

REPUBLIC OF SOUTH AFRICA

**DRAFT
PUBLIC PROCUREMENT BILL**

*(As introduced in the National Assembly (proposed section 76); explanatory
summary of Bill published in Government Gazette No. of)
(The English text is the official text of the Bill)*

(MINISTER OF FINANCE)

BILL

To regulate public procurement; to prescribe a framework for procurement policy envisaged in section 217(3) of the Constitution; and to provide for matters connected therewith.

PREAMBLE

WHEREAS the Constitution of the Republic of South Africa stipulates that procurement must occur in accordance with a system which is fair, equitable, transparent, competitive and cost-effective;

AND WHEREAS the Constitution allows for organs of state to implement a procurement policy providing for categories of preference in the allocation of contracts and the protection or advancement of persons disadvantaged by unfair discrimination within a framework prescribed by national legislation;

AND RECOGNISING that the Constitution requires efficient, ethical, effective, equitable and development-oriented public administration in all organs of state and all spheres of government;

AND IN ORDER TO advance economic opportunities for previously disadvantaged people and women, the youth and people with disabilities, small businesses, and promote local production;

AND IN ORDER TO create single regulatory framework for public procurement to eliminate fragmented procurement prescripts,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

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CHAPTER 1
DEFINITIONS, OBJECTS, APPLICATION AND ADMINISTRATION OF ACT

Definitions

1. (1) In this Act, unless the context indicates otherwise—
- "accounting authority"** means an accounting authority as defined in section 1 of the Public Finance Management Act;
- "accounting officer"** means—
- (a) an accounting officer as defined in section 1 of the Public Finance Management Act;
 - (b) in relation to a municipality, the municipal official referred to in section 60 of the Local Government: Municipal Finance Management Act; or
 - (c) in relation to a municipal entity, the official of the entity referred to in section 93 of the Local Government: Municipal Finance Management Act;
- "bid"** means a written offer, in the form determined by instruction, in response to an invitation for the procurement of goods or services or other form of procurement through a price quotation, a competitive bidding process, a restricted bidding process or any other method envisaged in this Act;
- "bid document"** means a written or electronic document required to be submitted in response to an invitation to bid;
- "bidder"** means any person or entity who tenders for a bid;
- "Broad-Based Black Economic Empowerment Act"** means the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);
- "client institution"** means an institution which initiates, commissions and pays for infrastructure projects;
- "Constitution"** means the Constitution of the Republic of South Africa, 1996;
- "Construction Industry Development Board Act"** means the Construction Industry Development Board Act, 2000 (Act No. 38 of 2000);
- "consultancy service"** means any service of an intellectual or advisory nature, not incidental to the provision of goods or services or the execution of infrastructure;
- "department"** means—
- (a) a national department listed in Schedule 1 to the Public Service Act, 1994;
 - (b) a provincial department listed in Schedule 1 to the Public Service Act, 1994, in the case of the Office of a Premier, and in Schedule 2;
 - (c) a national government component listed in Part A of Schedule 3 to the Public Service Act, 1994; and
 - (d) a provincial government component listed in Part B of Schedule 3 to the Public Service Act, 1994;
- "emergency"** means a natural disaster, epidemic, riot, war, fire or any other situation that may result in a threat to—
- (a) life; or
 - (b) health, welfare or safety of the public,
- which requires immediate action;
- "infrastructure"** means—
- (a) any work associated with the construction, reconstruction, rehabilitation, repair or renovation, site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing; or

- (b) any service incidental to construction including drilling, mapping, satellite photography, seismic investigations and similar services;
- "institution"** means an institution referred to in section 3(1);
- "instruction"** means an instruction issued by the Regulator in terms of section 5;
- "Local Government: Municipal Finance Management Act"** means the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003);
- "major capital project"** means an infrastructure project or a series of interrelated infrastructure projects on a single site having an estimated cost, including the costs required for new facilities or systems to become fully operational, above a threshold prescribed by National Treasury instruction;
- "member of Tribunal"** means a member of the Tribunal referred to in section 101;
- "Minister"** means the Minister of Finance;
- "municipal entity"** has the meaning assigned to it in section 1 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000);
- "municipality"**—
- (a) when referred to as a corporate body, means a municipality as described in section 2 of the Local Government: Municipal Systems Act, 2000; or
- (b) when referred to as a geographic area, means a municipal area determined in terms of the Local Government: Municipal Demarcation Act, 1998 (Act No. 27 of 1998);
- "National Archives and Record Service of South Africa Act"** means the National Archives and Record Service of South Africa Act, 1996 (Act No. 43 of 1996);
- "National Conventional Arms Control Act"** means the National Conventional Arms Control Act, 2002 (Act No. 41 of 2002);
- "National Treasury"** means the National Treasury established by section 5 of the Public Finance Management Act;
- "National Treasury instruction"** means an instruction issued by the National Treasury in terms of section 76 of the Public Finance Management Act;
- "official"** means an employee of an institution;
- "panel"** means a panel of the Tribunal constituted in terms of section 109;
- "panel member"** means a member of a panel;
- "prescribed"** means prescribed by regulation in terms of section 121;
- "Prevention and Combat of Corrupt Activities Act"** means the Prevention and Combat of Corrupt Activities Act, 2004 (Act No. 12 of 2004);
- "private party"**, in relation to a public-private partnership agreement, means a party to a public-private partnership agreement, other than an institution to which this Act applies;
- "procurement"** means the acquisition of goods, services or infrastructure by purchasing, renting, leasing or other means;
- "procurement contract"** means a contract between an institution and a supplier resulting from a procurement process;
- "Promotion of Access to information Act"** means the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000);
- "Promotion of Administrative Justice Act"** means the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000);
- "provincial treasury"** means a provincial treasury established by section 17 of the Public Finance Management Act;
- "Public Finance Management Act"** means the Public Finance Management Act,

1999 (Act No.1 of 1999);

"public office bearer" means—

- (a) a member of Cabinet or a Deputy Minister;
- (b) a member of the National Assembly;
- (c) a permanent delegate to the National Council of Provinces;
- (d) a Premier or a member of an Executive Council;
- (e) a member of a provincial legislature;
- (f) a member of a Municipal Council;
- (g) a member of the National House of Traditional Leaders;
- (h) a member of a provincial house of traditional leaders;

"Public Service Act" means the Public Service Act, 1994 (Proclamation No. 103 of 1994);

"publish" means publication in the *Gazette* or on a website;

"Regulator" means the Public Procurement Regulator established by section 4;

"small enterprise" means a small enterprise as defined in section 1 of the National Small Enterprise Act, 1996 (Act No. 102 of 1996);

"standard bid documents" means standard bid documents issued in terms of section 5(2)(a);

"State Information Technology Act" means the State Information Technology Act, 1998 (Act No. 88 of 1998);

"supplier" means a person delivering goods, services or infrastructure;

"transversal term contract" means a centrally facilitated contract arranged by the relevant treasury for goods or services that are required by one or more institutions;

"treasury" means the National Treasury or a provincial treasury;

"Tribunal" means the Public Procurement Tribunal established by section 99;

"Tribunal rules" means rules made in terms of section 110;

"this Act" includes the regulations, codes of conduct and instructions made in terms of this Act;

"value for money"—

- (a) means increasing output for the inputs used or minimising inputs used to attain the output or reducing the cost of inputs used to attain the output while maintaining quality and achieving the intended outcomes;
- (b) in relation to a public-private partnership agreement, means the provision of the institutional function or the use of State property by a private party in terms of a public-private partnership agreement which results in a net benefit to the relevant institution with respect to cost, price, quality, quantity, risk transfer or a combination thereof; or
- (c) in relation to infrastructure, means the optimal use of resources to achieve intended outcomes.

(2) In this Act, a word or expression which is a derivative or other grammatical form of a word or expression defined in this Act, has a corresponding meaning unless the context indicates that another meaning is intended.

Objects of Act

2. The primary objects of this Act are, with due regard to section 217 of the Constitution, to—

- (a) 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 small businesses; and
 - (ii) promote local production;
- (b) provide for procurement that—
 - (i) is developmental in nature;
 - (ii) ensures value for money in the use of public funds;
 - (iii) aspires to expand the productive base of the economy;
 - (iv) supports innovation and investment and achieve economy, efficiency and maximum competition;
 - (v) uses technology to simplify procurement processes and better leverage economies of scale;
- (c) develop economic capacity in the Republic, through the provision of opportunities for local suppliers to participate in procurement; and
- (d) incorporate in the procurement system—
 - (i) categories of preference in the allocation of contracts; and
 - (ii) the protection and advancement of persons and categories of persons disadvantaged by unfair discrimination; and
- (e) create single regulatory framework for public procurement to eliminate fragmented procurement prescripts.

Application and administration of Act

- 3.** (1) This Act applies to—
- (a) a department as defined in section 1 of the Public Finance Management Act;
 - (b) a constitutional institution listed in Schedule 1 to the Public Finance Management Act;
 - (c) a municipality or a municipal entity;
 - (d) public entity listed in Schedule 2 or 3 to the Public Finance Management Act;
- and
- (2) This Act applies to all procurement carried out by an institution, including procurement of goods, services and infrastructure by donor funding.
- (3) In the event of a conflict between—
- (a) a provision of this Act and a provision of any legislation; or
 - (b) a procurement rule of a donor or funding agency,
- the provision of this Act prevails.
- (4) The Minister is responsible for the administration of this Act.

CHAPTER 2
PUBLIC PROCUREMENT REGULATOR, PROVINCIAL TREASURIES AND
PROCURING INSTITUTIONS

Part 1
Public Procurement Regulator

Establishment of Public Procurement Regulator

4. (1) There is hereby established a Public Procurement Regulator within the National Treasury.

(2) The Head of the Regulator must ensure that the business of the Regulator is conducted impartially and that powers are exercised without fear, favour or prejudice.

General functions of Regulator

5. (1) The Regulator must, in accordance with this Act—
- (a) ensure that institutions comply with this Act and engage in the prudent spending of funds for procurement;
 - (b) guide and support officials and institutions to ensure compliance with this Act and in doing so—
 - (i) provide advice and assistance to institutions;
 - (ii) develop, promote and support the training and professional development of officials involved in procurement;
 - (iii) encourage institutions to engage procurement professionals in their procurement units;
 - (c) promote and ensure the integrity of the procurement system and monitor and integrate revisions and learning in procurement from institutions with oversight of the procurement system;
 - (d) develop and implement measures to ensure transparency in the procurement process and promote public involvement in the procurement policies of institutions;
 - (e) intervene by taking appropriate steps to address a serious or persistent material breach of this Act by an institution;
 - (f) reconsider decisions of institutions where necessary as envisaged in this Act;
 - (g) monitor the changes effected and revisions proposed to the procurement system by other organs of state including the courts and oversight institutions;
 - (h) continuously revise and provide guidance on procurement and the procurement system;
 - (i) establish and maintain registers for bidders and suppliers debarred in terms of section 22(1);
 - (j) create and maintain one or more databases as envisaged in this Act;
 - (k) promote the use of technology in procurement;
 - (l) perform other powers conferred by this Act; and
 - (m) perform other duties imposed by this Act.

(2) The Regulator may, in accordance with this Act—

- (a) issue, review and amend standard bid documents for use by institutions;
 - (b) establish data retention and reporting requirements applicable to institutions;
 - (c) require institutions to—
 - (i) publish information on their procurement proceedings; and
 - (ii) allow the public to observe their adjudication processes for procurement above the prescribed threshold, unless for a national security reason, the institution is permitted by the Regulator not to allow the public to observe in a specific matter;
 - (d) determine a model procurement policy;
 - (e) specify the institutional arrangements and roles and responsibilities within institutions in a manner consistent with laws on public finance management and public administration;
 - (f) issue a directive to declare certain procurement practices as undesirable;
 - (g) issue binding instructions in accordance with this Act;
 - (h) issue non-binding guidelines for information purposes to assist institutions with the implementation of this Act or any other procurement related matter
- (3) The Regulator may issue different instructions in terms of subsection (2)(g) for—
- (a) different categories of institutions;
 - (b) different categories of goods, services or infrastructure.

Declaration by Regulator of certain practices as undesirable

6. (1) The Regulator may issue a directive to declare a particular procurement practice to be undesirable for all or a category of institutions and may provide guidance on the treatment of such practice.

(2) The Regulator must take into account the following principles when considering whether or not to issue a directive envisaged in subsection (1)—

- (a) that the practice concerned is not likely to result in fairness, equity, transparency, competitiveness and cost-effectiveness or to promote socio-economic, industrial and environmental development; and
- (b) that if the practice is allowed to continue, such practice is likely to defeat the objects of this Act.

Access to information held by Regulator

7. (1) Subject to any applicable law, the Regulator may make information in its possession available to—

- (a) an investigating authority in the Republic;
- (b) the National Prosecuting Authority;
- (c) an intelligence division in an organ of state;
- (d) the Public Protector;
- (e) the South African Revenue Service;
- (f) an investigating authority outside of the Republic subject to the approval of the Minister;
- (g) a person who is entitled to receive such information in terms of an order of court; or
- (h) a person who is entitled to receive such information in terms of other national

legislation.

(2) Information envisaged in subsection (1) may only be made available to an institution referred to in subsection (1)(a) to (e)—

- (a) at the initiative of the Regulator or the request of an authorised officer of the institution; and
- (b) if the Regulator reasonably believes such information is required to investigate suspected unlawful activity.

(3) A request for information envisaged in subsection (2)(a) must be in writing and must specify the required information and the purpose for which the information is required.

(4) The Regulator may, as a condition to the provision of any information envisaged in subsection (1), make the procedural arrangements regarding the furnishing of such information that the Regulator considers appropriate to maintain the confidentiality of the information before the information is provided.

(5) A person who obtains information from the Regulator may use that information only—

- (a) within the scope of that person's power or duty; or
- (b) for the purpose specified in the request.

(6) The Regulator must make information it holds available to the appropriate Intelligence Structure, as defined in section 1 of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994), if it reasonably believes that the information relates to any potential threat or threat to the national security, as envisaged in that Act.

Protection of information

8. (1) No person may disclose confidential information held by or obtained from the Regulator except—

- (a) within the scope of that person's power or duty in terms of any legislation;
- (b) for the purpose of carrying out the provisions of this Act;
- (c) with the written permission of the Regulator;
- (d) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or
- (e) in terms of an order of court.

(2) The Regulator must take appropriate measures in respect of personal information in its possession or under its control to prevent—

- (a) loss of, damage to or unauthorised destruction of the information; and
- (b) unlawful access to or processing of personal information, other than in accordance with this Act and the Protection of Personal Information Act, 2013 (Act No. 4 of 2013).

