OUTA

ORGANISATION UNDOING TAX ABUSE

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# OUTA submission to National Treasury - Comment on the draft Public Procurement Bill


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# INTRODUCTION

The legal and regulatory landscape that governs procurement in the public sector is fragmented and has failed to achieve its intended objectives. The Public Procurement Bill is a long-awaited legislative reform that is welcomed as it will provide umbrella legislation that addresses this fragmentation. At a time when tax revenue is shrinking and budget deficits are widening, it is critical to better manage public procurement and to ensure that the contracting of goods or services is done in accordance with a system which is fair, equitable, transparent, competitive and cost-effective, as envisioned in Section 217(1) of the Constitution.

A widespread and unacceptable practice of largescale public procurement of goods and services at local, provincial, and national levels of government being directly or indirectly determined by political decision makers has eroded the impact of public spending. Targeted social expenditure must, by definition, transform the socio-economic landscape of South Africa. Instead, we have seen organised corruption and exploitation of preferential procurement legislation, resulting in the abuse of vast amounts of taxpayers' money. Political influence has been leveraged to channel public resources to well-connected companies and individuals, which provide generous donations and support for those political parties and persons who determine bid adjudications in a vicious cycle.

Government spending on remuneration of middle management and executives has also grown far beyond their peers in the private sector. Despite the public sector's mandate to spend and operate efficiently in the public interest, private sector industries optimize resource use and become financially self-sustainable, while State Owned Entities, Government Departments and Municipalities do not. Rather than spending taxpayers' money in a manner that maximizes the quality and fair distribution of goods and services, we see government spending being concentrated in the remuneration of a bloated public service. The shrinking portion of tax revenue that remains to deliver much needed services is often misspent. South Africa's sovereign debt has grown from R450 billion in 2009/10 to almost R4 trillion today. This is evident in Auditor General Reports that paint a clear picture of worsening

deviations and expansions, irregular-, unauthorised-, fruitless- and wasteful expenditure and a lack of financial transparency in procurement processes at virtually every level of government.

This submission will focus on the Public Procurement Bill. Targeted social spending over the past 25 years attempted to address the inequalities that have persisted (and in some respects worsened) since the dawn of democracy and formalisation of the South African economy. Instead of fulfilling its mandate of rebuilding our nation, political capital has been used to plunder public coffers. Our research and investigations have identified several examples of well organised efforts to circumvent and/or manipulate public procurement protocols. Those lessons inform this document and its recommendations.

The first among listed objects of the proposed Public Procurement Act is to ensure that the State utilises and leverages procurement to i) advance economic opportunities for previously disadvantaged people and women, the youth and people with disabilities; and ii) promote local production. This fundamental provision must, however, benefit the majority and not be exploited for the benefit of an elite minority.

Procurement malpractice has become the norm. For example, the financial failure of major State-Owned Entities and concomitant debt spirals came about due to executives and managers absconding their duty of care, loyalty to the public stakeholder and, most importantly, their individual fiduciary responsibilities and accountability. The sole Ministerial responsibility to represent stakeholder interests above certain thresholds of expenditure defined in the relevant legislation has also been abused. This calls for renewed emphasis on civil oversight mechanisms and systems where trusted and politically disinterested members of the public also represent the public stakeholder in matters of public procurement above certain thresholds.

Politically appointed Accounting- and Executive Authorities, Boards and Ministers have unchecked power over the financial decision making of major organs of state. This results in failed business models that often run at a loss and become dependent on government guarantees, periodic bailouts and Special Appropriations that undermine social spending.

The State Capture saga has also revealed the erosion of law enforcement agencies that, despite all the requisite legislation being in place, have failed to curb corruption and criminal contravention of procurement legislation. There have been little or no consequences for individuals and companies known to have stolen from the public.

The solution should be proactive. The proposed Public Procurement Act, supported by related legislation, must provide for the exercise of heavy penalties, seizure of assets, naming and shaming and holding to account those in authority who contravene laws that govern how taxpayers' money is spent. This submission presents an analysis of the proposed Public Procurement Act which was done to assess its ability to not only prevent the malpractices outlined above, but also to contribute to rational, impactful and sustainable targeted social expenditure in South Africa.

