South African Institute of Race Relations NPC
Submission to the
Standing Committee on Finance
National Assembly,
regarding the
Public Procurement Bill of 2023 [B18-2023]
Johannesburg,
11th September 2023

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1 Introduction

The Standing Committee on Finance in the National Assembly (the Committee) has invited public comment, by 11th September 2023, on the Public Procurement Bill of 2023 [B18-2023] (the Bill).

This submission is made by the South African Institute of Race Relations (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

2 The urgent need to increase opportunities for the disadvantaged

Almost 30 years after the political transition in 1994, it remains vitally important to increase opportunities for the poor and unemployed: the truly disadvantaged in the country. This cannot be done without overcoming key barriers to upward mobility, which include:

- a meagre annual economic growth rate, averaging some 1.3% of gross domestic product (GDP) over the past 15 years, instead of the 5% or more required;
- one of the worst public education systems in the world, despite the massive tax revenues allocated to it;
- stubbornly high unemployment rates on a broad definition (42.1%) among South Africans in general and 60.7% among young people aged 15 to 24[1], made worse by labour laws that encourage violent strikes, deter job creation, and price the unskilled out of work;
- pervasive family breakdown, as a result of which some 70% of black children grow up without the support and guidance of both parents;
- electricity shortages and costs, compounded by general government inefficiency in the management and maintenance of vital economic and social infrastructure;
- a limited and struggling small business sector, unable to thrive in an environment of low growth, poor skills, and suffocating red tape; and
- a mistaken reliance on race-based affirmative action measures, which (like similar policies all around the world) generally benefit a relative elite while bypassing the poor.

Constantly ratcheting up black economic empowerment (BEE) and other 'transformation' policies, as the African National Congress (ANC) government has been doing in recent years, will not help to overcome these problems. On the contrary, the continued erosion of business autonomy and business confidence will raise these barriers still higher. So too will the persistent exclusion of many of the most competitive businesses from the state's procurement of vital goods and services.

3 The negative impact of preferential procurement rules

[1] https://www.statssa.gov.za/publications/P0211/Presentation%20QLFS%20Q2%202023.pdf

BEE preferential procurement in state tenders has often made for enormous wastefulness. This core problem was summed up by journalist Jovial Rantao back in 2007, well before Jacob Zuma came to power and Gupta-linked 'state capture' began.

The government's declared BEE aim, wrote Mr Rantao, was to 'spend billions of rands' on delivering much needed goods and services while simultaneously empowering black business. But what many suppliers did was to 'pocket the millions' they received, buy better houses and 'the biggest and flashiest 4x4 by far' – and then use what little was left over to deliver on their contracts with the state.[2]

Inflated pricing often compounds defective delivery, as finance minister Pravin Gordhan lamented in 2010, when he said that the government was paying more for everything, from pencils to building materials, than a private business would: 'R40 million for a school that should have cost R15m, R26 for a loaf of bread that should have cost R7.'[3]

In 2012 Gwede Mantashe, secretary general of the ANC, voiced a similar concern, saying that BEE companies must 'stop using the state as their cash cow by providing poor quality goods at inflated prices'. He also criticised officials for 'prioritising the enrichment of BEE companies through public contracts at the expense of…quality services at affordable prices'.[4]

Later the same year, Mr Mantashe warned that the state would be ill advised to continue putting preferential procurement before service delivery. Said the ANC secretary general: 'This thing of having a bottle of water that you can get for R7 procured by the government for R27 because you want to create a middle-class person who must have a business is not on. It must stop.'[5]

One of the factors making for persistent BEE price escalation was explained in 2012 by an unnamed BEE contractor, who told *The Star* that BEE businessmen seeking state contracts had little choice but to charge inflated prices to 'recoup the costs of paying mandatory kickbacks' to corrupt officials and 'regularly donating huge sums' to the ANC and its allies.[6]

Said the businessman: 'You pay to be introduced to the political principals, you pay to get a tender, you pay to be paid [for completed work], and you must also "grease the machinery". From time to time, you are called to make donations to the ANC. There are also donations to the youth league, the women's league, and the SACP.' Those who failed to make the necessary payments either in cash or 'in kind' – by giving sub-contracts to the relatives of public servants and politicians – would find themselves excluded from state contracts worth many millions of rands.[7]

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[2] *Business Report* 23 September 2011
[3] *Business Day* 18, *Sunday Times* 20 September 2009
[4] *The Sta*r 22 August 2012
[5] *Business Da*y 22 August 2012
[6] T*he Star* 22 August 2012
[7] *The Star* 22 August 2012

Though few other businessmen have admitted to making payments of this kind, the comment is consistent with the persistent inflated pricing that both Mr Gordhan and Mr Mantashe have lamented. It also seems to provide insight into a wider pattern of corruption estimated to be costing the state between 30% and 50% of an annual procurement budget of around R1 trillion a year.

These figures come from the Treasury itself. In October 2016 Kenneth Brown, then the chief procurement officer at the Treasury, warned that between 30% and 40% of the state's R600bn annual procurement budget was effectively being lost to 'fraud and inflated prices'.[8]

The problem has since grown worse, for in August 2018 the Treasury's acting chief procurement officer, Willie Mathebula, told the Zondo commission of inquiry into state capture that 'the government's procurement system is deliberately not followed in at least 50% of all tenders'. This had a huge impact on service delivery, Mr Mathebula went on, because the government was 'the biggest procurer of goods and services, spending an estimated R800bn a year'. Moreover, once the usual tendering rules had been suspended, often for spurious reasons, 'a contract which started at R4m was soon sitting at R200m'.[9]

The state's current annual procurement bill is considerably larger than R800bn. According to the first part of the Zondo commission's report, published in January 2022, state procurement amounted to R967bn by 2017.[10] It is now almost R1 trillion a year.[11]

The Preferential Procurement Policy Framework Act of 2000 (the PPPFA), which the Bill seeks to repeal and replace, is supposed to limit BEE price inflation to a maximum of 10% (on bigger contracts) or 20% (on smaller ones), as described below. In practice, however, these maximum authorised BEE weightings of 10% or 20% have signally failed to prevent the much higher price escalations highlighted by Messrs Gordhan, Mantashe, Brown, and Mathebula. Even higher price escalations – that will help the few and harm the many – are sure to result once the relatively precise provisions of the PPPFA are replaced by the vague clauses of the Bill.

4 Relevant constitutional provisions

Section 217(1) requires that organs of state, in contracting for goods and services, must do so 'in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'.[12]

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[8] businesstech.co.za, 6 October 2016
[9] News24.com, 21 August 2018
[10] Judicial Commission of Inquiry into State Capture, Part 1, para 327 (Zondo Report)
https://www.bowmanslaw.com/insights/government-contracting-and-public-sector-procurement/south-africa-public-procurement-cast-into-uncertainty-by-constitutional-court-judgment/
[11] https://www.bowmanslaw.com/insights/government-contracting-and-public-sector-procurement/south-africa-public-procurement-cast-into-uncertainty-by-constitutional-court-judgment/
[12] Section 217(1), Constitution of the Republic of South Africa, 1996

Section 217(2) goes on to say that this obligation 'does not prevent the organ of state…from implementing a procurement policy providing for (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons disadvantaged by unfair discrimination'.[13]

Section 217(3) adds that 'national legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented'.[14] The PPPFA is, of course, the legislation that was enacted for this purpose. However, the PPPFA has been criticised – as the Preamble to the Bill makes clear – as 'constraining justified advancement of persons or categories of persons'.[15] The PPPFA is thus to be replaced by the Bill, which is intended to remove such 'constraints'.

5 The present Preferential Procurement Policy Framework Act of 2000

The present Preferential Procurement Policy Framework Act (PPPFA), which is to be repealed and replaced by the Bill, lays down a mandatory 'preference point system', as follows.