Part 2 ***Provincial Treasuries***

Functions of Provincial Treasuries

9. (1) A provincial treasury must—

- (a) within its provincial administration—

- (i) exercise control over the implementation of the procurement function; and
- (ii) promote and enforce transparency and effective management in respect of the procurement function of institutions;
- (b) oversee institutions within its provincial administration in respect of the procurement function;
- (c) intervene by taking appropriate steps to address a material breach of this Act by an institution within its provincial administration;
- (d) provide any information required by the Regulator in terms of this Act;
- (e) perform other duties imposed by this Act;
- (f) perform other powers conferred by this Act.

(2) A provincial treasury, within its provincial administration, may—

- (a) issue provincial instructions on procurement not inconsistent with an instruction issued by the Regulator;
- (b) assist institutions in building their capacity for efficient, effective and transparent procurement management;
- (c) investigate any procurement policy applied by an institution;
- (d) after consultation with the Regulator, investigate any procurement policy applied by an institution which is a municipality or municipal entity in its province.

(3) A provincial treasury may issue different instructions in terms of subsection (2)(a) for—

- (a) different categories of institutions;
- (b) different categories of goods, services or infrastructure.

Part 3 **Procuring institutions**

General procurement requirements

10. (1) Institutions must, in the execution of their duties, strive to achieve the highest standards of equity, taking into account—

- (a) equal opportunity for all bidders;
- (b) fair treatment of all parties;
- (c) ethics;
- (d) open and effective competition; and
- (e) the need to obtain the best value for money in terms of price, quality and delivery having regard to set specifications and criteria.

(2) A bidder may not be excluded from participating in procurement on the basis of nationality, race, religion, gender or any other criterion not related to his or her eligibility or qualification, except to the extent prescribed in terms of this Act.

(3) An institution may only contract with bidders that—

- (a) are tax compliant; and
- (b) comply with the requirements of the Employment Equity Act, 1998 (Act No. 55 of 1998).

Decision-making for institution

11. (1) An accounting officer is responsible for decisions on behalf of the institution in terms of this Act.

(2) An accounting authority is responsible for decisions on behalf of the institution in terms of this Act.

Duties of institution

12. An institution must—

- (a) conduct procurement in accordance with this Act and a supply chain management policy referred to in section 52;
- (b) plan and document requirements for procurement;
- (c) obtain authorisation from the accounting officer or accounting authority for procurement;
- (d) define procurement needs by compiling a statement of requirements which includes a correct and complete description of the goods, services or infrastructure and the statement of requirements must be included in the invitation documents, evaluation process and contracts;
- (e) identify the appropriate standard bid documents to be used by the institution and suppliers or potential bidders;
- (f) clearly state the methodology and criteria to be used in the evaluation of bids and the determination of the best evaluated bid;
- (g) provide procurement information as may be prescribed or as the Regulator or the relevant treasury may require;
- (h) ensure that all communications with bidders and suppliers are in writing; and
- (i) keep confidential the information that comes into its possession relating to procurement proceedings.

Instructions inconsistent with Act

13. (1) If an accounting officer, an accounting authority, a member of an accounting authority or an official of an institution (herein called "the affected person") is directed by—

- (a) a public office bearer; or
- (b) any other person with authority over the affected person, to do or omit to do anything in respect of procurement and disposal of assets, which the affected person believes he or she is not authorised to do in terms of this Act, he or she must not comply with the direction but, immediately submit in writing to the public office bearer or other person in authority, as the case may be, his or her objections and the reasons for the objection.

(2) If after receiving objections and reasons envisaged in subsection (1), the public office bearer or other person instructs the affected person, in writing, to comply with the direction concerned, the affected person must comply with the instruction and immediately submit a written report to the Minister responsible for administering this Act.

(3) If the public office bearer or other person fails or refuses to provide the instruction in writing, the affected person must not comply with the

instruction and, despite any term or condition of his or her employment, may not be subjected to any disciplinary measures due to the non-compliance or failure to comply with the instruction.

Implementation of project by another person or organisation

14. If an institution transfers funds to a person or organisation other than an organ of state to implement a project on behalf of the institution, any procurement arising from the project must be in accordance with this Act.

Use of technology

15. Institutions must, to the extent possible, use information and communication technology to implement any of the procurement methods in this Act.

CHAPTER 3 PROCUREMENT INTEGRITY

Codes of Conduct

16. Officials, bidders, suppliers, members of the Tribunal and any other person involved in procurement, in terms of this Act, must comply with the prescribed code of conduct.

General conduct of officials in procurement

- 17.** Officials must—
- (a) exercise powers and perform duties for a purpose, consistent with their responsibilities, and with the degree of care and diligence that a reasonable person would exercise in similar circumstances;
 - (b) perform duties impartially so as to ensure fair competitive access to procurement;
 - (c) not use their position, or information obtained because of their position, improperly to gain an advantage for themselves or someone else or cause a detriment to an institution;
 - (d) not interfere with or exert undue influence on any person to affect any procurement process;
 - (e) avoid conflict of interest;
 - (f) not commit or abet corrupt, fraudulent, collusive or coercive practices;
 - (g) safeguard the confidentiality of information relating to procurement, including a bidders' proprietary information; and
 - (h) disclose any financial or other interest related to any procurement that official participates in.

Disclosure of interest by official

18. (1) If an official, or a close relative or close associate of an official, has, or intends to acquire, a direct or indirect personal interest a matter requiring the institution' decision, the official—

- (a) must disclose such interest, as soon as possible after receiving the agenda of the meeting of the procurement structure of the institution regarding a procurement, or on notification of a matter being brought to the attention of the procurement structure or at the time during the evaluation or adjudication of the bid when the official becomes aware of the interest; and
- (b) may not be present at or participate in the deliberations or decision making process of the institution in relation to the agenda item or the matter in question.

(2) A disclosure of interest made in terms of this section must be recorded in the minutes of the meeting at which it is made or it relates to.

Conduct of bidders and suppliers

- 19.** Bidders or suppliers participating in procurement—
- (a) must comply with this Act and code of conduct;
 - (b) may not commit or abet corrupt, fraudulent, collusive or coercive practices; and
 - (c) must, where considered necessary by the institution and before appointment, be subjected to a vetting investigation envisaged in section 2A of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994).

Declarations of interest by bidders and applicants for registration on database

20. (1) A declaration of interest, as may be determined by instruction, must be made by—

- (a) all bidders, in the case of bids; and
- (b) all applicants, in the case of applications for registration on a database created by the Regulator in terms section 5(1)(j).

(2) Failure to comply with subsection (1) or submitting a false declaration renders a bid referred to in subsection (1)(a) or an application referred to in subsection (1)(b) invalid.

Undue influence

- 21.** No person may—
- (a) interfere with, or improperly influence, the procurement process of an institution;
 - (b) impede the accounting officer or the accounting authority or an official in fulfilling his or her responsibilities in terms of this Act; or
 - (c) amend or tamper with any bid or quotation after its submission, or contract after such contract has been awarded.

Debarment

22. (1) The Regulator must issue a debarment order against a bidder or supplier, if the bidder or supplier—

- (a) knowingly provided false information in a bid or any other document submitted to an institution in connection with a procurement process or contract;
- (b) connived to interfere with the participation of other bidders;
- (c) committed a corrupt, fraudulent, collusive or coercive practice, price fixing, a pattern of under-pricing or breach of confidentiality relating to procurement by an institution;
- (d) accepted, delivered against, or made a claim for payment against, an order knowing that the order had not been authorised or was not in a proper format or had been issued by a person not authorised to do so;
- (e) refused to sign a contract or furnished a performance security in accordance with the terms of the invitation document bid if required to do so;
- (f) has not performed a material contractual obligation not due to circumstances beyond the control of the supplier;

- (g) has been convicted of an offence relating to—
 - (i) obtaining or attempting to obtain a contract or subcontract; or
 - (ii) business or professional activities;
- (h) attempted, or conspired with, aided, abetted, induced or incited another person to contravene a provision of this Act; or
- (i) contravened a provision of this Act.
 - (2) An institution must inform the Regulator in writing of any bidder or supplier who commits any of the acts listed in subsection (1) for possible debarment.
 - (3) A debarment order prohibits the bidder or supplier, for the period specified in the debarment order, from participating in procurement generally or in circumstances specified in the order.
 - (4) A debarment order takes effect from—
 - (a) the date on which it is served on the bidder or supplier; or
 - (b) if the order specifies a later date, the later date.
 - (5) (a) A bidder or supplier subject to a debarment order may not engage in conduct that, directly or indirectly, contravenes the debarment order.
 - (b) Without limiting paragraph (a), a bidder or supplier subject to a debarment order contravenes that paragraph if the bidder or supplier enters into an arrangement with another person to engage in the conduct that directly or indirectly contravenes a debarment order on behalf of, or in accordance with the directions, instructions or wishes of, the bidder or supplier subject to the debarment order.
 - (6) An institution that becomes aware of a debarment order issued against a bidder or supplier must take all reasonable steps to comply with the conditions of the debarment order.
 - (7) The Regulator may, on application by a bidder or supplier subject to a debarment order—
 - (a) reduce the period of the debarment order; or
 - (b) revoke the debarment order, if the order was made in error of fact or law.
 - (8) The Regulator must publish each debarment order, and amendments envisaged in subsection (7).

Consultation before making debarment order

23. (1) The Regulator may provisionally debar a bidder or supplier and must provide the bidder or supplier with a provisional debarment notice stipulating the reasons for the debarment.

- (2) A provisional debarment notice must—
 - (a) indicate the reason for the debarment;
 - (b) date of effect;
 - (c) call upon the bidder or supplier to provide written reasons within 30 days why he or she must not be debarred.

(3) If the Regulator after taking all reasonable steps, including through electronic means, cannot locate a bidder or supplier to be given a provisional debarment notice, delivering the document or information to the bidder or supplier's last known e-mail, physical business or residential address constitutes delivery.

(4) The Regulator must consider the reasons submitted in terms of subsection (2)(c) and—

- (a) confirm the debarment and issue a final debarment order; or
- (b) remove the provisional debarment.

(5) The Regulator must inform the supplier or bidder of the decision in writing within ten days from the date of the decision.

Automatic exclusion from procurement processes

24. The following persons by virtue of their interest or membership in an entity supplying or rendering goods or services, must be excluded from participating in procurement:

- (a) A bidder or supplier subject to a debarment order in terms of section 22(1);
- (b) a public office bearer;
- (c) an official or an employee of any organ of state.

Publication of debarred bidders or suppliers

25. (1) An institution must immediately inform the Regulator of the debarment of a bidder or supplier in terms of section 22(1).

(2) The Regulator must publish the names of debarred bidders or suppliers and must make such names available to institutions upon request.

CHAPTER 4 PREFERENTIAL PROCUREMENT

Framework for preferential treatment

26. (1) The Minister must prescribe a framework for preferential treatment for categories of preferences, and the protection or advancement of persons, or categories of persons, previously disadvantaged by unfair discrimination, in procurement.

(2) The framework envisaged in subsection (1) must consider the Broad-Based Black Economic Empowerment Act and include—

- (a) a preference point system and applicable thresholds;
- (b) measures to advance a category or categories of persons or businesses or a sector;
- (c) measures for preference to set aside the allocation of contracts to promote—
 - (i) a category or categories of persons or businesses or a sector;
 - (ii) goods that are manufactured in the Republic;
 - (iii) local technology and its commercialisation;
 - (iv) services that are provided by a citizen or citizens of the Republic;
 - (v) the creation of jobs or intensification of labour absorption;
 - (vi) enterprises based in townships, rural or underdeveloped areas;
 - (vii) enterprises based in a particular province or municipality for goods, services or infrastructure based in that province or municipality;
- (d) measures regarding the participation of a manufacturer of goods in a bid to supply the goods it manufactures;
- (e) measures aimed at advancing industrial development; and
- (f) measures aimed at advancing small medium and micro enterprises in high value procurement.

(3) Persons referred to in this section include, but are not limited to, women, youth and people with disabilities.

(4) The Minister must consult with the Minister responsible for women, youth, people with disabilities, small businesses, trade, industry, competition or infrastructure before making a regulation under this Chapter relevant to that Minister.

CHAPTER 5 PROCUREMENT METHODS AND BIDDING PROCESS

Part 1 *Procurement principles*

Procurement methods and principles

- 27.** (1) The Minister must prescribe –
- (a) types of procurement methods including procuring from an organ of state, as defined in section 239 of the Constitution; and
 - (b) the requirements and procedure to be followed for each procurement method referred to in paragraph (a).

(2) An institution may stipulate in the bid documents, irrespective of the procurement method, that bidders may only quote in South African currency, inclusive of all applicable taxes.

(3) An institution may not split procurement of goods, services or infrastructure or use different procurement methods to avoid the prescribed threshold.

Part 2 *Bidding process*

Invitation to bid

28. An institution must prepare an invitation to bid inviting bidders to submit bids for the provision of goods or services, other than consultancy services or infrastructure.

Bid documents

- 29.** (1) An institution must use the appropriate standard bid document.
- (2) A bid document must, at least, contain—
- (a) clear instructions on the procurement process and the applicable rules, including deadlines for bidders to submit queries or request clarification;
 - (b) a clear description of the object of the procurement in the form of a statement of requirements;
 - (c) the methodology and criteria to be used in the evaluation of bids and the determination of the best evaluated bids; and
 - (d) the proposed form and conditions of contract which will apply.

Qualification criteria for bidders

30. (1) An institution may require bidders to meet such qualification criteria as the institution considers appropriate in order to demonstrate that the bidder is capable of effectively providing the goods, services or infrastructure.

(2) An institution must specify, in the bid invitation, that bidders must meet the following qualification criteria:

- (a) Professional and technical qualifications and experience;
- (b) financial resources;
- (c) equipment and other physical facilities;
- (d) personnel and managerial capability;
- (e) record of past performance of similar contracts;
- (f) registration or licensing with the relevant professional body; or
- (g) any other criteria that the institution considers necessary.

(3) Bid documents must specify the documentary evidence or information required to demonstrate the bidder's qualifications.

Submission of bids

31. (1) A bid must be submitted in the form and manner specified on the bid documents.

(2) An institution may specify in the invitation for pre-qualification or bid documents, that bidders may submit pre-qualification documents or bids by hand, mail, courier or other method determined by instruction.

Bid security

32. (1) If applicable, and in the manner as may be prescribed, a institution must include in the bid documents the requirements for bid security.