# RECOMMENDATIONS

## PUBLIC PROCUREMENT REGULATOR

This section of our comments deals with access to information on government procurement processes as well as the proposed Public Procurement Regulator (*herein referred to as the Regulato*r), Provincial Treasuries and Procuring Institutions. All sections should be read with the Draft Public Procurement Bill as published. Questions, comments, and (primarily) recommendations focused on proposed provisions are set out below.

**Section 4(1)**: This section of the Draft Bill speaks about the establishment of a Regulator. Although we welcome the establishment of a Regulator, the Draft Bill however is silent on the composition element of such a Regulator, it does not specify how the Regulator will be structured. This creates a *lacuna* and leaves room for imagination. We recommend that the Regulator be composed of several members, of which some members should be politically disinterested representatives of civil society organisations or the public.

Furthermore, the establishment of the Regulator raises questions about its relationship with the existing Office of the Chief Procurement Officer (OCPO) and that office's mandate, which is not provided for in the Draft Bill. Apart from the Tribunal envisioned in the Bill, oversight of the Regulator cannot be taken for granted and should not depend solely on Ministerial discretion given its highly centralised role in public procurement across the spectrum of procuring institutions.

**Section 5(1)(d)**: In this section, the Regulator is mandated to develop and implement measures to ensure transparency in the procurement process and promote public involvement in the procurement policies of institutions. This is a serious burden of responsibility and begs the question of how the Regulator will promote such public participation, unless members of the public also form part of the Regulator as suggested

above. In addition, the word "promote" should be replaced by "facilitate" or another phrase that is practically oriented and obliges the Regulator to ensure public involvement in a hand on way through different phases of the wide range of procurement processes in government.

**Section 5(1)(e**): According to this section, the Regulator will be required to intervene by taking appropriate steps to address a serious, material breach of 'the Act' by institutions, however, again, the Draft Bill fails to elaborate as to what those 'appropriate steps' will be. This is problematic because it creates a *lacuna* and allows for any action taken by the Regulator to be regarded as appropriate. We recommend that the so called 'appropriate steps' should be specified, just like the steps against bidders and suppliers who materially breach the provisions of the Bill have been specified. We further recommend that this provision should be aligned with the provisions of the Public Audit Amendment Act 5 of 2018 which empowers the Auditor General to ascribe personal financial liability to accounting and executive authorities responsible for material irregularities. A definition of a material breach of the Bill should be inserted accordingly.

**Section 5(2)(c)(ii)**: This section begs the question of how the Regulator will ensure that there is no wasteful expenditure within the security cluster. Furthermore, how will research commissioned from universities be managed as to ensure that universities do not become captured.

**Section 6(2)**: Without being pedantic and taking away from the seriousness of the Bill, there is a grammatical error in this section. We recommend that 'issues' be replaced with issue.

**Section 7(1)**: OUTA recommends that this section should include <u>(i) a person or entity representing civil society and the public interest</u>. This recommendation is justified by the practical difficulties experienced by several civil society organisations and members of the public trying to obtain financial information from organs of state and concessionaires that

prefer to spend secretly. The Promotion of Access to Information Act 2 of 2000 is often a cumbersome mechanism that is sometimes abused by authorities.

**Section 7(2)(b)**: We would like clarity with regards to the type of information the Regulator will need in order for it to 'reasonably' believe that the information required by the institutions is for purposes as set out in this provision. This is to prevent a situation where the Regulator withholds information from the institutions without a just cause.

**Section 8(2)(a)**: We welcome the provisions of this section, however we would also like clarity on the 'appropriate measures' to be taken in the event of procurement information being destroyed. This is an important provision that should carry heavy consequences to discourage the destruction of potentially incriminating evidence.