Under the PPPFA, 'for contracts with a rand value above a prescribed amount, a maximum of 10 points may be allocated' for BEE status (and other specific goals), 'provided that the lowest acceptable tender scores 90 points for price'.[16] For contracts with a rand value below the prescribed amount, up to 20 points may be allocated for BEE status (and other specific goals), provided the lowest acceptable tender scores 80 points for price.[17]

According to the PPPFA, 'acceptable tenders which are higher in price must score fewer points on a pro rata basis'. Once this scoring exercise has been completed, the contract must be awarded to 'the tenderer who scores the highest points'.[18]

The 'specific goals' to which the Act refers include 'contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender and disability'.[19] (Another specific goal is to implement the programmes of the Reconstruction and Development Programme (RDP) of 1994. In practice, however, this latter aim has fallen away, along with the RDP itself.)

6 Key provisions of the Bill

6.1 Chapter 1: Objects and application of the Bill

6.1.1 Clause 2: Objects of the Bill

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[13] Section 217(2), 1996 Constitution
[14] Section 217(3), 1996 Constitution
[15] Preamble, Bill
[16] Section 2(1)(a), Act
[17] Section 2(1)(b), Act
[18] Section 2(1)(f), Act
[19] Section 1(d)(i), Act

Under Clause 2, the objects of the Bill are two-fold. The first aim is to 'introduce uniform treasury norms and standards for all procuring institutions' in keeping with Section 217(1) and Section 216 of the Constitution.[20] The second aim of the Bill is to 'determine a preferential procurement framework for all procuring institutions, … as envisaged in Sections 217(2) and (3) of the Constitution'.[21]

'The uniform treasury norms and standards' required in terms of the Bill's first aim are to not only 'ensure value for money' but also to combat corruption; advance 'transformation, beneficiation, and industrialisation'; stimulate economic development; improve efficiency; and 'promote a sustainable environment'.[22]

The wording used indicates that the need to 'ensure value for money' is confined to the first aim and so does not extend to the second aim, which is to 'determine a preferential procurement framework' for all procuring institutions. But ensuring value-for-money is essential in all procurement, as the wording of Section 217(1) of the Constitution states and the Zondo commission report on state capture and other corruption has confirmed.[23] In addition, once value-for-money is secured, the other stated aims – from combating corruption to bringing about sound transformation and meeting other important economic objectives (industrialisation, economic development, efficiency, and a sustainable environment) will all flow from this foundation.

6.1.2. Clause 3: Application and administration of the Bill

The Bill is to apply to all 'procuring institutions'. These are defined in Clause 3.1 of the Bill as all national and provincial departments (as defined in Section 1 of the Public Finance Management Act); all 'constitutional institutions' listed in Schedule 1 of that Act; all municipalities and municipal entities; and all 'public entities listed in Schedule 2 or 3' of that Act.[24] (These last 'public entities' include Eskom, Transnet, Denel, and other state-owned enterprises (SOEs), along with various authorities, commissions, councils, and the like.)

Under Clause 3.2 of the Bill, the preferential procurement provisions in Chapter 4 are also to apply to Parliament and provincial legislatures,[25] which further expands the scope for preferential procurement. However, the most effective way to help the disadvantaged get ahead is to ensure that all essential public goods and services are procured on a value-for-money basis which promotes efficiency and allows scarce tax revenues to stretch further.

The Bill applies to 'all procuring institutions' and to 'every person who submits a bid or has been awarded a bid'.[26] In the event of a conflict between the Bill and 'any other legislation',

[20] Clause 2(1), Bill
[21] Clause 2(2), Bill
[22] Clause 2(2), Bill
[23] Commission of Inquiry into Allegations of State Capture, Zondo report, p410
[24] Clause 3 (1), Bill
[25] Clause 3(2), Bill
[26] Clause 3(3), Bill

the Bill is to prevail.[27] The full ramifications of this trumping clause are impossible to foresee, especially as the trumping effect will apply to legislation still to be adopted as well as that already enacted.

6.2. Chapter 2: Public Procurement Office, provincial treasures and procuring institutions

6.2.1 Clause 4: Establishment of Public Procurement Office

This Clause establishes a Public Procurement Office (PPO) within the National Treasury. It requires the Head of the PPO and its officials to 'perform their functions under the Bill impartially, and without fear, favour or prejudice'.[28]

However, for as long as the ANC retains its cadre deployment policy, the individuals appointed to the PPO are likely to be cadres appointed to their posts for their loyalty to the ruling party, rather than their commitment to impartial performance. The Zondo commission has found cadre deployment unconstitutional and illegal – and the ANC needs urgently to jettison the strategy so that impartiality can in future be sustained. There is also a substantial risk, based on experience to date, that the broad preferences envisaged in Chapter 4 will often benefit those with connections to the ruling party. In practice, this too will make difficult for the PPO to maintain impartiality, irrespective of what the Bill might say.

6.2.2 Clause 5: Functions of Public Procurement Office

The PPO must 'promote compliance' with the Bill by all procuring institutions. Among other things, it must 'guide and support' officials in procuring institutions and 'ensure transparency in procurement'. It must also 'issue binding instructions' and 'non-binding guidelines' to procuring institutions. In addition, it must 'determine model procurement policies' for different categories of procurement, 'promote standardisation in procurement', and intervene to 'address any material breaches of the Bill by procuring institutions.[29]

The main problem with this clause stems from the vague wording of the Bill, especially in Chapter 4. The PPO cannot easily 'ensure transparency' or 'promote compliance' in the context of preferential procurement rules that are so uncertain as to be virtually unintelligible, as further described below. There is also a risk that the PPO's 'binding instructions' to all procuring institutions in all spheres will conflict with those provided by provincial treasuries at the provincial level (see below), so adding to the difficulties of interpreting and enforcing the Bill.

6.2.3 Clause 6: Functions of provincial treasuries

In similar vein, provincial treasuries must 'oversee the implementation of the procurement function' within their provinces, while also 'enforcing effective management and transparency' in procurement. They must provide any information required by the PPO and

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[27] Clause 3(4), Bill
[28] Clause 4(1), (2), Bill]
[29] Clause 5(1), (2), Bill]

intervene where necessary to 'address any material breach' of the Bill. Like the PPO at national level, they must 'issue binding provincial instructions' as well as 'non-binding guidelines'. They must also help procurement institutions build their capacity for 'efficient, effective, and transparent procurement management'.[30]

Again, the vague terms of the Bill will undermine the capacity of provincial treasuries to ensure transparency and otherwise uphold these obligations. The potential for conflict between PPO and provincial instructions could also compound uncertainty as to what the law requires.

6.2.4 Clause 7: Decision-making for procurement institutions

Under Clause 7, 'the accounting officer or accounting authority of a procurement institution' is responsible for making procurement decisions under the Bill.[31]

6.2.5 Clause 8: Duties of procuring institution

A procuring institution must 'conduct procurement in accordance with' the Bill. It must also 'develop and implement an effective and efficient procurement system'; clearly state 'the methodology and criteria to be used' in evaluating bids; 'take steps to prevent non-compliance' with the Bill; and 'provide procurement information' as the PPO or a provincial treasury may require.[32]

Again, the vague terms of the Bill, especially in Chapter 4, limit the utility of this provision. They will make it difficult for any procuring institution to maintain 'an effective and efficient procurement system', or prevent 'non-compliance' with rules that are too uncertain to be readily intelligible.

In addition, 'a procuring institution may, as prescribed, reconsider its own [procurement] decision if the decision was based on error of law, error of fact, or fraud'. This seems too limited a list when all procurement should be aimed at achieving the best value-for-money, as required by Section 217(1) of the Constitution. (However, this limitation will not apply where a bidder is not satisfied with a procurement decision and makes an application for reconsideration by the procuring institution under Clause 31(1) of the Bill (see below).[33]

6.3 Chapter Three: Procurement integrity, prohibition of certain practices, and debarment

6.3.1 Clause 9: Codes of conduct

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[30] Clause 6(1) and (2), Bill]

[31] Clause 7, Bill

[32] Clause 8(1), Bill

[33] Clause 8(2), Bill

All those involved in procurement, from an accounting officer to a member of a bid committee or the Tribunal, along with any 'bidder, supplier or other person', must comply with 'the prescribed code of conduct'. Contraventions of this code on the part of the accounting officer and various others 'constitute misconduct'.[34]

The Bill does not specify how this code of conduct is to be drawn up or brought into operation. This is a worrying omission. In addition, that all those involved in procurement must comply not only with this code – but also with the instructions, non-binding guidelines, and/or procurement models to be issued by the PPO, provincial treasuries, and the minister – increases the scope for conflicting rules and resulting uncertainty of law.