(2) The bid security will be forfeited if a bidder—

- (a) modifies or withdraws the bid after the deadline for submission of bids;
- (b) refuses to accept a correction of an error appearing on the face of the bid; or
- (c) fails to sign a procurement contract in accordance with the terms and conditions set out in the bid documents.

Deadline for submission of bids

33. An institution must set a deadline of at least four weeks for the submission of applications for pre-qualification and bids.

Withdrawal and modification of bids

34. (1) A bidder who has submitted a bid, may by written notice to the institution, modify or withdraw such bid prior to the expiry of the deadline for submission of bids.

(2) A notification envisaged in subsection (1) must be accompanied by a revised bid if applicable.

Bid validity period

35. (1) A bid remains valid for a period not exceeding 180 days which must be specified in the bid documents.

(2) The validity period of a bid may be extended by the accounting officer or accounting authority of an institution in agreement with the bidder

concerned, prior to the expiry of the validity period indicated in the bid document.

(3) If a bidder agrees to an extension of the validity period, the bidder must furnish a corresponding extension of the bid security if applicable.

Opening of bids

36. (1) A bid must be opened at the time and place indicated in the bid documents.

(2) An institution may deviate from the opening of a bid as provided in the bid documents if the institution informs all bidders of such changes before the date set for the opening of bids.

(3) A bidder or his or her representative is authorised to attend the opening of bid session, if applicable.

(4) At the opening of bids session, the name of the bidder, the total amount of each bid, any discount or alternative offered, and the presence or absence of any bid security, if required, must be read out and recorded, and a copy of the record must be made available to any bidder on request.

(5) An institution may not make a decision regarding the disqualification or rejection of a bid at a bid opening session.

Examination and evaluation of bids

37. (1) An institution may request clarification from any bidder or any other party during the examination of bids to facilitate the evaluation process.

(2) Following the opening of bids, an institution must—

(a) examine the bids in order to determine whether they are complete and in accordance with the bid document requirements; and

(b) determine whether—

(i) the bid documents are properly signed; and

(ii) the documents required to establish their legal validity and the required security have been furnished.

(3) If a pre-qualification procedure is applicable, an institution must reject a bid received from a bidder other than a prequalified bidder.

(4) If a bid contains—

(a) an arithmetical error; or

(b) a discrepancy between figures and words,

the institution must consult the bidder and make a decision regarding the error or the discrepancy.

(5) An institution must, except if the request for written quotations method is used, set up a bid evaluation committee to evaluate bids.

(6) Every bid must be evaluated according to the criteria and methodology set out in the bid documents and the evaluated cost of each bid must be compared with the evaluated cost of other bids to determine the most economically advantageous bid.

(7) The bid evaluation committee established in terms of section 54 must prepare an evaluation report detailing the examination and evaluation of bids and identifying the bid with the lowest evaluated price that meets the qualification

criteria.

Rejection of bid or proposal

- 38.** (1) A bid may be rejected only in accordance with this Act.
- (2) An institution may, at any time before the award of a procurement contract, reject a bid if—
- (a) the bid is non-responsive;
 - (b) the bid with the lowest evaluated price is substantially above or below the applicable cost estimate;
 - (c) there is evidence of collusion among bidders;
 - (d) the bidder is—
 - (i) an official of an institution to which this Act applies;
 - (ii) a company as defined in section 1 of the Companies Act, 2008 (Act No. 71 of 2008) and a director of the company is an official of an institution, unless the official is a director by virtue of his or her office, or in his or her official capacity;
 - (iii) a close corporation incorporated under the Close Corporations Act, 1984 (Act No. 69 of 1984) and a member of the close corporation is an official of an institution;
 - (iv) a co-operative registered under the Co-operatives Act, 2005 (Act No. 14 of 2005) and a member of the co-operative is an official of an institution; or
 - (v) a partnership, if a partner is an official of an institution.

Cancellation of procurement

- 39.** (1) An institution may cancel the procurement process if—
- (a) the goods, services or infrastructure are no longer required;
 - (b) insufficient funding is available for the procurement;
 - (c) it is not economically viable to proceed with the bid;
 - (d) there is a significant change in the required technical specifications, bidding conditions, conditions of contract or other details;
 - (e) no responsive bids are received;
 - (f) insufficient bids are received to determine competitiveness;
 - (g) an irregularity in the procurement process occurred;
 - (h) there is evidence of corruption, fraud, coercion or collusion among suppliers;
- or
- (i) cancellation is considered to be in the interest of national security.
- (2) The reason for cancelling a bid must be noted in the record of the procurement process and promptly communicated to the bidders.
- (3) An institution is not liable to a bidder by reason only of cancellation of the procurement process in terms of subsection (1).
- (4) If a decision to cancel the procurement process is taken before the deadline for submission of bids, any bid received must be returned unopened to the bidder.
- (5) If a bid is cancelled in terms of subsection (1)(d), the procurement may not be re-advertised on the same technical specifications, bidding

conditions or conditions of contract.

Re-advertising of bid

- 40.** (1) An institution may re-advertise a bid if—
- (a) all bids have been rejected as envisaged in section 38; or
 - (b) the procurement process has been cancelled as envisaged in section 39.
- (2) Before re-advertising, an institution must—
- (a) examine and record the reason for the rejection of all the bids or the cancellation of the bidding process; and
 - (b) review and suitably modify the original technical specifications or contract conditions.

Verification of bidders or suppliers

41. (1) Before awarding any bid, an institution must forward a written request to the Regulator to verify if a preferred bidder, or any of that bidder's directors, members, trustees or partners, is listed on the register for bidders and suppliers debarred in terms of section 22(1).

(2) If the bidder or any director, member, trustee or partner of the bidder is listed in the register for bidders and suppliers debarred in terms of section 22(1), the institution must reject the bid.

Award of procurement contracts

42. (1) An institution must, in the absence of an application for reconsideration or review envisaged in section 96(1), 97(1), 98(1) or 100(1) by any other bidder within 10 days of the notice referred to in subsection (2), award a procurement contract to a bidder that—

- (a) submits a bid which, in all respects, complies with the specification and conditions of the bid as set out in the bid documents; and
- (b) obtains the highest score, subject to Chapter 4.

(2) An institution must, in the manner and form determined by instruction, notify—

- (a) the successful bidder; and
- (b) the other bidders,

specifying the name and address of the successful bidder and the price of the contract.

(3) If the bidder who has been awarded the contract—

- (a) fails to sign the contract; or
- (b) fails to provide any required security for the performance of the contract,

within the prescribed period, an institution may select another bidder from amongst the remaining valid bids.

(4) Subsections (2) and (3) apply to the award of a new bidder.

(5) An institution must promptly and in a manner determined by instruction, publish the results of a procurement process.

(6) An institution may award a procurement contract to qualifying multiple bidders as may be prescribed.

Part 3
Transversal procurement

Transversal term contracts

43. (1) The National Treasury must facilitate the arrangement of all transversal term contracts for goods, services or infrastructure that have been designated by the National Treasury as being transversal in nature.

(2) A provincial treasury may, after consultation with the National Treasury, facilitate the procurement of a transversal term contract for goods, services or infrastructure for provincial institutions in the province other than for goods, services or infrastructure for which a transversal term contract has been concluded in terms of subsection (1).

(3) Procurement of transversal term contracts must—

- (a) be in accordance with a system as approved by the Regulator which must, as far as practically possible, be similar to the system for competitive bids; and
- (b) follow a strategic sourcing methodology and leverage buying power to achieve economies of scale.

(4) The relevant treasury must ensure that institutions that will be affected by a transversal term contract appoint representatives with the required expertise to serve on the relevant procurement committees for the system referred to in subsection (3)(a).

(5)(a) An institution must participate in transversal contracts applicable to the institution, unless the relevant treasury has exempted the institution from such participation.

(b) The relevant treasury may exempt an institution as envisaged in subsection (5) if—

- (a) exceptional circumstances make it impossible, impractical or uneconomical to participate in the contract; or
- (b) national security is likely to be compromised.

(6) The relevant treasury must provide institutions with a list of goods, services or infrastructure that are proposed to be procured in the next financial year through transversal term contracts in order to determine the extent of the need for such goods, services or infrastructure that may be provided for in such contracts.

(7) The list referred to in subsection (6) must be provided to institutions at least six months before the commencement of the next financial year.

(8) (a) After goods, services or infrastructure have been procured through a transversal term contract, an institution must ensure that, where appropriate, a service level agreement is entered into between the supplier and the institution before any goods or services are ordered in terms of the contract.

(b) The provisions of the service level agreement must be consistent with the terms and conditions of the relevant transversal term contract.

Part 4
Public-Private Partnership

Public-private partnership approvals and agreement

44. (1) The following treasury approvals are required to complete a public-private partnership process:

- (a) Treasury approval I envisaged in section 46(5);
- (b) Treasury approval IIA envisaged in section 47(2)(b);
- (c) Treasury approval IIB envisaged in section 47(5)(a); and
- (d) Treasury approval III envisaged in section 48(2).

(2) A public-private partnership is an agreement between an institution and a private party under which—

- (a) the private party undertakes to perform a function on behalf of the institution;
- (b) the private party receives a benefit for performing the function, either by way of—
 - (i) compensation from public funds;
 - (ii) fees collected by the private party from the users of a service provided to them; or
 - (iii) a combination of such compensation and such fees;
- (c) the private party is generally liable for the risks arising from the performance of the function.

Project inception

45. As soon as an institution identifies a project that may be provided through a public-private partnership, the accounting officer or the accounting authority must, in writing—

- (a) submit the proposed public-private partnership to the relevant treasury;
- (b) inform the relevant treasury of the expertise within that institution to proceed with the public-private partnership;
- (c) appoint a project officer from within or outside the institution; and
- (d) appoint a transaction advisor, if the relevant treasury so requests.

Feasibility study

46. (1) To determine whether a proposed public-private partnership is in the best interest of the institution, the institution must undertake a feasibility study that—

- (a) explains the strategic and operational benefits of the proposed public-private partnership for the institution in terms of—
 - (i) its strategic objectives; and
 - (ii) government policy;
- (b) describes in specific terms—
 - (i) in the case of a public-private partnership involving the performance of an institutional function, the nature of the institutional function concerned and the extent to which that function, both legally and by nature, can be performed by a private party; and
 - (ii) in the case of a public-private partnership involving the use of property, a description of the property, the uses, if any, to which that property has been subject before the registration of the proposed

public-private partnership and a description of the types of use that a private party may legally subject the property to;

- (c) in the case of a public-private partnership in respect of which the institution will incur financial commitments, demonstrates the affordability of the partnership;
- (d) sets out the proposed allocation of financial, technical and operational risks between the institution and the private party;
- (e) demonstrates the anticipated value for money to be achieved by the public-private partnership; and
- (f) explains the capacity of the institution to procure, implement, manage, enforce, monitor and report on the public-private partnership.

(2) The feasibility study referred to in subsection (1) must be submitted to the relevant treasury for consideration and the relevant treasury—

- (a) may approve the feasibility study and inform the institution in writing of such approval;
- (b) reject the feasibility study and inform the institution in writing of the rejection together with reasons;
- (c) refer the feasibility study to the institution and request further information or clarification.

(3) The Treasury approval referred to in subsection (2)(a) shall be regarded as Treasury Approval I.

(4) If at any time after Treasury Approval I has been issued, but before the issuance of Treasury Approval III, any information in the feasibility study for the public-private partnership are materially revised, including any information concerning affordability, value for money and substantial technical, operational and financial risk transfer, the institution must immediately—

- (a) provide the relevant treasury with details of the revision, including a statement regarding the purpose and impact of the revision on the affordability, value for money and risk transfer evaluation in the feasibility study; and
- (b) submit the revised feasibility study to the relevant treasury for approval.

(5) If approved, the relevant treasury must, in writing, issue a revised Treasury Approval I.

Procurement for public-private partnerships

47. (1) Before an institution issues any bid documents to any prospective bidders, for a public-private partnership in respect of which Treasury Approval I has been issued, the institution must first submit the procurement documentation, including a draft public-private partnership agreement, to the relevant treasury for approval.

(2) A relevant treasury must consider the procurement documentation and draft agreement and—

- (a) may approve the form and content of the procurement documentation and draft agreement and inform the institution in writing of such approval;
- (b) reject the procurement documentation and draft agreement and inform the institution in writing of the rejection together with reasons;
- (c) refer all the documentation to the institution and request further information, amendments or clarification.

(3) The approval referred to in subsection (2)(a) is regarded as Treasury Approval IIA.

(4) After evaluating bids received in the procurement process, but before appointing the preferred bidder, the institution must first submit a report on the evaluation process to the relevant treasury for approval—

- (a) demonstrating how the criteria of affordability, value for money and substantial technical, operational and financial risk transfer were applied in the evaluation process;
- (b) demonstrating how these criteria were satisfied in the preferred bid; and
- (c) containing any other information as may be required by the relevant treasury.

(5) A relevant treasury must consider the information in subsection (4) and—

- (a) approve the process and inform the institution in writing of such approval; or
- (b) reject the process and inform the institution in writing of the rejection together with reasons.

(6) The approval envisaged in subsection (5)(a) is regarded as Treasury Approval IIB.

Concluding public-private partnership agreements

48. (1) After the procurement process has been concluded, but before the institution concludes a public-private partnership agreement with the preferred bidder, the accounting officer must submit the following documents to the relevant treasury for approval:

- (a) The draft public-private partnership agreement;
- (b) an explanatory memorandum on how the public-private partnership agreement meets the requirements of affordability, value for money and substantial technical, operational and financial risk transfer as approved in the feasibility study or revised feasibility study;
- (c) a management plan explaining the capacity of the institution, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the public-private partnership; and
- (d) a report demonstrating the satisfactory completion of a due diligence, including a legal due diligence in respect of the accounting officer and the proposed private party in relation to their respective competence and capacity to enter into the public-private partnership agreement.

(2) A relevant treasury must consider the documentation referred to in subsection 48(1) and, in writing—

- (a) approve; or
- (b) decline to approve and provide reasons therefor.

(3) The approval envisaged in subsection (2) is regarded as Treasury Approval III.

Management of public-private partnership agreements

49. (1) An institution must—

- (a) ensure that the public-private partnership agreement is properly implemented, managed, enforced, monitored and reported on; and

- (b) maintain such mechanisms and procedures as approved under Treasury Approval III for—
- (i) measuring the outputs of the public-private partnership agreement;
 - (ii) monitoring the implementation of the public-private partnership agreement and performance under the public-private partnership agreement;
 - (iii) liaising with the private party;
 - (iv) resolving disputes and differences with the private party;
 - (v) generally overseeing the day-to-day management of the public-private partnership agreement; and
 - (vi) reporting on the public-private partnership agreement in the annual report of the institution.