## PROVINCIAL TREASURIES

**Section 9(1)(c)**: Clarity is needed on 'appropriate steps' to be taken by provincial treasuries in the event of this Act's provisions being breached. The integrity and accountability of provincial treasuries themselves are often in doubt. We also believe that there is a skills shortage in proper accounting and auditing disciplines in provincial treasuries.

**Section 9(2)(b)**: Do provincial treasuries have the institutional capacity or political will to fulfil this provision themselves? The Auditor General of South Africa ("AGSA") also raises concerns that the lack of oversight and accountability from provincial government has contributed to the consistent decline in municipal audit outcomes across the country.

In addition, OUTA is concerned that the lack of effective, efficient and transparent provincial oversight of municipalities and related institutions in the performance of their role, enforcement of consequences for irregular spending and maladministration as well as their failure to ensure performance in local government undermines this provision in the Bill. We

recommend that independent institutions such as the Financial and Fiscal Commission, AGSA, public sector economic experts and/or relevant civic bodies should share the responsibility.

**Section 9(2)(c):** OUTA recommends that the investigative function should be carried out by an independent body. Their function is to investigate corruption within all procurement institutions and provide training on how to strengthen Anti-Corruption and Bribery (ABC) strategies and design a clean contracting manifesto- open contract data standard. This body should also have the power to investigate the Public Procurement Regulator.

## PROCURING INSTITUTIONS

**Section 10(1)(d):** This section of the Draft Bill creates uncertainty with regards to the criteria that will be used to determine who wins the tender, and what was the reason for winning. We recommend that such criteria need to be clearly stipulated. Usually such criteria need to be determined by factors such as the best price for the best quality of workmanship / track record of workmanship.

**Section 10(3)(a)**: We recommend that tax compliance needs to be defined. A mere presentation of a Tax Clearance Certificate has not resulted in a decline in procurement fraud. Greater scrutiny is required as to what constitutes tax compliance and how it relates to the different tax types associated with specific tenders, i.e. Customs, VAT, PAYE, CIT, etc.

Furthermore, it is our observation that South Africa's public sector has the unfortunate reputation of awarding contracts to inadequate suppliers, with a track record of not delivering or completing projects. Tax compliance and complying with the regulations of the Employment Equity Act does not mean one is an effective and efficient service provider that offers value for money. Based on OUTA's in-depth investigations, it has been identified that companies are awarded contracts even though they are non-compliant.

Therefore, the vetting process of suppliers needs to be reviewed. For example, businesses and civil society organisations could perform open vetting of suppliers before they are updated on the national supplier database. Independent due diligence must be undertaken before allowing a supplier on the national database. A database should also be expanded to incorporate blacklisted companies and individuals in order to integrate these entities with the preferred database.

**Section 11(1)**: This section appears to confer too much power to the Accounting officer without demonstrating that there will be room for checks and balances. We would like to know what will happen to an accounting officer when he or she resigns after making dubious decisions? Will there be room for the Accounting Officer to be held accountable in his or her personal capacity for the decisions that were made whilst she or he was still in office? We recommend that the Draft Bill should explicitly apply to former accounting officers who resigned after committing transgressions during their term of office.

Furthermore, Accounting Officers must be held accountable without impeding on the functionality of the office in question. For example, we would not want the office to remain indefinitely vacant due to people being reluctant to occupy the office for various reasons.

**Section 12(i)** OUTA is concerned about this provision as it may not necessarily promote the notion of 'transparency' as required by section 217 of the Constitution. Confidentiality is usually provided for to avoid collusive bidding. Nonetheless, certain types of contractors such as those in the construction industry are exclusively able to supply certain goods or services and are familiar with each other. How will collusive practices be avoided beyond making information about procurement proceedings confidential? This provision can be counterproductive.

**Section 13:** This provision allows an accounting officer to comply with the instructions of a 'person of authority' even when the accounting officer is not authorised to do so in terms of

the Act, as long as he or she writes to the Minister responsible to report the instruction. We are of the view that this provision can be problematic because it enables non-compliance with the Bill. Retrospective complaint to the Minister in writing will not prevent abuse of the Act and or public funds. Therefore, we recommend that instructions or directives in contravention of the Bill should not knowingly be complied with under any circumstances. This would enable political interference and should be avoided at all costs. The accounting officer should be able to fulfil its administrative mandate to the best of its ability.