6.3.2 Clause 10: Conduct of persons involved in procurement

All those involved in procurement, from an accounting officer to a member of the Tribunal, must 'perform their duties impartially and with the degree of care and diligence that a reasonable person would exercise in similar circumstances'. Moreover, those involved in procurement must not 'use their position…improperly to gain an advantage for themselves' or 'cause prejudice' to others. In addition, they must 'avoid conflicts of interest' and ensure they do 'not interfere with or exert undue influence on any [other] person involved in procurement'.[35]

These requirements for impartial performance are intrinsically important. However, they are unlikely to have much practical value as long as the ANC maintains its cadre deployment strategy and continues to appoint officials based on their loyalty to the ruling party rather than their objectivity or commitment to the law. Proper compliance will also be extremely difficult to ensure under the vague terms of Chapter Four.

6.3.3 Clause 11: Due diligence and declaration of interest regarding persons involved in procurement

A procuring institution must take steps to 'identify automatically excluded persons' (see Clause 13) and their 'immediate family members' or 'related persons'. All bidders, and all those 'applying for registration on a database created by the PPO' must make 'the prescribed declaration of interest'. A failure to submit such a declaration, or the making of a false declaration, renders a bid invalid.[36] In addition, an accounting officer whose relative is seeking 'a direct or indirect personal interest in a procurement matter' must disclose that interest and may not take part in any relevant procurement decision. Any such disclosure of an interest must also be recorded in the minutes of any relevant procurement meeting.[37]

The reports of the Zondo commission into state capture and other corruption have made it clear that conflicts of interest in procurement are very often hidden and obscured. Yet undisclosed conflicts of this kind greatly increase the scope for price-inflation and other

[34] Clause 9(1), (2), Bill; Clause 9(1), (2), Bill
[35] Clause 10(a) to (d), Bill
[36] Clause 11(1), (2), Bill
[37] Clause 11(3), (4) Bill

abuses in public procurement. Against this background, these provisions in the Bill are too limited to succeed in curtailing corruption and similar abuses.

More must be thus done to limit the scope for any such abuse. Necessary steps must start with a recognition of the over-arching importance of value-for-money procurement, which is the best form of redress for past injustices and offers the best way of helping the disadvantaged get ahead. Much clearer rules for preferential procurement are also needed, which should echo the PPPFA while recognising that preferences for the few cannot be allowed to override value-for-money for the great majority. Cadre deployment must also be scrapped and more effective protection for whistleblowers introduced. Also essential is the creation of an independent anti-corruption unit, similar to the Scorpions, which complies with all the criteria for institutional and operational independence laid down by the Constitutional Court in *Glenister II.*[38] This new unit must also be effectively insulated from political interference and unwarranted disestablishment.

6.3.4 Clause 12: Undue influence

Under Clause 12, 'no person may interfere with or influence the procurement process of a procuring institution' or 'tamper with any bid after its submission or award'. (However, this prohibition does not apply 'to an official or any other person performing a duty in terms of legislation'.)[39]

Again, this bland statement is not enough to curb the abuses so common in procurement, especially given the broad and vague terms of Chapter Four.

6.3.5 Clause 13: Automatic exclusion from procurement

Various persons are barred from submitting a bid, including 'a public office bearer', the leader of a registered political party, an employee of a constitutional institution, and an employee of a (relevant) public entity or of a municipality or municipal entity. 'A bidder or supplier debarred' under Clause 16 (see below) is also excluded, and so too are the relatives of those excluded under Clause 13.[40]

This is an arbitrary and incomplete list, for it does not include, for example, other senior office bearers of a party in government (such as a secretary general or treasurer), who may in practice have great influence over procurement decisions. Again, more comprehensive safeguards are needed than the Bill provides.

6.3.6 Clause 15: Prohibition of certain practices

Under Clause 15, the PPO 'may' declare 'a particular procurement practice to be prohibited for all, or a category of, procuring institutions'. In deciding whether to prohibit a procurement practice, the PPO must take account of various principles. These include 'whether the

[38] *Glenister* v *President of the Republic of South Africa and others* [2011] ZACC 6
[39] Clause 12(1), (2), Bill
[40] Clause (1)-(3), Bill

practice concerned is not likely to promote fairness, equity, transparency, competitiveness, or cost-effectiveness', and whether the practice, if allowed, 'is likely to defeat the objects' of the Bill.[41]

This wording suggests that the PPO has a discretion as to whether or not to prohibit procurement practices that are in conflict with Section 217(1) of the Constitution. Yet 217(1) is binding on all procuring institutions, while its requirements that state procurement must always be fair, equitable, transparent, competitive, and cost-effective must always be fulfilled. This clause should be revised accordingly, while other safeguards against inflated prices and other abuses are needed too.

6.3.7 Clause 16: Debarment

Under Clause 16(3), 'the PPO must issue a debarment order against a bidder or supplier' who has 'provided false information in a bid or any other document', has 'connived to interfere with the participation of other bidders', or has 'committed any offence involving corruption, fraud, collusion, coercion, price-fixing…or a pattern of under-pricing'. A debarment order may also be issued against a person who has failed to 'perform a material contractual obligation', has 'contravened a provision of' the Bill, or has 'induced or incited' another person to contravene the Bill.[42]

Before issuing a debarment notice, the PPO must provide the affected person with a notice of intention to debar, invite the affected person to provide reasons why he should not be debarred, and consider those reasons. If the PPO decides to issue the debarment notice, it must inform the affected person. A debarment notice 'prohibits the affected person from participating in procurement…for a specified period', either with procuring institutions in general or in specified circumstances. A procuring institution must 'take all reasonable steps to comply with a debarment order' and the PPO must 'establish and maintain a register of persons [who have been] debarred' and must 'make the register publicly available'.[43]

Some of these provisions are too broad: particularly the sub-clause allowing debarment for failure to 'perform a material contractual obligation'. Debarment should not follow if the failure was for reasons beyond the control of the bidder or supplier, such as electricity shortages and rail network failures. In addition, the Bill does not explain what is meant by 'a pattern of under-pricing' or what evidence of such a pattern may be required before the PPO issues a debarment notice. The provision could be used to bar procurement from larger and more experienced companies able to use economies of scale to supply at lower prices than smaller firms. These cost-effective suppliers should not be barred from bidding, as this could greatly prejudice millions of poor South Africans heavily reliant on the government for important goods and services. The majority of poor South Africans need the benefit of lower

[41] Clause 15(1), (2), Bill
[42] Clause 16(3), Bill
[43] Clause 16(4)-(12), Bill

prices and the increased delivery these prices make possible. Hence, 'a pattern of under-pricing' should not be a reason for debarment.

6.4 Chapter Four, Preferential Procurement

6.4.1 Clause 17

Chapter 4 of the Bill introduces a new system of preferential procurement. This system is set out in Clause 17, which is so badly drafted as to be almost unintelligible. One problem is that the sub-clauses setting out various requirements for the granting of preferences sometimes fail to state whether they are to be read conjunctively (meaning that all the listed requirements must be met) or disjunctively (so that only one listed requirement need be satisfied). In those instances where a conjunctive reading is required, the requirements listed are vaguely phrased and likely to conflict with one another – so compounding uncertainty as to the circumstances in which preferences may be applied. Because the wording of these provisions is so difficult to understand or paraphrase, the relevant clauses are generally set out in full below.

6.4.1.1 Sub-clause 17(1)

Sub-clause 17(1) of the Bill states that, 'when a procuring institution implements a procurement policy providing for (a) categories of preference in the allocation of contracts and (b) the protection or advancement of people disadvantaged by unfair discrimination', it 'must do so in accordance with' the objects of the Bill, this Chapter of the Bill, and Section 10(1)(b) of the Broad-Based Black Economic Empowerment Act of 2003 (the BEE Act).[44]

Section 10(1)(b) of the BEE Act states that 'Every organ of state and public entity must apply any relevant code of good practice issued in terms of this Act in…developing and implementing a preferential procurement policy'. Both a generic code of good practice and various sector codes of good practice have already been developed under the BEE Act, while more codes of this kind could in future be gazetted by the minister of trade, industry, and competition.