(2) A public-private partnership agreement involving the performance of a function of an institution does not divest the institution of the responsibility for ensuring that the function is effectively and efficiently performed in the public interest.

(3) A public-private partnership agreement involving the use of property by a private party does not divest the institution concerned of the responsibility for ensuring that the property is appropriately protected against forfeiture, theft, loss, wastage and misuse.

Amendment and variation of public-private partnership agreements

50. (1) Prior approval from the relevant treasury is required for any material amendments to a public-private partnership agreement, including any material variations to the outputs therein, or any waivers envisaged or provided for in the public-private partnership agreement.

(2) The relevant treasury must approve a material amendment if the relevant treasury is satisfied that the public-private partnership agreement, if so amended or varied, will continue to provide—

- (a) value for money;
- (b) affordability; and
- (c) substantial technical, operational and financial risk transfer to the private party.

(3) An institution must, with the necessary changes, follow the procedure set out in sections 46 and 48 for obtaining such treasury approval.

Binding public-private partnership agreements

51. A public-private partnership agreement, including an amended public-private partnership agreement, binds the institution, only if the requisite treasury approvals envisaged in sections 46, 47 and 48 have been obtained by the institution.

**CHAPTER 6
SUPPLY CHAIN MANAGEMENT**

***Part 1
Supply Chain Management System***

Supply chain management system

52. (1) An institution must develop, document, maintain and implement an effective and efficient supply chain management system in accordance with this Act.

(2) A supply chain management system referred to in subsection (1) must contain a procurement policy for the institution and must be consistent with—

- (a) section 217 of the Constitution;
- (b) section 3(2) of this Act;
- (c) the Broad-Based Black Economic Empowerment Act;
- (d) the Construction Industry Development Board Act;
- (e) the Prevention and Combating of Corrupt Activities Act;
- (f) the Promotion of Administrative Justice Act;
- (g) the Promotion of Access to Information Act; and
- (h) any other applicable legislation.

(3) A supply chain management system referred to in subsection (1) must provide for the following matters in a manner consistent with this Act—

- (a) Institutional and governance arrangements;
- (b) demand management;
- (c) procurement planning and budgeting;
- (c) acquisition management;
- (d) contract management;
- (e) risk management;
- (e) logistics management;
- (f) movable asset management;
- (g) disposal management;
- (h) monitoring and assessment of procurement performance; and
- (i) reporting.

***Part 2
Institutional arrangements***

Establishment of procurement units

53. (1) Every institution must establish a procurement unit.

(2) The responsibilities of the procurement unit must at least include the following:

- (a) Implementation of functions allocated to the unit in terms of this Act and the supply chain management system of the institution;
- (b) maintenance of the supply chain management system to ensure effectiveness and efficiency;
- (c) regular reporting to the institution on the performance of the supply chain

- management system;
- (d) ensuring compliance with section 52(2);
- (e) rendering assistance and administrative support to the line function managers and other officials of the institution in the performance of their procurement responsibilities;
- (f) providing advice to a procurement committee on request;
- (g) any other functions that the accounting officer or accounting authority may consider necessary.

Establishment of committees

54. (1) An institution must, within the supply chain management system, establish a committee system consisting of at least—

- (a) a bid specification committee;
- (b) a bid evaluation committee; and
- (c) a bid adjudication committee.

(2) The committee system established in terms of subsection (1) must be applied for all competitive and restricted bids or any other procurement method envisaged in this Act which requires that a committee be a part of the procurement process.

(3) If the accounting officer or accounting authority so directs, a committee may be established for the evaluation and adjudication of quotations.

(4) An institution must ensure the segregation of duties in the composition of all bid committees.

(5) In the exercise of its function, a bid committee must act without fear, favour or prejudice, and is not subject to the direction or control of any other person.

Appointment of bid committee members

55. (1) The accounting officer or accounting authority of an institution must, in writing, appoint the members of the respective committees and specify the duties of each member.

(2) The following persons may not be appointed to a bid committee:

- (a) A public office bearer;
- (b) a person appointed in terms of section 12A of the Public Service Act;
- (c) technical advisers and subject experts appointed in terms of section 56(1); and
- (d) any person having a conflict of interest.

Technical advisers and subject experts

56. (1) The accounting officer or accounting authority of an institution may, in writing, appoint technical advisers and subject experts to assist a bid committee with any technical aspect related to a bid.

(2) Technical advisers and subject experts referred to in subsection (1) do not have voting rights in any bid committee.

Procedures of bid committees

57. (1) A bid committee may determine its own procedures for meetings of the committee, subject to any directions as may be determined by the accounting officer or accounting authority.

(2) The proceedings of bid committees must be recorded electronically or in writing.

(3) Recordings or signed minutes must be kept in a secured environment for a period of at least five years after the fulfilment, lapse or cancellation of the contract to which the recordings or minutes relate, unless otherwise provided in the National Archives and Record Service of South Africa Act.

Composition of bid specification committees

58. A bid specification committee must consist of at least three members of which—

- (a) the chairperson must be an official of the relevant institution with requisite skills; and
- (b) other members must at least include a supply chain management practitioner and, where practical, the unit of the institution that requires the goods, services or infrastructure.

Functions and proceedings of bid specification committees

59. (1) A bid specification committee must for the procurement of goods, services or infrastructure recommend to the accounting officer, accounting authority or delegated authority, whichever is applicable—

- (a) the specifications;
- (b) the terms of reference;
- (c) the evaluation criteria; and
- (d) the special conditions of contract, if applicable.

(2) Bid specifications—

- (a) must be drafted in an unbiased manner to allow all potential suppliers to offer their goods, services or infrastructure;
- (b) must take into account any generally accepted industry standards in relation to the goods, services or infrastructure to be procured;
- (c) must be described in terms of performance required rather than in terms of descriptive characteristics for design;
- (d) may not create trade barriers in the form of specifications, plans, drawings, design, testing and test methods, packaging and marking or labelling of conformity certification; and
- (e) may not make any particular reference to trade mark, name, patent, type, specific origin or producer unless there is no other precise way of describing the characteristics of the work, in which case such reference must be accompanied by the words 'equivalent to'.

Composition of bid evaluation committees

- 60.** A bid evaluation committee must—
- (a) consist of at least three members of which—
 - (i) the chairperson must be an official of the institution with requisite skills;
 - (ii) other members must include a supply chain management practitioner and, where practical, an end user of the institution;
 - (b) be composed in such a way that it is cross-functional of the activities of the institution.

Functions and proceedings of bid evaluation committees

61. (1) A bid evaluation committee must evaluate bids in accordance with this Act and any criteria in the bid documentation, including the preference points system.

(2) When evaluating a bid, the bid evaluation committee must verify—

- (a) the capacity of the bidder to deliver the goods, services or infrastructure being procured;
- (b) the tax compliance status of the bidder;
- (c) the declaration of interests of the bidder;
- (d) that the bidder is registered on the database created by the Regulator in terms of section 5(1)(j), if applicable; and
- (e) that the bidder is not listed in the register for debarred bidders and suppliers referred to in section 7(1)(i).

(3) The bid evaluation committee must submit to the bid adjudication committee, a report and recommendation on the awarding of the bid or on any other related matter.

(4) No bid submitted by a member of, or a technical adviser or subject expert assisting, any bid committee of the institution, or by a family member or an associate of the member, adviser or expert, may be considered by the bid evaluation committee.

Composition of bid adjudication committees

- 62.** A bid adjudication committee must—
- (a) consist of at least three members of which—
 - (i) the chairperson must be an official of the institution with requisite skills;
 - (ii) other members must at least include a supply chain management practitioner of the institution; and
 - (b) be composed in such a way that it is cross-functional of the activities of the institution.

Functions and proceedings of bid adjudication committees

- 63.** (1) A bid adjudication committee must—
- (a) consider the report and recommendations of the bid evaluation committee;

- (b) make a recommendation on the award to the accounting officer or accounting authority, together with reasons for the recommendation; and
- (c) consider the cancellation, amendment, extension or transfer of any contract resulting from an award by the institution.

(2) The bid adjudication committee may refer any recommendation made by the bid evaluation committee back to the bid evaluation committee for reconsideration.

Decisions of accounting officer or accounting authority on recommendations of bid adjudication committee

64. If the bid adjudication committee makes a recommendation, the accounting officer or accounting authority may—

- (a) in the absence of an application for reconsideration or review in terms of section 96(1), 97(1), 98(1) or 100(2) award the bid, taking into account the recommendations of the bid evaluation committee and bid adjudication committee; or
- (b) decide not to proceed or to start afresh with the process.

Disagreements between bid evaluation committee and bid adjudication committee

65. If the bid adjudication committee disagrees with the recommendation of the bid evaluation committee and recommends to the accounting officer or accounting authority, a bid other than the bid recommended by the bid evaluation committee, the bid adjudication committee's recommendation must include the reasons for the decision.

Relevant treasuries to be notified in event of awards deviating from recommendations

66. (1) The accounting officer or accounting authority must report any award made, to the relevant Treasury, where—

- (a) the recommendation of the bid evaluation committee was rejected by the bid adjudication committee; or
- (b) the recommendation of the bid adjudication committee was rejected by the accounting officer or accounting authority and the bid was awarded to another bidder.

(2) An institution that is a public entity listed in the Public Finance Management Act must report through the relevant policy department to the relevant Treasury as envisaged in subsection (1).

(3) The report in terms of subsection (1) must be—

- (a) submitted within 30 days in writing; and
- (b) accompanied by the reasons for the award.

Measures to prevent abuse of supply chain management system

- 67.** The accounting officer or accounting authority of an institution must—
- (a) take all reasonable steps to prevent abuse of the supply chain management system;
 - (b) take all reasonable steps to ensure that no person interferes with the supply chain management system or is able to amend or tamper with any bid or contract;
 - (c) investigate any allegation against an official or other role player of corruption, improper conduct or failure to comply with the supply chain management system, and when justified—
 - (i) take steps against that official or other role player and inform the relevant treasury of those steps; and
 - (ii) report to the South African Police Service any conduct that may constitute a criminal offence;
 - (d) reject a recommendation for the award of a bid if the recommended bidder has made a misrepresentation or submitted false documents in competing for a particular contract;
 - (e) reject a recommendation for the award of a bid if the recommended bidder has been convicted of a corrupt or fraudulent act in competing for any contract; or
 - (f) cancel a contract awarded to a supplier for goods, services or infrastructure—
 - (i) if it becomes aware that the supplier has made a misrepresentation, submitted falsified documents or has been convicted of any corrupt or fraudulent act in competing for a particular contract or during the execution of that contract; or
 - (ii) if any employee or other role player was convicted of any corrupt or fraudulent act during the bidding process or during the execution of that contract.

Part 3 **Demand management**

Demand management system

68. (1) An accounting officer or accounting authority of an institution must ensure that the institution has and maintains an effective and efficient demand management system.

(2) The demand management system referred to in subsection (1) must be aimed at ensuring that—

- (a) goods, services or infrastructure required to support the strategic and operational commitments of the institution are delivered at the right price, at an appropriate time and to the correct location; and
- (b) the quality and quantity of the goods, services or infrastructure satisfy the needs of the institution.

Approval of procurement plan

69. (1) An institution must, within its demand management plan, have

an annual procurement plan approved by the accounting officer or accounting authority.

(2) An annual procurement plan referred to in subsection (1) must be prepared in a rational manner and in particular must—

- (a) be aligned to the budget of the institution;
- (b) avoid emergency procurement wherever possible;
- (c) aggregate an institution's requirements wherever possible, both within the institution and between institutions, to obtain value for money and reduce procurement costs;
- (d) avoid splitting of procurement to avoid the use of the applicable procurement method; and
- (e) integrate the procurement budget with the allocated funds of the institution.

(3) An institution must submit an annual procurement plan referred to in subsection (1), to the relevant treasury, by a date as determined by instruction.

(4) An institution must comply with the approved annual procurement plan and any unplanned procurement must be authorised by prior written approval from its accounting officer or accounting authority.

(5) An institution must review the annual procurement plan referred to in subsection (1), at least quarterly against the budget and against strategic and annual performance plans to ensure its relevance.

Part 4 **Acquisition management**

Acquisition management system

70. (1) An accounting officer or accounting authority must ensure that the institution has and maintains an effective and efficient acquisition management system.

(2) The acquisition management system referred to in subsection (1) must be aimed at ensuring that—

- (a) expenditure on goods, services or infrastructure are provided for in the available budget;
- (b) goods, services or infrastructure are procured in accordance with authorised processes;
- (c) the prescribed threshold values for the different range of procurement are complied with; and
- (d) bid documentation, general and special conditions of contract are in accordance with this Act.

Strategic procurement

71. The accounting officer or accounting authority must apply strategic sourcing principles in accordance with the strategic procurement framework determined by the National Treasury when procuring goods or services that are of a strategic nature or which are identified as such by the National Treasury.

Part 5

Contracts and contract management

Contracts

72. An accounting officer or accounting authority must ensure that all contracts entered into by the institution for the procurement of goods or services comply with this Act.

Contract management

73. (1) The accounting officer or accounting authority must ensure that the institution has and maintains an effective and efficient contract management system.

(2) The contract management system referred to in subsection (1) must be aimed at ensuring that—

- (a) contracts for the procurement of goods, services or infrastructure are recorded in a contract register;
- (b) contracts are monitored and regularly reported on;
- (c) service level agreements are evaluated for compliance with the applicable transversal term contracts;
- (d) timelines in relation to the expiry of period contracts and specific clauses within a contract that are subject to timelines are monitored;
- (e) applications for price adjustments, cancellations, amendments, expansions, variations, extensions or transfer of contracts are considered;
- (f) service complaints against or failures by suppliers to meet their contractual obligations are recorded;
- (g) performance in accordance with contracts is enforced; and
- (h) appropriate measures are taken in the case of non-performance or underperformance.

Part 6

Logistics management

Logistics management system

74. (1) An accounting officer or accounting authority must ensure that the institution has and maintains an efficient and effective logistics management system.