**Section 15**: This provision raises the concern of potential failure to keep electronic records of procurement processes or inadequate advertisement of tenders with the excuse of technical incapacity. For example, "*to the extent possible"* may be exploited to minimize tender advertisement in municipalities with poor information and communications technology infrastructure.

## CONSEQUENCES OF TRANSGRESSION

This section of our comments focuses mainly on the consequences of the contraventions of the proposed Bill. One of OUTA's primary objectives is to ensure that there are consequences for individuals and entities that fail to abide by Public Finance Management Legislation and related laws that govern the decision making of accounting- and executive authorities. Countless scandals and exposés have illustrated examples of criminal procurement processes in detail - with no serious consequences for the culprits.

Current practices lead to penalties where budgets are cut etc, instead of holding the individuals to account. The consequences of cutting budgets or penalising a government entity usually spills over to the innocent citizen or business who should be benefitting out of goods or services the entity should be providing.

As mentioned in the introduction of this submission, law enforcement agencies are overwhelmed with cases of maladministration and corruption. Intentional erosion of their

capacity over the past decade demands policy that answers unlawful procurement with harsh, simple, and immediate consequences.

## PROCUREMENT INTEGRITY

**Section 17(c)** We recommend that the word 'improperly' should be removed from this provision. This is because the provision is ambiguous as it stands. It may be read to imply that officials may use their positions to gain advantage for themselves or others as long as such abuse of power is 'proper'.

**Section 17(e)** We recommend that the word 'avoid' is replaced with 'eliminate'.

**Section 20 (1):** OUTA's in-depth investigations suggest that declaration of interest is often undermined by both the accounting authorities and the service providers. The Bill stipulates that the service provider and the participants should disclose interest. However, the accounting authority is not included and there is no justification. We recommend that the declaration of interests should also be applicable to accounting authorities.

**Section 21**: It is OUTA's recommendation that this section should also include "No person or entity of any nature". Our findings show that faceless entities are capable of unduly influencing the accounting officers and accounting authorities. Furthermore, improper influence and manipulation of accounting- and executive authorities are common methods for unlawful public procurement. Contravention of this provision and others must be met with clearly stipulated measures provided for in the proposed Act, as recommended above.

**Section 22**: We welcome this provision and we further recommend that it should be expanded to include long term contracts that are still operative that were procured by bidders and suppliers prior to the promulgation of the proposed Bill.

**Section 22(1)(g)**: We recommend that this provision should also apply to international bidders or service providers who would partake in procurement processes conducted by our South African institutions as defined in Section 3(1) of this draft Bill.

**Section 22(2):** We recommend that this provision should be extended to include '*any other person or public body*' who might have access to the information to report to the Regulator. The reason for this recommendation is because limiting the reporting only to the institution does not necessarily promote the objectives of Section 217 of the Constitution, in particular, the notion of transparency. Institutions are not always credible hence confining the reporting of misconduct to them may not yield the necessary result.

**Section 22(4):** We recommend that there should be clarity with regards to how the debarment orders will be served. Considering the importance of these orders we recommend that there should be more than one method of service.

**Section 23:** We recommend that the Bill should clearly define what 'provisional debarment' means and its consequences should be clearly specified so as to prevent confusion amongst potential suppliers and bidders. Furthermore, in specifying the consequences of a provisional debarment order, due regard should be given to the fact that the supplier or bidder would not have heard at the time that the provisional order would be granted.

## PREFERENTIAL PROCUREMENT

**Section 26(1)**: This provision may prove to be problematic as it confers an enormous amount of power to the Minister without leaving room for checks and balances. Furthermore, there seem to be no real guidelines and the Minister can as easily change the system. Our recommendation is that the framework for preferential procurement must be determined by Parliament instead of the Minister.