The aim of this sub-clause is clearly to incorporate the preferential procurement rules in the various BEE codes of good practice into the preferential procurement system provided by the Bill. However, the matter is not a simple one. Among other things, there is considerable scope for conflict between the Bill and existing (or future) codes of good practice under the BEE Act. This could throw the preferential procurement requirements in the BEE codes into considerable confusion. It could also cause great uncertainty as to what requirements still apply, thereby undermining the rule of law. Yet this would be inconsistent with Section 1(c) of the Constitution, which identifies the 'supremacy of the rule of law' as a founding value of South Africa's constitutional order.

In addition, since the Bill is to trump all conflicting laws, as stated in sub-clause 3(4), the regulations to be gazetted under the Bill – for example, regarding the 'pre-qualification

[44] Clause 17(1), Bill

criteria' that all bidders must fulfil – would override both the BEE generic codes of good practice and the various sector codes. Regulations gazetted under Bill could also trump the mining charter developed under the Mineral and Petroleum Resources Development Act of 2002. Yet this would greatly add to uncertainty regarding empowerment requirements in the crucial mining industry, which plays a vital part in generating tax revenues and export earnings – and is already battling to attract the new investment the country so badly needs. Imposing pre-qualification criteria and giving them precedence over the mining charter could also make it harder for Eskom, for example, to secure adequate coal supplies at cost-effective rates.

Also relevant is Section 217(3) of the Constitution, which states that 'national legislation must prescribe a framework within which [an organ of state's preferential procurement] policy must be implemented'. The Constitution refers to 'a' framework – which is currently provided by the PPPFA – not a plethora of frameworks under different statutes. The rule of law also requires 'a' framework which is certain and clear. This framework needs to be set down in a single statute and written in unambiguous language. It should not be open to extension and expansion by ministerial regulation – both because the executive has no law-making capacity and because Section 217(3) requires 'a' framework for preferential procurement to be set down in 'national legislation'.

6.4.1.2 Sub-clause 17(2)(a)

Sub-clause 17(2)(a) of the Bill states any procurement policy must include (a) 'one or more preference point systems or thresholds'.

The Bill does not specify whether sub-clause 17(2)(a) is to be read conjunctively with the rest of sub-clause 17(2). However, the absence of the word 'and' – coupled with its presence elsewhere in sub-clause 17(2) – indicates that a disjunctive interpretation is required.

This means that a preference policy must include a 'preference point system' or a 'threshold' but need not include anything else listed in sub-clause 17(2).[45] The wording in sub-clause 17(2)(a) is thus extraordinarily vague, for it provides no indication whatsoever what 'preference point system or systems' may be applied, or what 'thresholds' might be relevant. The sub-clause is therefore in breach of the rule of law, the supremacy of which is guaranteed by Section 1(c) of the Constitution.

Sub-clause 17(2)(a) of the Bill also conflicts with Section 217(3) of the Constitution, which states that 'national legislation must prescribe a framework' for preferential procurement. The framework provided in that national legislation must be certain and clear if it is to comply with this constitutional requirement. The meaningless terms of sub-clause 17(2) of the Bill cannot suffice to provide the necessary 'framework' and are unconstitutional.

[45] Sub-clause 17(2)(a)

6.4.1.3 Sub-clause 17(2)(b)
Under sub-clause 17(2)(b) of the Bill, a preferential procurement policy 'must include measures regarding preference for: (i) a category or categories of persons, enterprises, or a sector; (ii) goods that are produced in the Republic, and (iii) services provided in the Republic'.

This sub-clause is conjunctive, meaning all three sub-items must be included in any preferential measure. However, the wording used is again too vague to comply with the rule of law. It also fails to 'prescribe a framework' that is sufficiently clear to comply with Section 217(3) of the Constitution.

6.4.1.4 Sub-clause 17(2)(c)
Under sub-clause 17(2)(c) of the Bill, a preferential procurement policy 'must include measures: (i) to set aside the awarding of bids to promote any of the preferences referred to in paragraph (b); to set subcontracting as a bid condition to promote any of the preferences referred to in paragraph (b); (iii) for subcontracting by suppliers awarded bids to promote any of the preferences referred to in paragraph (b); (iv) to advance transformation, beneficiation, industrialisation, innovation, creation of jobs, intensification of labour absorption, and economic development; (iv) to balance the economic impacts of imported goods or services, unless the procuring institution is exempted by the Minister; and (v) to advance a sustainable environment'.[46]

The sub-items here are conjunctive, which means that a preferential procurement policy must include measures of all the kinds listed from sub-items (i) to (v). In practice, this is likely to generate great confusion and uncertainty. The various requirements are sure to be interpreted in different ways by different officials, which undermines the doctrine of certainty in law. In addition, the wording used is again too vague to comply with the law of law. The sub-clause also fails to provide a clear and certain 'framework', as required by Section 217(3) of the Constitution.

The wording of some sub-items is particularly vague. Take, for example, sub-item (i), under which a preferential procurement policy 'must include measures…to set aside the awarding of bids to promote any of the preferences referred to in paragraph (2)(b)'. Does this mean that bids already awarded must be 'set aside' (ie invalidated) in order to provide preferences of the kind vaguely described in sub-clause 17(2)(b)? Or does it mean that some bids must be 'set aside', ie made available solely, to bidders falling within sub-clause 17(2)(b)? Either meaning is possible, which contradicts the doctrine against vagueness of laws. This uncertainty is also inconsistent with the 'supremacy of the rule of law', as guaranteed by Section 1(c) of the Constitution.

Take sub-item (iv) as well. Mandatory (presumably local) 'beneficiation' may in fact push up input prices for downstream domestic manufacturers and so inhibit (presumably local)

[46] Subclause 17(2)(b), Bill

‘industrialisation’, but the wording is conjunctive, so both measures, though contradictory, must be included in the relevant preferential procurement policy. This again makes for vague and uncertain rules, contrary to the rule of law.

A broader point also applies. The best way to provide redress for past disadvantage and help uplift the poor is to ensure that all state contracts provide the best possible value for money. If this criterion is met, this will enormously assist the millions of disadvantaged people dependent on the state’s for the supply of electricity, water, sanitation, education, healthcare, transport, and other essential services. Sound ‘value-for-money’ delivery to the poor will do far more to provide redress for past wrongs – and to promote upward mobility for the great majority – than the granting of preferential state tenders to a relatively small and politically connected elite.

Effective ‘value-for-money procurement is also needed to promote the careful and frugal use of scarce tax revenues so that, for example, a new road linking a rural settlement to a town can be built all the way to that settlement – and not only half-way there. Such cost-effective procurement is thus vital in providing a sound foundation for beneficiation, industrialisation, innovation, job creation, and economic development.

Organs of state should therefore focus on ‘value-for-money’ procurement as the essential foundation for investment and economic growth. As investment increases, growth rises, and business confidence in a sound regulatory regime is restored, these further economic benefits will follow. They cannot be achieved by government fiat – and they certainly cannot be obtained by introducing vague preferential procurement rules that erode business confidence and make little economic sense.

6.4.1.5 Sub-clause 17(3)

Sub-clause 17(3) reads as follows: ‘Regulations: (a) must be made regarding the application of subsection 2(a) and (b)(ii) and (iii); and (b) may be made regarding any other provision of this Chapter’.[47]

Here, the Bill seeks to empower the minister of finance to determine, by regulation, the ‘framework’ which Section 217(3) of the Constitution requires to be set out in ‘national legislation’. This breaches the doctrine of the separation of powers, under which the power to develop ‘a’ framework is vested in Parliament and not the executive.