(2) The logistics management system referred to in subsection (1) must be aimed at ensuring that-

- (a) manual or electronic processes and procedures that support the effective, efficient, economical and transparent use of the resources of the institution are in place;
- (b) a proper record is maintained of all the assets under the control of the institution;
- (c) effective control mechanisms are in place-

- (i) to prevent theft, losses, wastage and misuse; and
- (ii) to maintain stock levels at an optimum and economic level;
- (d) the reliability of suppliers is monitored, at least in relation to-
 - (i) compliance with delivery periods;
 - (ii) quantity and quality of goods supplied or services rendered or infrastructure; and
 - (iii) actions taken against non-performing or underperforming suppliers; and
- (e) a complete record is maintained in respect of all procurement transactions.

Institutional instructions and standard operating procedures for logistics management

75. A logistics management system for an institution referred to in section 74(1) must be regulated by institutional instructions and standard operating procedures on at least the following matters—

- (a) requisitioning of goods, services or infrastructure;
- (b) placing of orders for goods, services or infrastructure;
- (c) receipt of goods;
- (d) distribution of goods;
- (e) preparation of payment vouchers;
- (f) reconciliation of asset and inventory records with financial accounts; and
- (g) inventory management in accordance with section 76.

Inventory management

76. (1) Institutional instructions on inventory management issued in terms of section 75(g) must at least cover—

- (a) the measurement of inventory for reporting in the annual financial statements and associated disclosures;
- (b) a coding system for the recording of inventory items;
- (c) manual or computerised systems for demand forecasting and material requirement planning;
- (d) approaches for inventory control;
- (e) stock levels for the different categories of inventory items;
- (f) quality and re-order point models to be used for categories of inventory items;
- (g) stocktake requirements;
- (h) mechanisms to prevent theft, losses, wastage and misuse for each category of items;
- (i) warehouse and stockroom organisation; and
- (j) systems, whether manual or computerised, for the recording of inventory transactions.

(2) Standard operating procedures on inventory management issued in terms of section 75(g) must at least cover—

- (a) demand forecasting and resource planning for stock items;
- (b) calculation of stock levels, safety stock, reorder quantities and reorder points;
- (c) stocktaking;
- (d) restricted access areas;

- (e) disposal of damaged, spoiled, obsolete or slow moving items;
- (f) losses and misuse of inventory items;
- (g) safe operation of storage facilities, plant and equipment;
- (h) recording of orders, receipts, issues and returns;
- (i) production of inventory management reports; and
- (j) reconciliation of inventory records with financial accounts.

Part 7
Movable asset management

Movable asset management system

77. (1) An accounting officer or accounting authority must ensure that the institution has and maintains an effective and efficient movable asset management system.

(2) A movable asset management system referred to in subsection (1) must provide for—

- (a) a planning phase, involving planning and establishing the need for a new movable asset;
- (b) an acquisition phase, involving the procurement of the movable asset, whether purchased, constructed, donated or transferred or otherwise acquired;
- (c) an operational and maintenance phase, involving the use and maintenance of the movable asset for its intended purpose; and
- (d) a disposal phase, involving the disposal of the movable asset when its economic life cycle has expired or it has become redundant or obsolete.

(3) A movable asset management system must be based on and implemented in accordance with the following principles:

- (a) Movable asset management activities must be geared to achieve the institution's strategic objectives and be driven by the service delivery needs, programmes and functions of the institution;
- (b) movable asset management planning and decisions must be an integral part of the institution's strategic and operational planning processes;
- (c) movable asset management decisions must be based on the evaluation of alternatives that take into account the full life cycle costs, benefits and risks of movable assets; and
- (d) accountability and reporting requirements for both ownership and control are to be determined and clearly defined.

Movable asset management plans

78. (1) An accounting officer or accounting authority must develop and implement a movable asset management plan for the institution which must cover a five-year period and which must be reviewed and updated at least annually.

(2) A movable asset management plan referred to in subsection (1) must at least include the following:

- (a) An acquisition plan that identifies the movable assets to be acquired or replaced during the planning period and which establishes the sources and

- monetary value of funding for the acquisitions;
- (b) an operational plan that describes the use of the institution's movable assets and which must, in relation to those assets, at least include matters regarding access, security, accountability, the monitoring of performance, training of staff in the use of those movable assets and estimates of operating costs;
- (c) a maintenance plan that identifies movable assets to be maintained, the level of maintenance and the delivery of maintenance services, which must include an annual programme of routine preventative maintenance and a long term-programme for major repairs and maintenance;
- (d) a disposal plan that identifies movable assets to be disposed of in the planning period, the expected proceeds of disposal and the treatment of the proceeds related thereto;
- (e) a funding plan that describes the options available for funding capital and recurrent movable asset costs; and
- (f) a risk management plan that describes the risk management strategies and control activities to be implemented for the various categories of movable assets.

Movable asset register

- 79.** (1) An accounting officer or accounting authority must ensure that—
- (a) the institution has and maintains a comprehensive movable asset register that complies with the relevant reporting framework applicable to the institution; and
 - (b) a register is updated each month within 20 days after the end of the previous month.
- (2) The register referred to in subsection (1) must—
- (a) be integrated, to the extent practicable, with the logistics and financial systems of the institution and its general ledger;
 - (b) distinguish between the different movable asset classifications;
 - (c) in relation to financial data on movable assets, be maintained down to a level that is important and relevant to decision-makers;
 - (d) identify an official or a unit responsible for the movable asset within the institution;
 - (e) be updated as transactions and events occur;
 - (f) be regularly reconciled with the acquisition, disposal or transfer data as well as the general ledger;
 - (g) be readily available to movable asset managers; and
 - (h) allow for the gathering of relevant information for purposes of compiling the annual financial statements in terms of the applicable accounting standards.

Reporting of movable asset management information

- 80.** (1) An accounting officer or accounting authority must annually report on matters relating to movable asset management in a format as may be determined by instruction.
- (2) The report referred to in subsection (1) must be included—

- (a) as part of the institution's annual financial statements; and
- (b) in the case of an institution which is a department, also as part of the interim financial statements of that department.

CHAPTER 7
INFRASTRUCTURE DELIVERY MANAGEMENT

Part 1
Application of this Chapter

Application of this Chapter

- 81.** (1) Part 2 of this Chapter applies to—
- (a) departments;
 - (b) constitutional institutions listed in Schedule 1 to the Public Finance Management Act; and
 - (c) public entities listed in Schedule 3A and 3C to the Public Finance Management Act.
- (2) Part 3 of this Chapter applies to—
- (a) major public entities listed in Schedule 2 to the Public Finance Management Act;
 - (b) government business enterprises listed in Schedule 3B and 3D to the Public Finance Management Act; and
 - (c) municipalities and municipal entities.
- (3) This Chapter does not apply to—
- (a) infrastructure or the maintenance of infrastructure to be procured through a public-private partnership in terms of this Act; or
 - (b) the disposal or letting of land, the conclusion of any form of land availability agreement or the leasing or rental of fixed assets.

Part 2
Infrastructure procurement and delivery management by departments, constitutional institutions and 3A and 3C public entities

Supply chain management system for infrastructure

- 82.** (1) An accounting officer or accounting authority must develop, document, maintain and implement an effective procurement system for infrastructure procurement and delivery management.
- (2) The procurement system for infrastructure referred to in subsection (1) must provide for the matters that comply with any standard for infrastructure procurement and delivery management as may be determined by instruction.

Infrastructure functions of procurement unit

- 83.** A procurement unit must—
- (a) perform functions listed in section 53(2) in relation to the supply chain management system for infrastructure; and
 - (b) co-ordinate and manage the interactions between the department, constitutional institution listed in Schedule 1 or public entity listed in Schedule

3A or 3C to the Public Finance Management Act and the relevant treasury in the implementation of this Part.

Infrastructure procurement

84. (1) An accounting officer or accounting authority, implementing a supply chain management system for infrastructure, must ensure that the infrastructure procurement system complies with any applicable standards for infrastructure procurement and delivery management referred to in section 82(2).

(2) A supply chain management system may, despite subsection (1), be applied for the procurement of infrastructure where the value of the transaction is less than the threshold for the application of the register of contractors stated in the Construction Industry Development Regulations issued in terms of the Construction Industry Development Board Act.

Implementation by another institution

85. (1) An accounting officer or accounting authority of a client institution may, subject to any legislation, delegate or assign the responsibility to implement an infrastructure project to another institution.

(2) A delegation referred to in subsection (1) may only be performed through a written service delivery agreement between the relevant parties which must comply with and require the application of any applicable standard for infrastructure procurement and delivery management, including an instruction in terms of section 82(2), when functioning as an implementing institution.

(3) (a) A school governing body, established in terms of section 16 of the South African Schools Act, 1996 (Act No. 84 of 1996), and which makes a substantial financial contribution towards a project at that particular school, may be delegated to act as an implementing agent for projects at that particular school subject to the approval of the provincial education department.

(b) If a school governing body is appointed to act as an implementing agent, the provincial education department must enter into a service delivery agreement with that particular school.

Use of contract of another organ of state

86. The accounting officer or accounting authority of an institution may make use of a contract arranged by another institution as prescribed and in accordance with any applicable standard for infrastructure procurement and delivery management.

Part 3

Infrastructure procurement and delivery management by major public entities, government business enterprises, municipalities and municipal entities

Supply chain management system

87. (1) An accounting officer or accounting authority must develop, document, maintain and implement an effective and efficient supply chain management system for infrastructure.

(2) The supply chain management system for infrastructure referred to in subsection (1) must comply with any standard for infrastructure procurement and delivery management for major public entities and government business enterprises, as may be determined by instruction.

Feasibility studies for major capital projects

88. (1) Before procuring any major capital project, the accounting authority of an institution listed in Schedule 2, 3B or 3D to the Public Finance Management Act must conduct a feasibility assessment of the project.

(2) A feasibility study referred to in subsection (1) must at least include the following:

- (a) Preparatory work covering—
 - (i) a needs and demand analysis with output specifications; and
 - (ii) an options analysis;
- (b) a viability evaluation covering—
 - (i) a financial analysis; and
 - (ii) an economic analysis, if necessary;
- (c) a risk assessment and sensitivity analysis;
- (d) a professional analysis covering—
 - (i) a technology options assessment;
 - (ii) an environmental impact assessment; and
 - (iii) a regulatory due diligence; and
- (e) implementation readiness covering—
 - (i) institutional capacity; and
 - (ii) a procurement plan.

Part 4

Gateway review process

Review process

89. (1) An accounting officer or accounting authority must comply with a gateway review process for infrastructure projects that are consistent with any applicable standards for infrastructure procurement and delivery management referred to in section 82(2).

(2) In this section, “gateway review process” means an independent peer review process that examines an infrastructure project at key points in its lifecycle to assess the progress and to rate the likelihood of successful delivery of the project.

CHAPTER 8 DISPOSAL OF ASSETS

Application of this Chapter

90. This Chapter does not apply to the disposal of State land regulated by the State Land Disposal Act, 1961 (Act No. 48 of 1961) or a provincial land administration law.

Disposal of assets

- 91.** (1) The Minister may prescribe—
- (a) methods for the disposal of assets;
 - (b) empowerment measures for the disposal of any category of assets.
- (2) The methods referred to in subsection (1)(a) must include at least—
- (a) open advertised bidding;
 - (b) public auction;
 - (c) electronic reverse auction which is an online real time purchasing technique utilised by an institution to select the successful bid and entails the presentation by bidders of successfully lower bids during a scheduled period and the automatic evaluation of bids; and
 - (d) restricted bidding.
- (3) Section 43 applies with the necessary changes to the award of disposal contracts.

Disposal management system

- 92.** (1) An accounting officer or accounting authority must ensure that the institution has and maintains an effective and efficient disposal management system that is fair, equitable, transparent, competitive and cost effective.
- (2) An accounting officer or accounting authority must, before the disposal of any movable asset, determine the appropriate methods and options for disposal after at least taking the following into account—
- (a) the nature and quantity or volume of the movable asset to be disposed of;
 - (b) the potential market value or trade-in price of the movable asset;
 - (c) the value of the component parts of the movable asset;
 - (d) whether the movable asset can be used to support any function of any other organ of state;
 - (e) environmental considerations relating to the type of movable asset; and
 - (f) market conditions.
- (3) An accounting officer or accounting authority may transfer any movable asset free of charge to any organ of state.
- (4) (a) The National Conventional Arms Control Act must be complied with when firearms are disposed of in terms of this Chapter.
- (b) An institution must obtain the approval of the National Conventional Arms Control Committee, established by section 2 of the National Conventional Arms Control Act for the disposal or transfer of firearms to any person

within or outside the Republic.

Disposal methods and options

93. A disposal management system must provide for different disposal methods or options, as may be appropriate, for various categories of movable assets, which may include—

- (a) sales by auction;
- (b) sales by written price quotations;
- (c) transfers to other organs of state; and
- (d) controlled dumping.

CHAPTER 9
DISPUTE RESOLUTION
Part 1
Reconsideration and review

Reconsideration or review of decision

94. (1) A bidder may, in accordance with section 96, 97, 98 or 100 seek a reconsideration or review of a decision or a failure to take a decision by an institution in terms of this Act.

(2) A bidder seeking a reconsideration or review of a decision must pay such fee as may be prescribed.

Prohibition on contract award during reconsideration or review proceedings

95. (1) If a procurement process is subject to—

(a) a reconsideration in accordance with section 96, 97 or 98, no contract may be awarded within 10 days after completion of the reconsideration or review process; or

(b) review in accordance with section 100, no contract may be awarded prior to completion of the review process.

(2) Despite subsection (1), if urgent public interest considerations require the procurement of goods, services or infrastructure—

(a) in the case of an institution in the national sphere of government, the Regulator; or

(b) in the case of an institution in the provincial or local sphere of government, the relevant provincial treasury,

may upon request by the institution authorise an award of a contract or an extension to an existing contract prior to the lapse of the period referred to in subsection (1)(a) or completion of the review process.

(3) The award, referred to in subsection (2), must be limited to the quantity of goods, services or infrastructure required to meet the urgent needs during the time period for completion of the reconsideration or review process.

(4) If an institution seeks to make an award or consent to an extension in accordance with subsection (2), the institution must make a submission to the Regulator or the relevant provincial treasury which—

(a) states that urgent public interests require an award or extension;

(b) justifies the grounds for claiming urgent public interest;

(c) specifies the quantity of goods, services or infrastructure required to meet urgent needs; and

(d) recommends the bidder to whom the contract or extension is to be awarded.

Part 2
Reconsideration by institution

Reconsideration by institution

96. (1) A bidder may submit an application for reconsideration to the institution if he or she is not satisfied with a decision made in terms of this Act by the institution.

(2) An application envisaged in subsection (1) must be made in writing to the institution that made the decision.