**Section 26(c) (iii):** We recommend that the Bill should define the meaning of "local content" as there tends to be confusion in the meaning of local content and what the requirement entails. The definition of local content can be; '*within South Africa, regional, local municipalities or spatial zones'*. In addition, does local content requirement necessitate the provision of training for local labourers who do not have the skill to participate in the procurement implementation.

It is advisable that the "local content" requirements should first prioritize service providers from the same local or spatial zone as procuring public entities or municipalities and contributes a bonus point. This will enable local economic development as local service providers will be prioritized. It makes it easy for the project to be monitored and most importantly it improves human capital (technical capacity) in the community.

Furthermore, we recommend that focus should be on exploitation of preferential and emergency procurement.

OUTA is concerned that during emergency procurement, the framework allows procuring institutions to deviate from the normal or usual procuring processes. A similar process is followed when there is a sole service provider. This can lead to corruption and maladministration as procuring procedures are most likely to be exploited. In addition, procurement institutions have poor procurement plans. As a result, institutions might need to purchase bulk goods in an emergency at higher pricing.

It is therefore our recommendation that, within the Tribunal (as envisaged in Section 99 of the Bill) there should be a "Contingency Board''. This board will focus on drafting and implementing an emergency procurement plan. Their role will also focus on conducting research on the current needs as per the social, clinical and environmental requirements and prepare for emergency procurement in conference with the Regulator.

There are instances where the information on the deviation is not accessible to the public domain. As a result, monitoring procurement planning is difficult. It is important that provincial treasuries ensure that emergency procurement is consistently updated and monitored. It will also be beneficial if such processes are transparent and open in the public domain.

Political interference is known to be at the heart of 'tenderpreneurship' and similar practices in South Africa and elsewhere. The enactment of the Funding of Political Parties Bill serves as testament to the need for more transparency in the finances of political parties that are close to public procurement processes. Often, certain suppliers are routinely favoured over others purely because they have close ties with some political party - rather than their proven ability to provide quality goods and services at the most affordable price.

## PROCUREMENT METHODS AND BIDDING PROCESS

Corruption in South Africa is estimated to have cost up to R1 trillion and 700 000 job opportunities. Findings of the National Treasury and the Auditor General of South Africa has flagged that the procurement and bidding methods are manipulated, which need to be strengthened. We have found that the procurement and bidding processes are often undermined, which raises serious concerns and the need for them to be addressed.

**Section 27 (1) (a):** Public procurement processes should be transparent and represent the interest of its citizenry. Therefore, the Minister is given too much power as an individual to prescribe the procurement process. The Minister should establish and consult a committee formed by the Regulator, provincial treasuries, civic bodies and procuring institutions that must advise the Minister on standardized procurement processes.

**Section 27 (3):** It is also concerning that different procurement processes are used depending on the value of the product required. High value transactions require a full bidding process while *below threshold transactions* require quotation comparison for pricing purposes. OUTA's in-depth investigations have indicated that *below threshold transactions* are often exploited as a result of watered-down procurement processes.

**Section 30 (1):** It is concerning that tenders have been awarded to service providers who do not meet the requirement as stipulated by the procuring institutions. Sometimes, the procuring institution overlook the requirements when awarding contracts to bidders.

**Section 30(2)**: It is our submission that this provision should be expanded to include '*Proof of corporate, social, and environmental responsibility; (i) Compliance with corporate governance best practice e.g. King Codes'*

**Section 33 (1 - 3)**: A general concern is that some tenders are not advertised as prescribed by legislation, making it hard to monitor procurement. Therefore, it is the role of provincial treasuries to have oversight and ensure all procuring institutions are compliant with the procurement legislation. In addition, e-procurement be a useful system that can increase transparent, efficient and effective.

**Section 37 (7):** This provision suggests that a bid evaluation committee should be established to evaluate bids, it is in line with **Section 54** of the Bill which further provides that, an institution within its supply chain management should establish the bid evaluation committee, bid adjudication committee and the bid specification committee. In addition, **Sections 55, 58, 60 and 62** outline the composition of the committees. Civil society is precluded from the committee.

