act.

Addressing concerns that s26, access to procurement processes, has become a secrecy clause

33. There are two issues with s26 (the "access clause"). The first issue arises from certain changes made to the clause after the Nedlac process, which potentially impact not only on its own operation, but also on the operation of clause 27, the disclosure of procurement information clause (the "disclosure clause"). In the immediate post-NEDLAC version of the Bill, the disclosure clause occurred at 53A and the access clause occurred after it at 53B. This suggested to readers that the access clause was an addition to and not potentially a derogation from the rights advanced in the

disclosure clause. The disclosure clause set out a system of procurement disclosures and then the access clause facilitated additional and open-ended measures for access to and observation of procurement processes.

34. The version of the Bill tabled in Parliament is different in these respects. The language of the access clause ("access," "scrutiny," "monitoring") is vague, it now occurs before the disclosure clause, and it also now includes a limiting provision, empowering the Public Procurement Office to constrain access. A result of these juxtapositions is that a clause that was originally conceived to expand access and transparency, is now widely interpreted as a secrecy clause which is set to close down existing rights to information.

35. We do not believe that this is the government's intention, nor would it be legally feasible, but the fact that the Bill is open to such an interpretation blunts the government's public messaging. It has, in fact, eroded trust in government and, thereby, it undermines public support for the procurement reform process. The potential for this interpretation also undercuts the legal certainty that is required to capacitate public monitoring efforts. There is a possibility that in future the clause might be abused to deny ordinary rights to information, which will generate costly litigation and disruption of procurement operations.

36. These outcomes can be addressed with a minimal rewrite. This rewrite can and should preserve the government's own justified concern that the limiting provisions contained at the new s26(2) are necessary to curtail abuse of access rights, to contain administrative costs associated with providing access, and to protect legitimately confidential information. But this rewrite would also constrain any broader impact from those limitations.

37. In the course of proposing this rewrite, we also suggest one further change. We are advised that the list contained in sub-clauses 26(1)(a),(b), and (c) of the access clause could be read as providing access to, scrutiny of, and monitoring of *only* high-value or complex procurement. We do not believe this is the intention of the drafters, but this would constrict the clause problematically. The efficient and effective purchase of relatively simple things, such as school stationery and hospital beds, can be even more important to advancing the well-being of the South African people than more high value and complex purchases. We accept the need for limitations to access in certain circumstances, but we believe that this power of limitation is already provided for appropriately and flexibly at the current clause 26(2)(b). In the following, therefore, we also address this issue:

> 26. Access to <u>and observation of</u> procurement processes
> (1) The Public Procurement Office must determine, by instruction, measures for the public, civil society and the media to access, scrutinise and monitor procurement processes and systems.**[—**
> **(a) access procurement processes;**
> **(b) scrutinise procurement; and**
> **(c) monitor high-value or complex procurement that entail significant risks of mismanagement and corruption.]**

(2) The instruction referred to in subsection (1)—

(a) must put in place measures to ensure candid deliberations and to protect officials from undue influence and threats and to provide for disallowing or terminating access by the public or a specific category of persons or a specific person if such access resulted in, or is likely to, inhibit candid deliberations or result in undue influence of, or threats to officials; and

(b) may be limited to certain categories of procurement or procurement above a specified threshold.

(3) The instruction referred to in subsection (1) provides rights to access and information that are additional to and not in substitution or derogation of rights to access and information advanced in other provisions of this Act or any other law.

Preserving the transparency agreement achieved at Nedlac

38. There are two minor but important issues to address in the transparency clause that follows at s27. First, the term "all information regarding a bid," is vague as to whether this will include tender documentation. We believe it should, that this was the substance of the agreement on transparency achieved at Nedlac, and that this should be clarified in the Bill. Second, the provision for the publication of beneficial ownership information was negotiated in Nedlac on the basis of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill, which was subsequently passed as an Act. The contents of the proposed amendment of s56(12) of the Companies Act, No. 71 of 2008, was ultimately separated in the amendment act into both s56(7)(aA) and (12). To preserve the agreement made in Nedlac, this change must now be expressed in the Bill as follows:

27. Disclosure of procurement information (partially reproduced)

(1) The Public Procurement Office must, by instruction, determine requirements to disclose information regarding procurement.

(2) The instruction envisaged in subsection (1) must, among others, require—

(a) the categories of information to be disclosed to enable effective monitoring of procurement, which includes among others—

(i) the reasons for the decision, if a decision is made to not follow an open competitive tender process;

(ii) all information regarding a call for tenders and a bid;

(iii) the identity of each entity which submits a bid, including information relevant to that entity contained in the companies register established under section 187(4) of the Companies Act, 2008 (Act No. 71 of 2008), if applicable;

(iv) the date, reasons for and value of an award to a bidder, including the record of the beneficial ownership of that bidder required under section 56(7)(aA) and (12) of the Companies Act, 2008 (Act No. 71 of 2008); and

(v) contracts entered into with a supplier and invoices submitted by the supplier; …

Completing the list of documents to be made available by the Public Procurement Office

39. Finally, the Bill makes provision for procurement policies. In current practice, these policies are often treated as law, but these instruments are often not published, thereby falling short of the

definition of law contained in the Constitution and the Interpretation Act, No. 33 of 1957. We argue that this situation, which has considerable implications for transparency, accountability, and rights, be remedied as follows. We also suggest that all subordinate instruments under the Act be published similarly:

> 28. Documents to be made available
> The Public Procurement Office must ensure that copies of—
> (a) this Act and any regulations made thereunder; and
> (b) all instructions, prohibitions, models, guidelines**[and]** codes of conduct and procurement policies that are issued in terms of this Act, are accessible at the offices of the Public Procurement Office and National Treasury website.

Thank you for your consideration. PARI stands ready to assist this committee in its deliberations and, whenever called on, to contribute to the improvement of this important Bill and to the broader process of public procurement reform.

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