(3) An institution may dismiss an application for reconsideration if the application was not submitted within 10 days of the date the bidder became aware of the circumstances giving rise to the application for reconsideration or of the date when that bidder should have become aware of those circumstances, whichever is earlier.

(4) Unless the application is dismissed as envisaged in subsection (3) or withdrawn by the bidder, the institution must—

- (a) immediately institute an investigation; and
- (b) issue a written decision, within 10 days after the submission of the application.

(5) A decision referred to in subsection (4)(b) must state—

- (a) whether the application is upheld, in whole or in part, or dismissed;
- (b) the reasons for the decision; and
- (c) any corrective measures that may be taken.

(6) A bidder who is dissatisfied with the decision envisaged in subsection (4)(b) may apply to the relevant treasury or Regulator, as the case may be, to reconsider the decision made in subsection (4)(b).

(7) Nothing prevents an institution from reconsidering its own decision made in terms of this Act relating to any procurement process that the institution has undertaken.

Part 3

Provincial reconsideration procedure

Reconsideration by provincial treasuries

97. (1) A provincial treasury may, upon application by a dissatisfied bidder, reconsider a decision made by an institution in the provincial sphere of government, if the application is in respect of the procedure followed during the award of a bid that used a competitive bid method.

(2) A bidder must have participated in a bid advertised within the jurisdictional area of the relevant provincial treasury.

(3) A bidder must complete the process envisaged in section 96 and obtain a decision envisaged in section 96(4)(b) before making an application under subsection (1).

(4) An application referred to in subsection (1) must be submitted within 10 days from the date the bidder became aware or should reasonably have become aware of the decision envisaged in section 96(4)(b).

(5) Unless the application is dismissed for noncompliance in terms of subsection (4), the relevant provincial treasury must—

- (a) immediately institute an investigation;
- (b) inform the institution that an application has been made in terms of section 97 and instruct the institution not to make an award prior to the provincial

- treasury making a final decision; and
- (c) communicate its decision in writing, within at least 30 days from the date the bidder submitted an application in terms of subsection (1) to the bidder and the institution.
- (6) The decision referred to in subsection (5)(c) must state—
- (a) whether the application is upheld, in whole or in part or dismissed;
- (b) the reasons for the decision; and
- (c) any corrective measures that may be taken.

Part 4

National reconsideration procedure

Reconsideration by Regulator

98. (1) The Regulator may, upon application by a dissatisfied bidder, reconsider a decision made by an institution in the national sphere of government, if the application is in respect of the process followed in the award of a bid through a competitive bid method.

(2) A bidder must follow the process envisaged in section 96 and obtain a decision envisaged in section 96(4)(b) before making an application under subsection (1).

(3) The application referred to in subsection (1) must be submitted within 10 days from the date the bidder became aware or should reasonably have become aware of the decision envisaged in section 96(4)(b).

(4) Unless the application is dismissed for noncompliance in terms of subsection (3), the Regulator must—

- (a) immediately institute an investigation;
- (b) inform the institution that an application has been made in terms of section 98 and instruct the institution not to make an award prior to the Regulator making a final decision; and
- (c) issue a written decision, within at least 30 days from the date the bidder submitted an application, to the bidder and the institution.

- (5) The decision referred to in subsection (4)(c) must state—
- (a) whether the application is upheld, in whole or in part or dismissed;
- (b) the reasons for the decision; and
- (c) any corrective measures that may be taken.

Part 5

Review

Establishment of Tribunal

99. (1) The Public Procurement Tribunal is hereby established to review, administrative actions taken by—

- (a) a provincial treasury in terms of section 97; or
- (b) the Regulator in terms section 98.

- (2) The Tribunal—
- (a) is independent;

- (b) must be impartial and exercise its powers without fear, favour or prejudice;
- (c) is a tribunal of record; and
- (d) must perform its function in accordance with this Act and other relevant laws.

Review process

100. (1) If a bidder is not satisfied by a decision made by a provincial treasury in terms of section 97 or the Regulator in terms section 98, that bidder may, within 10 days of it becoming aware of the provincial treasury or the Regulator's decision, submit an application for review to the Tribunal.

(2) Despite the period stated in subsection (1), a bidder may request the Tribunal to consider an application for review filed after the expiry of the period mentioned in subsection (1), but not later than 20 days after the entry into force of the procurement contract or a decision to cancel the procurement, on the ground that the application raises significant public interest considerations.

(3) The Tribunal may consider the request in terms of subsection (2) if the Tribunal is satisfied that such a review will be in the public interest.

(4) The Tribunal must communicate its decision in terms of subsection (2) and the reasons for the decision to the bidder within 10 days from the date of receipt of the request envisaged in subsection (2).

(5) A review in terms of this Part constitutes an internal remedy as envisaged in section 7(2) of the Promotion of Administrative Justice Act.

Composition of Tribunal

101. (1) The Tribunal consists of as many members as appointed by the Minister.

- (2) The members of the Tribunal must include at least—
- (a) two persons who are retired judges, or are persons with suitable expertise and experience in law; and
 - (b) two other persons with experience or expert knowledge of procurement processes.

Qualification of members

102. (1) A person may not be appointed or hold office as, a member of the Tribunal if that person—

- (a) does not possess the necessary skills, expertise and knowledge; and
- (b) is not a citizen or permanent resident of the Republic.

(2) The Minister must appoint a member of the Tribunal referred to in section 101(2)(a) as the Chairperson, and another member as Deputy Chairperson.

Functions of Chairperson and Deputy Chairperson

- 103.** (1) The Chairperson—
- (a) must preside at meetings of the Tribunal; and
 - (b) is responsible for managing the work of the Tribunal.

(2) The Deputy Chairperson performs the functions of the Chairperson on delegation by the Chairperson, or in the absence of the Chairperson, or if for any reason the office of the Chairperson is vacant.

Disclosure of interest by members

104. (1) Subject to subsection (2), a member may not participate in the proceedings at any meeting of the Tribunal, if in relation to any matter before the Tribunal—

- (a) he or she or a close relative or close associate is a director, member or partner of, or has controlling interest or any financial interest in the business of the bidder or any person who made representations in relation to the application by the bidder; or
- (b) he or she has any interest which precludes him or her from performing his or her functions as a member in a fair, unbiased and proper manner.

(2) (a) If at any stage during the proceedings before the Tribunal it appears that a member has or may have any interest envisaged in subsection (1), that member must forthwith fully disclose the nature of his or her interest and leave the proceedings so as to enable the remaining members to discuss the matter and determine whether that member is precluded from participating in the proceedings by reason of a conflict of interest.

(b) The disclosure envisaged in paragraph (a) and the decision taken by the remaining members regarding such determination must be recorded in the minutes of the proceedings.

(c) If any member fails to disclose any interest envisaged in subsection (1) or if, having such interest, he or she attends or in any manner whatsoever contributes to the proceedings of the Tribunal, such contribution must be regarded as not having been made, but the decision of the Tribunal is not invalid.

Term of office, re-appointment, termination of membership and conditions of service

105. (1) A member holds office for a period of three years, or such shorter period as the Minister may determine, from the date of his or her appointment.

(2) A member may be re-appointed at the expiry of a term for a further term not exceeding three years.

(3) A member may resign by giving at least three-months written notice to the Minister, or a shorter period as approved by the Minister.

(4) The Minister may terminate the appointment of a member if—

- (a) the member is unable to perform the functions of office due to ill health or other reasons accepted by the Minister; or
- (b) an independent inquiry by the Minister has found that the member—
 - (i) has failed in a material way to discharge his or her responsibilities; or
 - (ii) has acted in a way that is inconsistent with continuing to hold such office.

(5) Subject to the Promotion of Administrative Justice Act, if an independent inquiry has been undertaken in terms of subsection (4)(b) in relation to a

member, the Minister may suspend the member from office pending a decision.

(6) The Minister must determine the remuneration and other terms and conditions of service for members.

Finances of Tribunal

106. The Tribunal is financed from—

- (a) money that is appropriated by Parliament;
- (b) fees payable to the Tribunal in terms of this Act; and
- (c) money received from any other source.

Resources of Tribunal

107. The Chairperson may—

- (a) for the work of the Tribunal—
 - (i) appoint persons as employees;
 - (ii) second persons in accordance with applicable law; or
 - (iii) engage persons on contract otherwise than as employees;
- (b) enter into contracts;
- (c) acquire and dispose of assets; and
- (d) do anything else necessary for the performance of the Tribunal's functions.

Conduct of persons involved in work of Tribunal

108. A person referred to in section 107(a) may not use his or her position or any information by virtue his or her work for the Tribunal to—

- (a) improperly benefit himself or herself or another person;
- (b) impede the Tribunal's ability to perform its functions.

Panels of Tribunal

109. (1) The Chairperson must constitute a panel for each application envisaged in section 100.

(2) Any reference in this Act to the Tribunal must be construed as including a reference, where appropriate in the case of an application envisaged in section 100, to a panel to whom a review is or was assigned.

(3) The panel is the decision-making body for that particular application, and the panel may exercise any of the powers or functions of the Tribunal when hearing such application.

(4) A panel consists of—

- (a) a person to preside over the panel, who must be a member of the Tribunal; and
- (b) two or more persons who are members of the Tribunal.

(5) If, for any reason, a panel member is unable to complete a hearing of an application, the Chairperson may—

- (a) replace that member;
- (b) direct that the proceedings continue before the remaining panel members; or
- (c) constitute a new panel and direct the new panel to either continue the

proceedings, or start proceedings afresh.

Tribunal rules

110. (1) The Chairperson may make rules, not inconsistent with this Act, in respect of the procedure to be followed in connection with hearings that form part of an application envisaged in section 100, and the conduct of those hearings, and may at any time amend or revoke such rules.

(2) The Tribunal must give notice in the *Gazette* where the Tribunal rules, and amendments and revocations of Tribunal rules, will be available.

Review proceedings

111. (1) In review proceedings—

- (a) the Chair of the panel must determine the procedure for hearings, subject to this Act and Tribunal Rules;
- (b) the Panel must strive to ensure that hearings are conducted with as little formality and technicality, and as expeditiously, as the requirements of this Act and a proper consideration of the matter permit; and
- (c) any party may be represented by a legal representative at the hearing.

(2) The Chair of a panel may give directions to facilitate the conduct of proceedings subject to subsection (1) and any applicable Tribunal Rules.

(3) A panel must conduct a hearing in public, but the Chair of the panel may direct that a person be excluded from a hearing on any ground on which it would be proper to exclude a person from civil proceedings before the High Court.

(4) In review proceedings, the panel is not bound by the rules of evidence, but may, subject to this section, inform itself on any relevant matter in any appropriate way.

(5) A Chair of a panel—

- (a) may, on good cause shown, by order, direct a specified person to appear before the panel at a time and place specified in the order to give evidence, to be questioned or to produce any document; and
- (b) must administer an oath to, or accept an affirmation from, any person called to give evidence.

(6) A person giving evidence or information, or producing documents, has the protections and liabilities of a witness giving evidence in proceedings before the High Court.

Tribunal orders

112. (1) In review proceedings, the panel may, by order—

- (a) confirm a decision made in terms of section 97 or 98;
- (b) set aside a decision made under section 97 or 98 and refer the matter back to the relevant provincial treasury or the Regulator, as the case may be, for further consideration;
- (c) order an institution not to make an award or cancel an award made for the procurement under review;
- (d) order the procurement proceedings be terminated;

- (e) take such alternative action as is appropriate in the circumstances;
- (f) require the payment of compensation for any reasonable costs incurred by the bidder submitting an application as a result of an act or decision of, or procedure followed by, the institution in the procurement proceedings that is not in compliance with the provisions of this Act, and for any loss or damages suffered, which must be limited to the costs relating to the application; or
- (g) dismiss the application.

(2) If a panel is divided in opinion as to an order to be made, the opinion of the majority of the panel members prevails, but if they are equally divided in opinion, the opinion of the Chair of the panel prevails.

(3) The Tribunal may, in exceptional circumstances, make an order that a party to proceedings on an application for review of a decision pay some or all of the costs reasonably and properly incurred by the other party in connection with the proceedings.

(4) The Tribunal may, by order, summarily dismiss an application for review of a decision if the application is frivolous, vexatious or trivial.

(5) The decision of a panel in terms of subsection (1) is regarded as a decision of the Tribunal.

Judicial review and enforcement of Tribunal orders

113. (1) Any party who is dissatisfied with an order of the Tribunal may institute proceedings for judicial review in terms of the Promotion of Administrative Justice Act or any applicable law.

(2) A party to proceedings may file with the registrar of a competent court a certified copy of an order made in terms of section 112(1) if—

- (a) no proceedings in relation to the making of the order have been commenced in a court by the end of the period for commencing such proceedings; or
- (b) if such proceedings have been commenced, the proceedings have been finally disposed of.

(3) The order, on being filed, has the effect of a civil judgment, and may be enforced as if lawfully given in that court.

CHAPTER 10 GENERAL PROVISIONS

Delegation

- 114.** (1) (a) The Minister may—
- (i) delegate to the Director-General: National Treasury any power conferred on the Minister by this Act, except the power to make regulations; or
 - (ii) authorise that Director-General to perform any duty imposed on the Minister by this Act.
- (b) The Director-General: National Treasury may—
- (i) delegate to any official of the National Treasury any power delegated to him or her in terms of paragraph (a); or
 - (ii) authorise that official to perform any duty he or she is authorised to perform in terms of paragraph (a).
- (2) The accounting officer or accounting authority of an institution may—
- (a) delegate to any official of the institution any power conferred on that accounting officer by this Act; or
 - (b) authorise that official to perform any duty imposed on that accounting officer or accounting authority by this Act.
- (3) The Regulator may—
- (a) delegate to a provincial treasury any power conferred on the Regulator by this Act; or
 - (b) authorise to a provincial treasury any duty imposed on the Regulator by this Act.
- (4) Any person to whom a power has been delegated or who has been authorised to perform a duty under this section must exercise that power or perform that duty subject to the conditions the person who made the delegation or granted the authorisation considers appropriate.
- (5) Any delegation of a power or authorisation to perform a duty in terms of this section—
- (a) must be in writing;
 - (b) does not prevent the person who made the delegation or granted the authorisation from exercising that power or performing that duty himself or herself; and
 - (c) may at any time be withdrawn in writing by that person.

Limitation of liability

115. A person who exercises a power or performs a function or duty in terms of this Act is not liable for, or in respect of, any loss or damage suffered or incurred by any person arising from a decision taken or action performed in good faith in the exercise of a function, power or duty in terms of this Act.