OUTA's in depth investigations into the maladministration and mismanagement of funds into multiple government entities identified the following trends:

- The bid evaluation committee failed to fulfil their role of evaluating the bid, as tenders were awarded to non-compliant services providers;
- The bid specification committee meetings were held in private and not accessible to the public;
- Specification of tender are customised for certain service providers which indicates that the need analysis is not properly conducted;
- The procured amounts of products do not correspond with the Annual Performance Plan;
- The bid adjudication committee recommended incompetent services providers to the accounting authority to fulfil their malicious mandates;
- The minutes of all the meetings held by the committees are not accessible to the public making it difficult to monitor procurement.

All bid committees dealing with transactions above a threshold determined by National Treasury should involve civil society and be transparent. This will promote public project management, implementation and monitoring of processes and procurement projects.

**Section 39(1)** OUTA recommends that clarity be provided regarding the different responses required with respect to "may" versus "must". The cancellation clauses must also not be abused to create emergencies at a later stage for the purpose of circumventing normal procurement processes.

**Section 44:** This provision addresses, for example, concessionaires. We recommend adding a provision to this section that makes financial statements of private enterprises providing goods or services on behalf of the State available for public scrutiny.

**Section 44(2)(c)**: We are concerned that this provision may unfairly shift the onus of accountability for non-performance onto non-governmental parties.

**Section 43(3)(b)**: We recommend that this section should include intensified applicability of the relevant Preferential Procurement provisions in cases of transversal term contracts as well as long-term contracts.

**Section 43(8)(a)**: We recommend further that provisions for non-adherence to said service level agreement must be proactive and avoid systemic lock-in in worst case scenarios.

**Section 45(d)**: This provision should be extended to include an appointment of an independent transaction advisor that is disinterested and unprejudiced in its recommendations.

**Section 46(1)(d)**: We welcome the provisions under this section, it is crucial especially in relation to E-tolls.

**Section 48**: We suggest that this section should be amended to include: *If a major public-private partnership [insert threshold] will rely heavily on the user-pays principle, i.e. direct payment from the public, these documents should form part of a robust public participation process.*

**Section 49(1)(a)**: We further suggest that this section should be amended to include: (4) …'*monitored and reported on with public transparency*'.

## SUPPLY CHAIN MANAGEMENT

**Section 52(2)(e)**. We welcome this provision, more so because PRECCA, in Section 34, does provide for reporting obligations on the official. Therefore, we encourage that supply chain management policies should adhere to that part of the legislation.

**Section 52(2)(g)**. We are of the view that the PAIA process should be the last resort to obtain information. OUTA's experience is that government departments hide behind the timing provisions of the PAIA application as well as abuse confidentiality clauses. More guidance is required specifically with regards to information pertaining to bids, after award.

**Section 65**. What are the possible reasons or justifications for recommendations to override the BEC's decisions?

**Section 67(e)**: We recommend that there should be unambiguous, non-negotiable and harsh penalties for Accounting Officers that fail to act under this section of the Bill.

**Section 68:** The demand management structure should be strengthened, as it is currently flawed. The accounting authority has power to manipulate the demand of the products. We have identified this in our investigations whereby the accounting officer/ authority creates a demand for products which are not procured or delivered, yet the service provider gets paid.

The demand structure is a crucial part of supply chain management processes because this is where the need for goods and services are identified. Therefore, it is important that the demand structure is strengthened, ensuring that goods and services procured are necessary, purchased at an affordable price, and most importantly, delivered as per the agreement.

**Section 72 and 73:** The Bill refers to the contract and contract management of service level agreements. However, the general concern is that the process is not accessible to the public. Civil society is excluded from the process, including planning and implementation.

Usually, the Service Level Agreement (SLA)s between the procuring institutions and the service providers are not available or accessible to the public. In addition, civil society is excluded from the negotiations between the parties and tender agreements. Unfortunately, because of this, it is impossible for civil society to ensure that tender agreements are fulfilled.