6.4.1.6 Sub-clause 17(4)

Sub-clause 17(4) adds to uncertainty by stating: ‘Without limiting the generality of sub-section (1)(b), the policy must include preferences for: (a) citizens or permanent residents of the Republic; (b) small enterprises as defined in the Small Enterprises Act…of 1996); (c)

[47] Clause 17(3), Bill

‘enterprises based in townships, rural or undeveloped areas, or in a particular province or municipality’.[48]

The wording here is disjunctive, indicating that only one of the specified requirements must be met. On this basis, preferences could be aimed simply at ‘permanent residents’ who are ‘disadvantaged by unfair discrimination’, including immigrants who have settled in South Africa long after 1994. However, this would not help provide redress for apartheid injustices, as BEE is supposedly intended to do. The wording used is also peremptory in demanding that preferences must be granted, which conflicts with the permissive (rather than mandatory) terms of Section 217(2) of the Constitution.

6.4.1.7 Sub-clause 17(5)

Sub-clause 17(5) adds to the confusion by stating: ‘Persons referred to in sub-sections (1)(b) and (2)(b)(i) include, but are not limited to: (a) black people, as defined in section 1 of the Broad-Based Black Economic Empowerment Act…of 2003 (the BEE Act); (b) women; (c) people with disabilities, as defined in the Employment Equity Act…of 1998; and youth, as defined in section 1 of the National Youth Development Agency Act… of 2008’.[49]

Some of the confusion here stems from the words ‘include, but are not limited to’. This wording could, for example, allow preferences for black people who became citizens by naturalisation after 1994 and would not have qualified for naturalisation before then. This would be inconsistent with the BEE Act and contradict BEE’s supposed role in promoting ‘redress’ for apartheid wrongs. However, since the Bill is to trump all other law, the criteria regarding naturalisation now included in the BEE Act would be superseded.

It is also uncertain how procuring institutions are to classify people as ‘black’ in the absence of legislation specifying the relevant criteria and procedures (including appeal processes) to be applied. Moreover, since the list of potential beneficiaries in this sub-clause is an open one, many other categories of beneficiaries could be added over time. This is again contrary to Section 217(3) of the Constitution, which requires a clear and certain ‘framework’ for preferential procurement to be set down in national legislation.

6.4.1.8 Sub-clause 17(6)

Sub-clause 17(6) states that the Minister of Finance, ‘before making a regulation under this Chapter, must consult with [relevant] Ministers’, including those responsible for small business, women, and the youth. Consultation with ‘any other relevant Minister whose portfolio is affected by the regulation is also required’.[50]

This sub-section highlights the Bill’s unconstitutional attempt to give the minister of finance substantive legislative powers. Since the minister is effectively to make new law, the Bill

[48] Clause 17(4), Bill
[49] Clause 17(5), Bill
[50] Clause 17(6), Bill

requires him to consult with affected cabinet colleagues before doing so. However, any attempt to give a minister law-making power of this kind is contrary to the separation-of-powers doctrine. It also contradicts Section 217(3) of the Constitution, which requires that a clear framework for preferential procurement be set out in national legislation, not ministerial regulation.

6.4.1.9 Sub-clause 17(7)

Sub-clause 17(7) states that 'any Minister referred to in sub-clause (6) may submit a request to the Minister of Finance to make regulations under this Chapter regarding a matter pertaining to the portfolio of the relevant Minister'.[51]

Again, this highlights the fact that the Bill is attempting to give the finance minister the capacity to make substantive law. This is again at odds with the doctrine of the separation of powers. It also conflicts with Section 217(3) of the Constitution which requires a clear and certain 'framework' for preferential procurement to be set out in 'national legislation'.

6.5 Chapter Five: General procurement requirements

6.5.1 Clause 18: Procurement systems and methods

Clause 18 empowers the minister to 'prescribe a procurement system for procuring institutions' as regards 'the procurement and strategic sourcing' of 'goods and services', as well as 'infrastructure and capital assets' and 'the disposal and letting of assets'. The minister may also prescribe 'procurement thresholds', as well as different 'types of procurement methods' and 'the requirements and procedures to be followed for each method'.[52]

Empowering the finance minister to 'prescribe a procurement system' conflicts with Section 217(3) of the Constitution, which requires a clear procurement framework to be laid down in national legislation, not ministerial regulation. In addition, the minister's power to 'prescribe' adds to potential conflict, as the minister's system could well differ from the procurement systems introduced by the PPO and the provincial treasuries, as earlier outlined.

Moreover, the 'strategic sourcing' to which sub-clause 18(1)(a)(i) refers is defined in a very broad way to mean 'a standardized [sic] and systematic approach to procurement that formalizes [sic] the way information is gathered and used so that a procuring institution can use its consolidated purchasing power to find the best possible values in the market place and align its purchasing strategy to service delivery goals'.[53] It is of course important that procuring institutions should seek 'the best possible values'. In practice, however, this objective is likely to be undermined by the vague wording of Clause 17 of the Bill and its attempt to impose on organs of state an unconstitutional obligation to apply preferences in procurement in a wide (and often conflicting) range of circumstances.

[51] Clause 17(7), Bill
[52] Clause 18(1), Bill
[53] Clause 1, definitions, Bill

Giving the minister the power to set different 'procurement thresholds' and stipulate 'different types of procurement methods', each with its own 'requirements and procedures', also conflicts with Section 217(3) of the Constitution, which requires that a clear framework be set out in national legislation. The sub-clause will also compound conflict and confusion, and make it even more difficult for procuring institutions, bidders, and suppliers to know what the Bill requires of them. This too contradicts the rule of law and is thus inconsistent with Section 1(c) of the Constitution.

Sub-clause 18(4) also empowers the PPO to 'determine standard bid documents', yet these may be different from those required by the minister. Sub-clause 18(5) allows procurement institutions to 'stipulate that bidders may only quote in South African currency', but this could be inappropriate in many instances – and particularly for commodities commonly quoted and supplied in foreign currencies such as the US dollar.

Under sub-clause 18(6), moreover, the PPO must 'create and maintain a database of potential suppliers', while 'a procuring institution may only procure from suppliers listed in [that] database'. Effectively, this could allow the PPO to set pre-qualification criteria which (based on experience with the 2017 regulations under the PPPFA) are likely to exclude many experienced and efficient suppliers from bidding at all. Limiting the choice of suppliers in this way would conflict with the over-arching need for 'value-for-money' procurement in Section 217(1) of the Constitution.

6.5.2 Clause 21: Measures to prevent abuse of procurement system

Under Clause 21, the accounting officer of a procuring institution must 'take necessary steps to prevent non-compliance' with the Bill. Towards this end, he must guard against any 'tampering with any bid or contract', investigate any allegations of corruption or improper conduct, and report any conduct that may constitute a criminal offence to the South African Police Service. He must also reject a bid if the recommended bidder has 'made a misrepresentation, submitted false documents…or been convicted of any offence involving corruption, fraud, collusion, or coercion' in a bidding process or the awarding of a contract.[54]

Major problems are likely to arise as regards the accounting officer's obligation to 'prevent non-compliance' with the Bill. Since the Bill is defined as including 'the regulations, codes of conduct, and instructions made' under its terms, there may often be conflicts and inconsistencies between the procurement systems prescribed by the minister by regulation and those introduced by the PPO or provincial treasuries. Conflicts are also likely to arise between the 'instructions' introduced by the PPO for all procuring institutions in all parts of the country, and those introduced by provincial treasuries for procuring institutions within their own provinces.

Conflicts of this kind will make for great uncertainty, both for accounting officers and for bidders or suppliers seeking to avoid non-compliance. Again, moreover, where people cannot

[54] Clause 21(a) to (f), Bill

easily tell what conduct is permitted and what is prohibited, this undermines the rule of law and is contrary to Section 1(c) of the Constitution.

The biggest problem, however, lies in the vague wording of Clause 17. This is so inherently uncertain that accounting officers will find it extremely difficult to assess whether the preferences being applied in many contracts are compliant with the Bill or not. In addition, the wider the scope for preferential procurement, the harder it will be in practice for accounting officers to uncover or combat abuses.