Documents to be made available

- 116.** (1) The Regulator must ensure that copies of—

- (a) this Act and any regulations made thereunder; and
 - (b) all instructions, guidelines and codes of conduct that are issued in terms of this Act and have general application,
- are kept available for public inspection at the offices of the Regulator and its website.

(2) The copies referred to in subsection (1) must be published in such form as the Regulator considers will make them readily accessible to institutions and potential bidders.

Database of prospective suppliers

117. If the Regulator creates a database in terms of section 5(1)(j) for specified goods or services, institutions may only procure goods or services through written price quotations from prospective suppliers listed in that database.

Offences

118. (1) A person who—

- (a) knowingly gives false or misleading information or evidence under this Act;
- (b) interferes with or exerts undue influence on any official of an institution or member of the Tribunal in the performance of his or her functions or in the exercise of his or her power under this Act;
- (c) opens any sealed bid, including such bids as may be submitted through an electronic system and any document required to be sealed, or divulges their contents prior to the appointed time for the public opening of the bid documents;
- (d) connives or colludes to commit a fraudulent, corrupt, collusive or obstructive act; or
- (e) causes loss of public assets or funds as a result of negligence in the implementation of this Act,

commits an offence and is liable on conviction to a fine or to imprisonment for a term not exceeding 10 years or to both, and in addition to the penalty imposed in this section, the court may order that the amount of loss incurred by the complainant be compensated, failure of which the court may issue an order of confiscation of personal property of the person convicted in order to recover the loss.

(2) A person who—

- (a) without reasonable excuse fails or refuses to give information, produce any document, records or reports required in terms of this Act;
- (b) delays, without justifiable cause, the evaluation of a bid or the awarding of a contract,

commits an offence and is liable on conviction to a fine or to imprisonment for a term not exceeding three years or both.

(3) If a person's conduct in terms of this Act constitutes an offence under the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), the offence must be dealt with in terms of that Act.

Exemption

119. (1) The Minister may, with or without conditions, exempt an

institution from any provision of this Act when undertaking national defence or national security-related procurement to the extent that such procurement is determined to be of a sensitive nature, in accordance with the schedule of items eligible for such special treatment as may be prescribed.

(2) An exemption referred to in subsection (1)—

- (a) may apply to any institution to which this Act applies or a category of institutions;
- (b) must be published in the *Gazette* or on the website of the National Treasury.

Deviation

120. (1) The Regulator may authorise a deviation from the application of a procurement method or instruction envisaged in this Act if—

- (a) exceptional circumstances make it impossible, impractical or uneconomical to comply with this Act;
- (b) market conditions or behaviour do not allow effective application of the method or instruction;
- (c) required by an international agreement binding on the Republic in terms of section 231 of the Constitution; or
- (d) national security is likely to be compromised.

(2) The procedure for applying for and authorising deviations must be as prescribed.

Regulations

121. (1) The Minister may make regulations regarding—

- (a) any matter required or permitted by this Act to be prescribed;
- (b) procurement thresholds;
- (c) the threshold for the variation of price in a procurement contract;
- (d) the setting of market related price ceilings for goods and services;
- (e) codes of conduct for officials, members of the Tribunal, bidders and suppliers,
- (f) the requirements for security vetting of officials employed by the Regulator, a provincial treasury and officials employed in a supply chain management unit of an institution;
- (g) the use of information and communications technology in procurement;
- (h) procedures for procurement under the public-private partnership;
- (i) pre-qualification of bidders, circumstances and procedures for pre-qualification processes;
- (j) procedures and processes for procurement of common use items under transversal term contracts;
- (k) procedures for bid submission, opening, evaluation, adjudication and awarding of bids and cancellation of procurement processes;
- (l) procedures to conduct evaluation and adjudication in public for certain types of procurement or procurement above a threshold;
- (m) procedures for lodging procurement complaints and reviews;
- (n) fees for services rendered by the Tribunal;
- (o) procedures for advertisements and publication of bid notices by institutions;
- (p) percentages for contract variations or amendments;

- (q) retention and the reporting of procurement data;
- (r) procedures for infrastructure procurement;
- (s) procedures for projects or services funded by grants in accordance with technical assistance agreements;
- (t) competency requirements of officials involved in procurement;
- (u) emergency procurement, which may include—
 - (i) the different types of emergency procurement that may be used and the circumstances under which the different types may be used;
 - (ii) an outline of the planning efforts of the institution to limit the need for emergency procurement and to improve responsiveness during an emergency;
 - (iii) the pre-requisites for awarding and administering contracts during emergencies;
 - (iv) options available to the institution during an emergency and the preferred methods of procurement; and
 - (v) procedures to be followed in respect of emergency procurement processes, including the recording of deliberations and the making of recommendations and awards; and
- (v) any procedural or administrative matters that are necessary to implement the provisions of this Act.

(2) The Minister may not make a regulation unless the Minister—

- (a) has published—
 - (i) a draft of the regulation;
 - (ii) a statement explaining the need for and the intended operation of the regulation;
 - (iii) a statement of the expected impact of the regulation;
 - (iv) a notice inviting submissions in relation to the regulation and stating where, how and by when submissions are to be made; and
- (b) has, once submissions referred to in paragraph (a)(iv) have been received and considered, submit to Parliament, while it is in session,—
 - (i) the documents mentioned in paragraph (a)(i) to (iv); and
 - (ii) a report of the consultation process, which report must include—
 - (aa) a general account of the issues raised in the submissions; and
 - (bb) a response to the issues raised in the submissions.

(3) (a) The period allowed for making submissions referred to in subsection (2)(a) must be at least four weeks.

(b) The period allowed for Parliamentary scrutiny referred to in subsection (4)(b) must be at least 30 days while Parliament is in session.

(4) If the Minister intends, whether or not as a result of a consultation process, to make a regulation in a materially different form from the draft regulation published in terms of subsection (2), the Minister must, before making the regulation, repeat the process referred to in subsection (2).

(5) If complying with subsection (2) or (4), in the opinion of the Minister, is likely to lead to prejudice to a procurement process or defeat the object of the proposed regulation, the Minister must, before making the regulation—

- (a) publish—
 - (i) a draft of the regulation and a statement explaining the need for and the intended operation of the regulation;

- (ii) a notice inviting submissions in relation to the regulation and stating where, how and by when submissions are to be made; and
 - (iii) a statement of the reasons why the delay involved in complying with subsections (2) and (4) is considered likely to lead to prejudice to the procurement process, or defeat the object of the proposed regulation; and
- (b) submit to Parliament the documents mentioned in paragraph (a).
- (6) (a) The period allowed for making submissions referred to in subsection (5)(a)(ii) must be at least seven days.
- (b) The period allowed for submission to Parliament referred to in subsection (5)(b) must be at least seven days, whether Parliament is in session or not.
- (c) The period referred to in paragraph (b) may run concurrently with the period referred to in paragraph (a).
- (7) The Minister must, after making a regulation pursuant to subsections (5) and (6), within 30 days of making the regulation, submit to Parliament a report of the consultation process referred to in subsections (11) to (12).
- (8) This section does not prevent the Minister from engaging in consultations in addition to those required in terms of this section.
- (9) In deciding whether to make a regulation, the Minister must take into account all submissions received by the expiry of the period referred to in subsection (3)(a) or (8)(a) and any deliberations of Parliament.
- (10) A regulation comes into effect—
- (a) on the date that it is published; or
 - (b) if the regulation provides that it comes into effect on a later date, on the later date.
- (11) (a) With each regulation, the Minister 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.
- (12) If the Minister did not comply with subsection (2) or (4) for the reason stated in subsection (5), the consultation report must be published 30 days after the instrument was made and the report must include a statement of the reasons why the delay involved in complying, or complying fully, with subsection (2) or (4) was considered likely to lead to prejudice to the procurement process, or defeat the object of the regulation.
- (13) The Minister may approve a deviation from a regulation in terms of this section if—
- (a) exceptional circumstances make it impossible, impractical or uneconomical to comply with this Act;
 - (b) market conditions or behaviour do not allow effective application of the method or instruction;
 - (c) required by an international agreement binding on the Republic in terms of section 231 of the Constitution; or
 - (d) national security is likely to be compromised.
- (14) The Minister may make different regulations for—

- (a) different categories of institutions;
- (b) different categories of goods, services or infrastructure.

Transitional measures

122. (1) A procurement contract existing at the commencement of this Act must be dealt with in terms of the law applicable at the time of the award, as if this Act has not been enacted.

(2) A bid that has been advertised before the date of commencement of this Act must be dealt with in terms of the law applicable at the time of the advertisement as if this Act has not been enacted.

Repeal of laws and saving

123. (1) Subject to subsection (2), the laws mentioned in the Schedule are hereby amended or repealed as set out in that Schedule.

(2) Anything done under any law repealed by subsection (1) and which could be done under a provision of this Act must be regarded as having been done under that provision.

Short title and commencement

124. (1) This Act is called the Public Procurement Act, 2020, and comes into effect on a date determined by the Minister by notice in the *Gazette*.

(2) Different dates may be determined by the Minister in respect of the coming into effect of—

- (a) different provisions of this Act;
- (b) different provisions of this Act in respect of different categories of institutions;
and
- (c) the repeal or amendment of different provisions of a law repealed or amended by this Act.

SCHEDULE
AMENDMENTS AND REPEALS
(Section 123)

Act No. and year	Short title	Extent of repeal or amendment
Act No. 86 of 1968	State Tender Board Act, 1968	1. The repeal of the whole
No. 89 of 1970	National Supplies Procurement Act, 1970	2. The repeal of the whole
Act No. 107 of 1997	Housing Act, 1997	3. The amendment of section 3 by the substitution in subsection (1) for paragraph (cA) of the following paragraph: "(cA) [determine a procurement policy, by no later than April 2002, which is consistent with section 217 of the Constitution in relation to housing development] <u>subject to the Public Procurement Act, 2020, review the existing procurement policy on housing development and determine another one by no later than 31 December 2021;</u> "
Act No. 36 of 1998	National Water Act, 1998	4. The amendment of section 26 by the substitution in subsection (1) for paragraph (n) of the following paragraph: "(n) <u>subject to the Public Procurement Act, 2020, prescribing procedures for the allocation of water by means of a competitive bid [public tender] or auction;</u> " 5. The amendment of section 45 by the substitution in subsection (2) for paragraph (f) of the following paragraph: "(f) allocated to every other applicant by <u>means of a competitive bid [public tender] or auction;</u> "
Act No. 88 of 1998	State Information Technology Agency Act, 1998	6. The amendment of section 7- (a) by the substitution in subsection (4)(a) for subparagraph (ii) of the following paragraph: "(ii) procure that service <u>in accordance with the Public Procurement Act, 2020, [through the Agency in terms of subsection (3)]</u> if the Agency indicates in writing that it is unable to provide the service itself;" (b) by the substitution in subsection (4)(b) for subparagraph (ii) of the following paragraph:

Act No. and year	Short title	Extent of repeal or amendment
		<p>"(ii) procure that <u>in accordance with the Public Procurement Act, 2020 [service through the Agency in terms of subsection (3)]</u>;"</p> <p>(c) by the substitution for the word "and" of the word "or" at end of paragraph (a) of subsection (5); and</p> <p>(d) by the substitution in subsection (5) for paragraph (b) of the following paragraph:</p> <p>"(b) procure any information technology goods or services <u>in accordance with the Public Procurement Act, 2020 [through the Agency]</u>;"</p> <p>7. The amendment of section 23 by the substitution in subsection (1) for paragraph (a) of the following: "must, <u>subject to the Public Procurement Act, 2020</u>, make regulations regarding the manner in which procurement in terms of section 7(3) to (7) must take place, <u>with the concurrence [subject to the approval]</u> of the Minister of Finance; and"</p>
Act No. 111 of 1998	Correctional Services Act, 1998	<p>8. The amendment of section 103 by the substitution for subsection (1) of the following subsection: "(1) The Minister may, [subject to any law governing the award of contracts by the State] <u>subject to the Public Procurement Act, 2020</u>, with the concurrence of the Minister of Finance and the Minister of Public Works, enter into a contract with any party to design, construct, finance and operate any correctional centre or part of a correctional centre established or to be established in terms of section 5."</p>
Act No. 1 of 1999	Public Finance Management Act, 1999	<p>9. The amendment of section 38 by the deletion in subsection (1)(a) of subparagraph (iii).</p> <p>10. The amendment of section 51 by the deletion in subsection (1)(a) of subparagraph (iii).</p> <p>11. The amendment of section 76- (a) by the substitution in subsection (1) for paragraph (k) of the following paragraph: "(k) the alienation[,] <u>or letting [or other disposal]</u> of state assets;" and (b) by the deletion in subsection (4) of paragraph (c).</p>
Act No. 20 of 1999	Road Traffic Management Corporation Act,	<p>12. The substitution for section 43 of the following section: "Procurement"</p>

Act No. and year	Short title	Extent of repeal or amendment
	1999	43. Any procurement under this Act must be undertaken in [terms of the prescribed procedures] <u>accordance with the Public Procurement Act, 2020.</u> "
Act No. 5 of 2000	Preferential Procurement Policy Framework Act, 2000	13. The repeal of the whole.
Act No. 32 of 2000	Local Government: Municipal Systems Act, 2000	14. The amendment of section 83 by the deletion in subsection (1) of paragraph (a).
Act No. 51 of 2003	Armaments Corporation of South Africa, Limited Act, 2003	15. The amendment of section 2 by the substitution in subsection (4) for the words preceding paragraph (a) of the following words: "(4) Subject to [this Act] <u>the Public Procurement Act, 2020</u> , the Corporation may—".
Act No. 53 of 2003	Broad-Based Black Economic Empowerment Act, 2003	16. The amendment of section 9- (a) by the substitution in subsection (1) for paragraph (b) of the following paragraph: "(b) qualification criteria for [preferential purposes for procurement and other] economic activities;" ; and (b) by the substitution of subsection (5) for the following subsection: "(6) If requested to do so, the Minister may by notice in the <i>Gazette</i> permit organs of state or public entities to specify qualification criteria for [procurement and other] economic activities which exceed those set by the Minister in terms of subsection (1)." 17. The amendment of section 10 by the substitution in subsection (1) for paragraph (b) of the following paragraph: "(b) developing and implementing a preferential procurement policy, subject to the <u>Public Procurement Act, 2020</u> ;" 18. The amendment of section 13P by the substitution for subsection (1) of the following subsection: "(1) Any person convicted of an offence in terms of this Act may not, for a period of 10 years from the date of conviction, contract or transact any

Act No. and year	Short title	Extent of repeal or amendment
		business with any organ of state or public institution and must for that purpose be entered into the register of [tender] bid defaulters [which the National Treasury may maintain] <u>established and maintained by the Regulator in terms of section 6(3)(j) of the Public Procurement Act</u> , for that purpose."
Act No. 56 of 2003	Local Government: Municipal Finance Management Act, 2003	19. The repeal of Chapter 11
Act No.4 of 2006	Electricity Regulations Act, 2006	20. The amendment of section 34 by the substitution in section (1)(e) for subparagraph (i) of the following subparagraph: "(e) <u>subject to the Public Procurement Act, 2020</u> , be established through a [tendering] bid procedure which is fair, equitable, transparent, competitive and cost-effective;"

MEMORANDUM ON OBJECTS OF PUBLIC PROCUREMENT BILL, 2020

1. PURPOSE OF BILL

The primary aim of the Bill is to regulate public procurement and to prescribe the framework for the procurement policy as envisaged in section 217 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

2. BACKGROUND

- 2.1 Section 217 of the Constitution stipulates that, procurement by organs of state and identified institutions, must occur in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- 2.2 The Constitution allows for organs of state to implement a procurement policy providing for categories of preference in the allocation of contracts and the protection or advancement of persons disadvantaged by unfair discrimination within a framework prescribed by national legislation. The Constitution requires national legislation to prescribe a framework within which the procurement policy must be implemented. The Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000), was enacted for this purpose.
- 2.3 The public procurement regime in South Africa is currently fragmented as there are a number of laws which regulate procurement across the public administration. This fragmentation results in confusion as different procurement rules apply. Some of these laws pre-date the constitutional order brought about in 1994.
- 2.4 It is important and necessary, taking into account the history of South Africa and the developments since the coming into operation of the Constitution, to have legislation which creates a single framework regulating procurement, in line with all applicable stipulations of the Constitution and which contributes to address the economic and social challenges of South Africa.