**Section 89(2)**. This is welcomed. The nature of said independence must be clarified.

## DISPUTE RESOLUTION

**Section 94**: We recommend that this section should be extended to include any other entity or body that may have access to the necessary information to register a dispute. This will promote accountability and transparency.

## OFFENCES

**Section 118(1):** This is a crucial section that defines consequences for offences in terms of the proposed Bill. The applicability of this provision should be expanded beyond individual 'persons'. When, for example, a public or private entity commits an offence without clear indication of any individual person responsible, how would it be applied? A broadened definition of 'persons' in the preamble may resolve this.

## THE DRAFT BILL AND COMMON CORRUPT PRACTICES

Civil oversight is crucial, especially in terms of project management. There is a consistent habit of incomplete projects in communities, including awarding tenders to incompetent service providers. Therefore, the civil society oversight role is essential and addresses this gap.

Civil Society Organisations play a significant role of amplifying universal values around human rights, the environment, labour standards, and anti-corruption. They are catalysts and custodians of those interests that are not adequately represented in public procurement.

Without the active involvement of CSOs, the world would have been ridden with much more corruption, violence, and human rights abuses, burdened with greater social injustice and equipped with less sensitivity to current ecological problems and corruption. OUTA believes that civil society can play a role of being watchdogs, whistle-blower havens and the frontline in ensure that government and its organs are accountable for all tax revenue spent in the public sector.

Where it is routinely observed that the public finance management law is not adequate, or fails to achieve its intended objectives, implementing agents should move a Bill for amendment or escalate observations to appropriate the authority. They also ensure that all stakeholders in public procurement such as public officers, bidders, suppliers, contractors, and service providers observe the principles of honesty, professionalism, accountability, transparency, fairness, and equity.

Civil society's role is to ensure that all stakeholders in public procurement such as public officers, bidders, suppliers, contractors, and service providers observe the principles of honesty, professionalism, accountability, transparency, fairness, and equity.

We suggest that National Treasury should provide more direct and explicit focus in the Bill on:

- Deviations from accepted procurement practices
- Expansions of contracts well above original value
- Extensions of contracts to include scope that should be tendered out
- Fronting issues
- Single sourcing
- Copy pasting the requirements of a specific supplier's product brochure or website into the Terms of Reference (TOR)
- Writing the requirements of the TOR in such a way that only one supplier can provide the goods or services
- Collusive bidding practices
- Political interference to sway the outcome of a tender
- Intergovernmental procurement
- IT procurement as a site of corruption and which undermines state responsiveness (SITA)
- Inadequate implementation of existing legislation and penalties - why has National Treasury never taken the blacklist seriously?
- Lack of holding transgressors to account
- Lack of clawing back money from transgressors
- Procurement transparency in an open tender environment
- Lack of repercussion for oversight bodies not acting against transgressors
- Lack of civil oversight

We note that the regulations that will be published after final enactment of the Draft Bill may address some of these concerns. These must, however, be extensively participative.

# CONCLUSION

In the main, OUTA welcomes National Treasury's publication of the Draft Public Procurement Bill and requests that our proposed recommendations are duly considered and implemented when reviewing the Draft Bill.

All recommended amendments to the Draft Bill are intended to enhance its effectiveness going forward, rather than detracting from intended policy objectives. Core shortcomings or weaknesses identified in our analysis of the Draft Bill are 1) terminological loopholes that could be exploited by seasoned public officials with ulterior motives; 2) assumptions of institutional capacity and political willingness to fulfil extended mandates in organs of state such as provincial treasuries and offices of accounting authorities; 3) a lack of provisions for serious and explicit remedial measures and consequences for transgression of the Draft Bill; and 4) a lack of institutionalized public involvement in public procurement processes such as augmentation of major bid adjudication committees, provincial treasuries, and the Regulator with vetted civil society representatives and organisations.

The recommendations in this document are intended to address these shortcomings and weaknesses in the Draft Bill proactively.

Depending on the measurable impact of OUTA's recommendations to National Treasury contained herein, subsequent participation processes in Parliament will be pursued similarly.