6.5.3 Clause 22: Establishment of procurement units

Clause 22 obliges every procuring institution to establish a procurement unit which must 'maintain its procurement system to ensure effectiveness and efficiency', regularly report to the procuring institution on the performance of its procurement system, provide administrative support to line function managers in the performance of their procurement responsibilities, and carry out any other functions that the accounting officer may consider necessary.[55]

This wording suggests that the many procurement units to be established may also develop their own 'procurement systems', which would further add to conflict and uncertainty. In practice, moreover, the more preferences expand, the harder it will be to 'ensure effectiveness and efficiency', as the Bill requires. This is one of the most salient lessons from the Zondo commission, which has provided chapter and verse on how existing preferential rules have been abused, even under the clear terms of the PPPFA. Once those clear terms have been replaced by the hodge-podge of Clause 17, the necessary 'effectiveness and efficiency' are sure to be undermined to an unprecedented extent.

6.5.4 Clause 24: Information and communication technology-based procurement system

Under Clause 24, the PPO must develop an information and communication technology-based procurement system to enhance efficiency, effectiveness, transparency, and integrity and to combat corruption. This ICT system should include a single platform that gives all officials, bidders, suppliers, and members of the public access to all procurement-related services. It should use 'standardised and inter-operable open data', along with 'uniform procurement processes and procedures' and 'reporting requirements on procurement'.[56]

The objectives behind Clause 24 might be admirable, but in practice the overlapping powers given the powers given to the minister, the PPO, provincial treasuries, and procurement units in every procuring institution will ensure that there are few 'uniform' procurement processes and procedures in place. This will make for vagueness of law and inhibit the use of 'standardised' data.

[55] Clause 22(1), (2), Bill
[56] Clause 24(1), (2), Bill

The broad and open terms of Clause 17 – and the great range of the preferences likely to be granted – will further undermine all attempts to 'enhance efficiency, effectiveness, transparency, and integrity' and to combat corruption. As preferences expand under Clause 17, it will become virtually impossible to uncover or counter abuses. The ICT system envisaged by the Bill cannot achieve or maintain the probity that Clause 17 seems calculated to undermine.

6.5.5 Clause 25: Use of technology by procuring institutions

Procuring institutions must where possible use technology in implementing the Bill. The PPO must, by instruction, develop requirements for digitisation, automation, and innovations that information and communication technology may enable.[57]

Again, however, digitisation cannot overcome the inefficiencies and abuses inherent in bad law of the kind contained in Clause 17.

6.5.6. Clause 26: Access to procurement processes

The PPO must 'determine, by instruction, measures for the public, civil society and the media to (a) access procurement processes, (b) scrutinise procurement, and (c) monitor high-value or complex procurement that entails significant risks of mismanagement and corruption'.[58]

The PPO instruction must 'ensure candid deliberations and protect officials from undue influence and threats'. However, such instruction may 'be limited to certain categories of procurement or procurement above a specified threshold'.[59]

Instructions requiring public scrutiny by the media and others may thus have only a limited ambit, which will greatly undermine the scope for critical scrutiny under Clause 26. In addition, whistleblowers have singularly little protection – as illustrated by the assassination of Babita Deokaran, among others – and, until this lacuna in the law is corrected, this provision in the Bill is unlikely to be effective in reducing threats of mismanagement and corruption in procurement.

6.5.7 Clause 27: Disclosure of procurement information

Under Clause 27, the PPO 'must, by instruction, determine requirements to disclose information regarding procurement'. The information to be disclosed should include 'the reasons for any decision…not to follow an open, competitive tender process', all information regarding a bid, the identity of every bidding entity, 'the date, reasons for and value of an award to a bidder', and the contracts entered into and invoices submitted by the supplier. All this information must be published 'as quickly as possible on an easily accessible central online portal that is publicly available free of charge' and in a format that allows easy tracking of information and is 'electronic and interoperable'.[60]

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[57] Clause 25(1), (2), Bill
[58] Clause 26(1), Bill
[59] Clause 26(1), (2), Bill
[60] Clause 27(1), (2), Bill

These requirements for disclosure are potentially valuable and will have to be followed for all procurement contracts. In practice, however, the bureaucratic burden will be considerable and reporting obligations may often be ignored or only partially met – especially as many public entities are notorious for inefficiency, poor management, and limited accountability.

Under the Bill, confidential information may also be severed and withheld if it is 'personal' information, 'commercial' information, information that is likely to endanger the life or safety of a person', or to 'prejudice law enforcement, legal proceedings, or national security'.[61]

However, 'national security', to take but one example, is broadly defined in the Bill,[62] which could further limit the practical value of disclosure obligations.

6.5.8 Clause 29: Access by certain authorities to information held by the Public Procurement Office and provincial treasuries

Under Clause 29, the PPO must make relevant information available to various authorities. These include 'an investigating authority' in South Africa, the National Prosecuting Authority, 'an intelligence division in an organ of state', the Public Protector, the Auditor General, and the South African Revenue Service. However, information may be made available to these entities only if the PPO 'reasonably believes such information is required to investigate suspected unlawful activity or it is in the public interest to provide it'. Information relating to a potential threat to national security may also be provided to any relevant National Intelligence Structure.[63]

Again, the value of this obligation on the PPO may in practice by limited by the volume of procurement transactions and the difficulty of protecting whistle-blowers who come forward. In addition, the vague terms of Clause 17 will increase the scope for corruption and other abuses, which in practice will be difficult for the PPO to uncover or counter.

6.6 Chapter Six, Dispute Resolution

The provisions of this chapter are dealt with in four separate parts. These cover (1) requests for 'reconsideration' of awards by procuring institutions; (2) the establishment and role of the Public Procurement Tribunal; (3) the review process; and a 'stand still process'.

6.6.1 Part 1: Reconsideration by procuring institution

6.6.1.1 Clause 31

Under Clause 31, a bidder who is dissatisfied with the bid awarded by a procuring institution may, on payment of a prescribed fee, submit an application for reconsideration by that institution. This application must be submitted within 10 days of the bidder being informed of

[61] Clause 27(1) to (3), Bill
[62] Clause 1, Bill
[63] Clause 29 (1) to (6), Bill

the award made, failing which the application may be dismissed for lateness. If the application is made in time, the procuring institution must 'immediately' begin investigating and inform the bidder of its decision within whatever time frame is prescribed by regulation. The procuring institution may grant or dismiss the application, in whole or part. It must state the reasons for its decision and identify any corrective measures to be taken.[64]

However, dissatisfied bidders may have little confidence in the capacity of a procuring institution to conduct an objective evaluation of their bids. They may thus prefer to apply immediately for judicial review of the procuring institution's decision – but will be barred from doing so until they have exhausted all internal remedies, including this one.

6.6.2 Part 2: Public Procurement Tribunal

6.6.2.1 Clause 32, establishment of Tribunal

Clause 32 of the Bill establishes a Public Procurement Tribunal (the Tribunal) to review decisions taken by procuring institutions (as well as the PPO's decision to 'debar' certain bidders and suppliers from participating in procurement under Clause 16 of the Bill, as earlier described).

The Tribunal is supposed to be 'independent' and 'impartial' and to exercise its powers 'without fear, favour, or prejudice'. However, it is entirely a creature of the executive and so lacks a necessary institutional independence. In addition, the Tribunal must carry out its functions in accordance with the Bill and 'other relevant legislation'. This second instruction is again vague and uncertain, for it could easily be applied in different ways at different times. Its potential ramifications are also too broad to understand or foresee.[65]

6.6.2.2 Clause 33, composition of Tribunal

Under Clause 33 of the Bill, the Tribunal is to have 'as many members as the Minister appoints'. It must include a retired judge (to act as chair) and a 'sufficient number of people', each of whom must have 10 years' experience in either law or procurement. The minister is to appoint both the chair and the deputy chair (though, as regards the chair, he must act with the concurrence of the justice minister).[66]

6.6.2.3 Clauses 34 and 36, qualifications of Tribunal members and disclosures of interest

Under Clause 34, Tribunal members must be South African citizens or permanent residents and 'possess the necessary skills, experience, and knowledge'. They must also have been nominated for appointment in response to the minister's invitation to the public to put forward such nominations.[67] Under Clause 36, Tribunal members must disclose any interests in a dispute which could affect their objectivity and then recuse themselves from any subsequent proceedings.[68]

[64] Clause 31(1) to (6), Bill
[65] Clause 32(1), (2), Bill
[66] Clause 33 (1) to (4), Bill
[67] Clause 34, Bill
[68] Clause 36, Bill

The preliminary nomination process does not alter the fact that all members of the Tribunal are chosen and appointed by the minister. This undermines their institutional autonomy and is likely to affect their individual commitment to independence too.