3. OVERVIEW OF BILL

The Bill aims to create a single regulatory framework for public procurement and eliminate fragmentation in laws which deal with procurement in the public sector by, among others—

- (a) determining general procurement requirements;
- (b) providing for an enabling framework for preferential procurement;
- (c) establishing a Public Procurement Regulator within the National Treasury and defining its functions;
- (d) defining the functions of provincial treasuries;
- (e) defining the functions of institutions;
- (f) providing for measures to ensure the integrity of the procurement process;
- (g) providing for the power to prescribe different methods of procurement and bidding process;
- (h) setting out a framework for supply chain management;
- (i) providing for infrastructure delivery management;
- (j) providing for a framework on the disposal of assets;

- (k) providing for dispute resolution mechanisms; and
- (l) providing for the repeal and amendment of certain laws.

4. CHAPTER BY CHAPTER BREAKDOWN OF BILL

4.1 Chapter 1- Interpretation, objects, application and administration of Act (clauses 1-3)

- 4.1.1 Clause 1 contains various definitions aimed at facilitating the interpretation of the Bill.
- 4.1.2 Clause 2 provides for the objects of the Bill which are to-
 - (a) ensure that the State utilises and leverages procurement to promote and support its policy objectives;
 - (b) provide for procurement which is developmental in nature and ensures value for money in the use of public funds, aspiring to expand the productive base of the economy, supporting innovation and investment and achieve economy, efficiency and maximum competition;
 - (c) develop economic capacity in the Republic, through the provision of opportunities for local suppliers to perform work for organs of state; and
 - (d) incorporate in the procurement system-
 - (i) categories of preference in the allocation of contracts; and
 - (ii) the protection and advancement of persons and categories of persons disadvantaged by unfair discrimination.
- 4.1.3 Clause 3 also sets out the application of the Bill and provide for provisions to deal with conflict between the Bill and other legislation, including conflict between a provision of the Bill and procurement rule of a donor or a funding agency.

4.2 Chapter 2- Public Procurement Regulator, provincial treasuries and institutions (clauses 4-15)

- 4.2.1 The Bill establishes a Public Procurement Regulator within the National Treasury and provides for the functions of the Regulator, which include, amongst other things-
 - (a) ensuring that institutions comply with the Bill and engage in the prudent spending of public funds on procurement;
 - (b) reconsidering decisions of institutions;
 - (c) continuously revising and providing guidance on procurement and the procurement system;
 - (d) promoting and ensuring the integrity of the procurement system; and
 - (e) establishing and maintaining register for debarred bidders and suppliers.
- 4.2.2 This Bill also provides for the functions of provincial treasuries and institutions.
- 4.2.3 The Bill provides a power for the Regulator to issue a directive to declare certain procurement practices as undesirable, and further provides for framework for the Regulator to deal with information in it.

- 4.2.4 The Bill sets out the general procurement requirements which institutions must strive to achieve and take into account when undertaking procurement.
- 4.2.5 The Bill provides protection for employees who refuse to take instructions inconsistent with the Bill and also allows institutions to use technology to implement any of the procurement methods.

4.3 Chapter 3- Procurement integrity (clauses 16-25)

- 4.3.1 Chapter 3 provides for measures to protect the integrity of the procurement process. Officials, bidders, suppliers, members of the Tribunal and any other person involved in a procurement process are required to comply with the applicable codes of conduct prescribed by the Minister. Provision is also made for vetting of bidders and suppliers where considered necessary by the institution.
- 4.3.2 This chapter provides for the issuing of a debarment order to bidders or suppliers by an institution under specified circumstances. A debarment order prohibits the bidder or supplier, for the period specified in the order, from participating in procurement generally or in circumstances specified in the order. The Regulator is required to publish the names of debarred bidders or suppliers and make such names available to institutions upon request.
- 4.3.3 The Bill prohibits any person from unduly influencing a procurement process.

4.4 Chapter 4- Preferential procurement (clause 26)

- 4.4.1 Chapter 4 regulates preferential procurement and enables the Minister to prescribe a framework for preferential treatment for categories of preferences, and the protection or advancement of persons, or categories of persons, previously disadvantaged by unfair discrimination, in procurement. The Chapter makes specific reference to women, youth and people with disabilities.
- 4.4.2 According to this chapter the framework prescribed by the Minister must take into account the provisions of the Broad-Based Black Economic Empowerment Act and include, among others-
 - (a) a preference point system;
 - (b) measures to advance a category or categories of persons or business or a sector;
 - (c) measures for preference to set aside the allocation of contracts;
 - (c) measures regarding the participation of a manufacturer of goods in a bid to supply the goods it manufactures; and
 - (d) measures aimed at advancing industrial development
 - (e) measures aimed at advancing small medium and micro enterprise in high value procurement.

4.5 Chapter 5- Procurement methods and bidding process (clauses 27-51)

- 4.5.1 Chapter 5 provides for the procurement principles which institutions must comply with as well as a power for the Minister to prescribe procurement methods, the correlating requirement and procedures applicable to each

method to be prescribed. Procurement from an organ of state is also provided for in the Bill.

- 4.5.2 This chapter also regulates the bidding process, including-
- (a) the use of standard bid document;
 - (b) the power for an institution to stipulate qualification criteria for bidders;
 - (c) allowing an institution to, if applicable, require security from bidders;
 - (d) examination and evaluation of bids;
 - (e) rejection of bid or proposal;
 - (f) cancellation of procurement;
 - (g) re-advertising of bid;
 - (h) verification of bidders or suppliers;
 - (i) award of procurement contracts.
- 4.5.3 An institution is required under this chapter to, before awarding any bid, verify with the Regulator whether the preferred bidder or any of its directors, members, trustees or partners, is listed on the register for debarred bidders and suppliers.
- 4.5.4 This chapter also regulates transversal procurement and gives the National Treasury the power to facilitate the arrangement of all transversal term contracts for goods, services or infrastructure that have been designated as being transversal in nature.
- 4.5.5 This chapter also regulates procurement undertaken through a public-private partnership. An institution is required to undertake a feasibility study in order to determine whether a proposed public-private partnership is in the best interest of the institution.

4.6 Chapter 6- Supply chain management (clauses 52-80)

- 4.6.1 This Chapter requires an institution to develop, document, maintain and implement an effective and efficient supply chain management system in accordance with this Bill. The supply chain management system must contain a procurement policy for the institution and it must, among others, be consistent with section 217 of the Constitution.
- 4.6.2 Every institution is required to establish a procurement unit, which is responsible for, among others-
- (a) Implementation of functions allocated to the unit in terms of this Bill and the supply chain management system of the institution;
 - (b) maintenance of the supply chain management system to ensure its effectiveness and efficiency.
- 4.6.3 The chapter also provides for the establishment of a committee system for the institution consisting of at least-
- (a) a bid specification committee;
 - (b) a bid evaluation committee; and
 - (c) a bid adjudication committee.
- 4.6.4 An institution is required to, within its demand management plan, have an annual procurement plan approved by the accounting officer or accounting authority.

4.6.5 An institution is also required to have and maintain efficient and effective acquisition management plan, contract management system, logistics management system and movable asset management system.

4.6.6 The Bill requires an institution to take measures to prevent abuse of supply chain management system.

4.7 Chapter 7- Infrastructure delivery management (clauses 81-89)

4.7.1 This chapter regulates the infrastructure delivery management and procurement by institutions and it provides for the application of the different parts of the chapter to different institutions.

4.7.2 The accounting officer or accounting authority of an institution is required to develop, document, maintain and implement an effective and procurement system for infrastructure procurement and delivery management.

4.8 Chapter 8- Disposal of assets (clauses 90-93)

4.8.1 Chapter 8 regulates the disposal of assets by institutions. This chapter does not apply to the disposal of State land regulated by the State Land Disposal Act, 1961 (Act No. 48 of 1961) or a provincial land administration law.

4.8.2 The chapter empowers the Minister to prescribe methods for the disposal of assets as well empowerment measures for the disposal of any category of assets.

4.8.3 The accounting officer or accounting authority of an institution must ensure that the institution has and maintains an effective and efficient disposal management system that is fair, equitable, transparent, competitive and cost effective. In terms of chapter, before the disposal of any movable asset, the accounting officer or accounting authority of an institution must determine the appropriate methods and options for disposal. This chapter requires an institution to obtain the approval of the National Conventional Arms Control Committee, established by section 2 of the National Conventional Arms Control Act, 2002 (Act No. 41 of 2002), for the disposal or transfer of firearms to any person or entity within or outside the Republic.

4.9 Chapter 9- Dispute resolution (clauses 94-113)

4.9.1 The chapter provides for a right of the bidder to seek a reconsideration of an institution's decision by-

- (a) the institution itself;
- (b) a provincial treasury in the case of a decision made by an institution within its provincial administration; or
- (c) the Regulator in the case of a decision made by an institution in the national sphere of government.

4.9.2 This chapter also provides for a right of review of a decision taken by an institution or a failure of an institution to make a decision.

4.9.3 An institution is prohibited from awarding a contract during the reconsideration or review proceedings.

- 4.9.4 This chapter establishes the Public Procurement Tribunal to review decisions made by a provincial treasury or the Regulator. The chapter also provides for the appointment of members of the Tribunal and other related matters.
- 4.9.5 The Tribunal may make an order-
- (a) confirming a decision of an institution or the Regulator;
 - (b) setting the decision aside and remitting the matter to the relevant provincial treasury or the Regulator, as the case may be, for further consideration;
 - (c) overturning the award of a procurement contract;
 - (d) ordering that the procurement proceedings be terminated;
 - (e) taking such alternative action as is appropriate in the circumstances;
 - (f) requiring the payment of compensation for any reasonable costs incurred by the bidder submitting an application as a result of an act or decision of, or procedure followed by an institution in the procurement proceedings that is not in compliance with the provisions of this Bill, and for any loss or damages suffered, which must be limited to the costs relating to the application; or
 - (g) dismissing the application.
- 4.9.6 The Bill allows any party dissatisfied with an order of the Tribunal to institute for judicial review in terms of Promotion of Just Administrative Justice Act, 2000.

4.10 Chapter 10- General provisions (clauses 114-124)

- 4.10.1 This chapter enables the Minister, the Director-General: National Treasury, the accounting officer or accounting authority of an institution and the Regulator to delegate functions conferred by the Bill.
- 4.10.2 The chapter provides for the criminalisation of the conduct of any person who-
- (a) knowingly gives false or misleading information or evidence under this Bill;
 - (b) interferes with or exerts undue influence on any official of an institution or a member of the Tribunal in the performance of his or her functions or in the exercise of his or her power under this Bill;
 - (c) opens any sealed bid or divulges their contents prematurely;
 - (d) connives or colludes to commit a fraudulent, corrupt, collusive or obstructive act;
 - (e) causes loss of public assets or funds as a result of negligence in the implementation of this Bill;
 - (f) without reasonable excuse fails or refuses to give information, produce any document, records or reports required in terms of this Bill;
 - (g) delays, without justifiable cause, the evaluation or awarding of a contract beyond the prescribed period.
- 4.10.3 The chapter provides for exemption to be granted by the Minister, to an institution from any provision of this Bill when undertaking national defence or national security-related procurement of a sensitive nature.
- 4.10.4 The chapter further provides for deviation to be authorised by the Regulator, from the application of a procurement method or instruction under specified circumstances.

- 4.10.5 The Chapter provides for a power for the Minister to make regulation regarding, among others, procurement thresholds, variation of contracts, codes of conduct for officials, members of the Tribunal, bidders and suppliers, the use of information and communications technology in procurement, different methods of procurement, procedure for lodging procurement complaints and reviews.
- 4.10.6 The chapter provides for the provisions of the Bill to be brought into operation on different dates and also on different dates for different categories of institutions.

5. FINANCIAL IMPLICATIONS FOR STATE

No substantial financial implications for the State are envisaged.

6. CONSULTATION

The development of the draft Bill included consultation with-

- (a) various national and provincial departments, municipalities and public institutions; and
- (b) the Directors-General's Clusters for Governance and Administration, Economic Sector, Employment and Infrastructure Development and Justice, and Crime Prevention and Security.

7. PARLIAMENTARY PROCEDURE

- 7.1 The Office of the Chief State Law Adviser and the National Treasury are of the opinion that this Bill must be dealt with in accordance with the procedure established under section 76 of the Constitution, since it contains provisions to which the procedure set out in section 76(4)(b) of the Constitution applies.
- 7.2 The Office of the Chief State Law Adviser is of the opinion that it is not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains no provision pertaining to customary law or customs of traditional communities.