6.6.2.4 Clause 37: Terms of office and termination of Tribunal members

A Tribunal member holds office for five years (or whatever shorter period the minister specifies) and may be re-appointed for a single three-year term. The minister may also terminate any appointment for incapacity, failure to disclose a relevant interest, or following 'an independent inquiry *by the minister*' which finds that the Tribunal member has 'acted in a way that is inconsistent with continuing to hold office'.[69]

These provisions will further undermine the independence of Tribunal members, who will depend on the minister's goodwill for reappointment. That Tribunal members may be sacked by the minister, following a supposedly 'independent' inquiry by the minister himself, will also erode their autonomy.

6.6.2.5 Clauses 41 and 42: Tribunal panels and rules

Every dispute before the Tribunal must be heard and decided by a panel comprising the chair, two people who respectively have experience of either the law or of procurement, and as many other members as the chair decides to include.[70] The Tribunal may make its own rules of procedure and may amend or revoke these rules.[71]

The Tribunal's capacity to make its own rules of procedure – and to amend or revoke these rules as it sees fit – raises further concerns as to its independence and its capacity to conduct hearings fairly and objectively.

6.6.2.6 Clause 46: Tribunal review of the decisions of procuring institutions

A bidder who has applied to a procuring institution to reconsider its award – and who is dissatisfied with the institution's decision on this reconsideration – may apply within ten days to the Tribunal to review that reconsideration decision. The panel responsible for this review must ensure that the proceedings are conducted with minimal 'formality and technicality' and as 'expeditiously' as the circumstances allow. The chair of a panel may call witnesses and subpoena documents 'on good cause shown'.[72]

That an aggrieved bidder must first seek reconsideration by the procuring institution and thereafter apply to the Tribunal to review that reconsideration decision expands the internal processes that must be exhausted before judicial review can be instituted. Yet aggrieved bidders cannot be confident of a fair hearing or an independent decision by either the procuring institution or the Tribunal. The sub-clause also empowers the Tribunal to dispense

[69] Clause 37 (1), (2), (4), Bill, emphasis supplied by the IRR
[70] Clause 41
[71] Clause 42
[72] Clause 46, Bill

with many procedural rules that have been developed by the common law over centuries and are invaluable in ensuring fairness to both parties.

6.6.2.7 Clause 47: Tribunal orders

At the end of its review proceedings, the Tribunal may confirm or set aside the reconsideration decision of the procuring institution. It may also 'direct that the procurement proceedings be terminated', 'take such alternative actions' as it considers appropriate, or dismiss the application. The decision made by a panel is regarded as that of the Tribunal.[73]

The aggrieved bidder is entirely in the hands of the Tribunal as to what relief, if any, is to be provided. Yet the Tribunal is a creature of the executive which lacks institutional autonomy and may be more interested in reaching a quick decision than in arriving at a just solution. Panel members may also lack a necessary individual independence.

6.6.2.8 Clause 48: Judicial review and enforcement of Tribunal orders

Any party that is dissatisfied with an order of the Tribunal may apply for judicial review of that order under the Promotion of Administrative Justice Act (PAJA) of 2000 or 'any applicable law'. In the absence of such review, a Tribunal order, once filed with the registrar of a competent court, 'has the effect of a judgment in civil proceedings and may be enforced as if lawfully given in that court'.[74]

Under the Bill, judicial review is available only after two flawed and potentially partisan internal remedies have been exhausted. Yet justice delayed is justice denied, as well-established common law rules have long acknowledged.

6.6.2.9 Clause 49: Stand-still process

If a bidder applies for reconsideration of a procuring institution's award, that institution may not conclude a contract with the successful bidder for ten days after the conclusion of the reconsideration process. This 'stand-still' process also applies where an application is made to the Tribunal to review a reconsideration decision. This too prevents a contract from being concluded until the Tribunal's review has been completed. In emergency circumstances, however, this stand-still period may be cut short.[75]

The stand-still process provides some limited protection for the aggrieved bidder, in that a contract cannot be awarded to a competitor while reconsideration and Tribunal proceedings are in progress. However, this apparent safeguard may also mean little in practice, especially if emergency circumstances are invoked to cut short the usual stand-still period. In practice, moreover, procuring institutions often claim the existence of emergency circumstances so that specified procurement safeguards can be bypassed.

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[73] Clause 47, Bill] Clause 47, Bill

[74] Clause 48, Bill

[75] Clause 49, Bill

6.7 Chapter 7, General provisions

6.7.1 Clause 50: Investigation by Public Procurement Office

Under Clause 50, the PPO may investigate any alleged non-compliance with the Bill, other than an alleged commission of an offence. If its investigation indicates non-compliance, the PPO may instruct a procuring institution to stop or prevent such non-compliance, take appropriate action against the official responsible, and refer any alleged offence to the relevant law enforcement body.

The power thus given to the PPO may mean little in practice, however, given the volume of procurement contracts entered into every year by procuring institutions in all spheres of government. Better protection for whistleblowers is essential if non-compliance is to be adequately notified to the PPO. In addition, the vague and open-ended terms of Clause 17 will in practice make it very difficult for the PPO to assess whether non-compliance is in issue.

6.7.2 Clause 51: Power to enter and search premises

The PPO may enter and search the premises of a procuring institution without any prior consent or warrant. However, the premises of an official, or of a bidder or supplier, may generally be entered only with prior consent or under the authority of a warrant. Any search must be conducted with 'strict regard' to dignity, privacy, and other constitutional rights.[76]

6.7.3 Clause 55: Offences

Under Clause 55, any person who 'knowingly gives false or misleading information', or who 'connives or colludes to commit a corrupt or fraudulent act' related to procurement, or who 'causes loss of public assets or funds as a result of a wilful act or gross negligence in the implementation' of the Bill, commits an offence and is liable on conviction to a fine or imprisonment for a term not exceeding ten years or both. In addition to this penalty, a court may order that 'the amount of loss incurred by the complainant be compensated'.[77]

An accounting officer who fails to take reasonable steps to implement the procurement system of the procuring institution in accordance with this Bill also commits an offence and is liable on conviction to a fine, imprisonment for up to three years, or both.[78]

In practice, the value of these clauses will often depend on adequate whistleblower protections. Clause 17 must also be replaced by clear and certain provisions regarding any preferential procurement policy that a procuring institution may choose to apply under Sections 217(2) and (3) of the Constitution. The overarching importance of 'value-for-money' procurement, as set out in Section 217(1) of the Constitution, must also be clearly stated in the Bill, so as to reduce the scope for corruption and other abuses.

[76] Clause 51 (1) to (10), Bill
[77] Clause 55(1), Bill]
[78] Clause 55 (3), Bill

6.7.4 Clause 56: Exemption

The minister may, by notice in the *Gazette*, exempt a procuring institution from any provision of the Bill if '(a) national security could reasonably be expected to be compromised, or (b) the procurement is to be funded partially or in full by donor or grant funding and such exemption will benefit the public or a section of the public'.[79]

This provision could be particularly useful to, say Chinese, Russian, or other foreign companies entering into procurement contracts at supposedly reduced prices to help restore or expand essential energy or other infrastructure – and which want to be excused from preferential procurement requirements. However, it would be far preferable to ensure that all procurement proceeds on a 'value-for-money' basis, as required by Section 217(1) of the Constitution.

6.7.5 Clause 57: Deviation

The PPO may authorise a deviation from a regulation or instruction if (a) 'it is impossible, impractical or uneconomical' to comply with it; (b) 'market conditions…do not allow effective application' of it; (c) a disaster is declared under the Disaster Management Act of 2002; (d) 'a state of emergency under Section 37 of the Constitution is declared'; or (e) 'national security could reasonably be expected to be compromised'. If a deviation is declared, the PPO must inform the Auditor-General and publish its terms.[80]

These provisions will allow the PPO to excuse a state-owned enterprise such as Eskom or Transnet from complying with preferential procurement requirements where, for example, there are not enough local or BEE companies with sufficient capacity to deliver at scale and at market prices. However, whether the PPO will allow deviations in appropriate circumstances is uncertain.

On the current formulation the PPO 'may' refuse to grant deviation even if it is 'impossible', 'impractical', and 'uneconomical' to proceed without that deviation. This conflicts with Section 217(1), which requires that the procurement system must always be 'cost effective'. The Bill should therefore be brought into line with Section 217(1), under which the PPO must always allow deviation from any provision that would render the procurement system less than 'cost effective'. In addition, under Section 217(2) of the Constitution, preferential procurement is discretionary rather than mandatory, which means this deviation clause is unnecessary too.

6.7.6 Clause 58: Regulations

Under Clause 58, the minister 'must' make regulations 'on any matter required by the Bill to be prescribed'. He must also set 'competency requirements for officials involved in

[79] Clause 56, Ibid

[80] Clause 57, (1), (2), Bill

procurement' and specify 'procedures for the evaluation, adjudication and awarding of bids and the cancellation of procurement processes'.[81]

In addition, the minister 'must' make regulations on 'the setting of market-related price ceilings for procurement', as well as on the 'circumstances and procedures for pre-qualification of bidders'.[82]

These latter two types of ministerial regulation are likely to be particularly damaging. Procurement legislation should not be used as a cover for price controls, which distort supply and demand and often lead to damaging shortages. If the minister is to be empowered to impose price controls, this capacity should be clearly set out and circumscribed in a statute specifically geared to that purpose. Any such legislation should also be fully debated in Parliament – and should not be enacted if a comprehensive and objective socio-economic assessment confirms its likely negative consequences.

In addition, the Bill should not require the 'pre-qualification' of bidders by ministerial regulation. This could easily lead, among many other things (given the vague terms of Clause 17) to demands that bidders have 50% or 100% BEE ownership, as experience with the Treasury's 2017 regulations showed.

Pre-qualification in the 2017 regulations excluded many of the most experienced, competitive, and cost-effective companies from bidding for state tenders at all. It thereby greatly prejudiced the great majority of disadvantaged black South Africans, who depend on the government for the efficient provision of key goods and services – and who need these to be provided at the lowest prices and in the most efficient way. In addition, the setting of pre-qualification criteria seems to be based on the assumption that preferential procurement is mandatory for state entities, whereas Section 217(2) of the Constitution shows it is instead discretionary. Moreover, Section 217(1) requires 'cost-effectiveness' in all public procurement, along with 'fairness, equity, transparency, and competitiveness'. Any attempt to give the minister the power to set prequalification criteria for bidders – and so exclude some of the most competitive bids from consideration – is thus unconstitutional for this reason too.

The Bill also states that the minister 'must' make regulations on 'emergency procurement'. In doing so, he 'may' include 'pre-requisites for awarding bids' -- but these are similar to pre-qualifications and are therefore also unconstitutional for the reasons outlined above. The minister 'may' also make regulations on 'the procedures to be followed in respect of emergency procurement processes, including the recording of deliberations and the making of recommendations and awards'.[83] However, given how often emergency procurement rules have been abused – as illustrated by widespread corruption in the emergency procurement of personal protective equipment (PPE) during the Covid-19 lockdown – appropriate safeguards

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[81] Clause 58(1)(a)(i), (ii) and (v)
[82] Clause 58(1)(a) (vi), (ix)
[83] Clause 47(1)(1)(xi), Bill

must be included in the Bill to ensure compliance with Section 217(1) of the Constitution and its emphasis on 'value-for-money' in all public procurement.

Under sub-clause 58(1)(b)(ii) of the Bill, the finance minister 'may' also make regulations 'regarding requirements for bidders to comply with specified legislation'. This provision could be used to demand, for example, that bidders must be in compliance with the Employment Equity (EE) Amendment Act of 2020, which took effect on 1 [check] September 2023.

The EE Amendment Act requires designated employers (of 50 people or more) to comply with binding racial and other targets, as laid down by the minister of employment and labour. However, employers will often find these targets very difficult to fulfil, especially in senior and professional posts, given pervasive skills shortages and anaemic economic growth. The EE Amendment Act nevertheless provides that state contracts may be issued solely to employers who are in compliance with the labour minister's unrealistic targets.[84] Sub-clause 58(1)(b)(ii) of the Bill will reinforce that obligation by giving the finance minister the power to make regulations requiring that bidders wanting state contracts under the Bill must 'comply' with the EE Amendment Act. Yet this compliance obligation amounts to yet another pre-qualification criterion – which is again unconstitutional for the reasons earlier outlined.

Under sub-clause 58(3) of the Bill, the finance minister 'must' publish his draft regulations and invite submissions on them. He must also table them in Parliament for scrutiny by MPs 'at least 30 days before their promulgation'. However, irrespective of what objections are raised by the public or opposition MPs, the minister may then proceed to promulgate his proposed regulations provided he publishes a 'consultation report' which gives 'a general account of the issues raised in the submissions' and the minister's 'response' to those issues.[85] This undermines the value of public consultation. It also underscores the fact that the minister will often be using his regulations to make new substantive law. However, this is contrary to the separation-of-powers doctrine. It also undermines the constitutional obligation resting on Parliament to 'facilitate public involvement' in the legislative process under Sections 59 and 72 of the Constitution.

7 Rationale for the Bill

The Preamble to the Bill states that 'legislation regulating procurement by organs of state is fragmented'. It also claims that 'legislation [currently] regulating preferential procurement constrains justified advancement of persons or categories of persons'. [86] However, this ignores the extent to which existing laws have promoted both price inflation – going far beyond the 10% or 20% mark-ups authorised by the PPPFA – and major inefficiency in the state's provision of essential goods and services. This situation has greatly enriched a

[84] Section 53(1), (6), Amended Act
[85] Clause 58(3) to (6), Bill
[86] Preamble, Bill

relatively small black elite with close ties to the ANC, while enormously harming the great majority of black South Africans. Yet it is the latter group that most needs redress for apartheid injustices.

The main aim of the Bill is nevertheless to replace the PPPFA, which many BEE proponents have criticised for some 20 years as being too restrictive in preferential preferences which it allows. The objective instead is to enact a broadly-phrased measure in which sweeping rules on preferential procurement can be laid down from time to time by regulation – instead of via the parliamentary process.

The Bill is intended to bypass (and effectively overturn) the February 2022 judgment of the Constitutional Court in the *Minister of Finance and others* v *AfriBusiness NPO*.[87]

In the *AfriBusiness* case, the Constitutional Court struck down regulations which had been gazetted by the finance minister in 2017 (supposedly under the terms of the PPPFA). These regulations allowed state entities to impose mandatory 'pre-qualification' BEE criteria in advertising their tenders. What this meant in practice was that opportunities to bid on state tenders were often confined to companies with 50% or 100% BEE ownership. Experienced companies with 25% BEE ownership, as the generic BEE codes require – and with a proven capacity for competitive and cost-effective tendering – were thereby ruled out of contention and prevented from lodging any bids at all for many state contracts. Yet the PPPFA makes no provision for mandatory pre-qualification of this kind. In its 2022 ruling the Constitutional Court struck down that mandatory pre-qualification as *ultra vires* the PPPFA and therefore both invalid and unconstitutional.

However, pre-qualification criteria had been very useful to many BEE companies more intent on promoting their own financial gains than on ensuring 'value-for-money' procurement for the benefit of all disadvantaged South Africans. Many BEE companies, along with BEE lobby groups such as the Black Business Council, thus urged the ANC to adopt new procurement legislation that would bypass the Constitutional Court's ruling and restore pre-qualification criteria. The Bill is intended to do just that. This is why sub-clause 58(1)(a)(ix) requires the minister to make regulations on the 'circumstances and procedures for pre-qualification of bidders'.

The Bill will also help restore another damaging provision in the 2017 regulations. This provision required that at least 30% of the value of all state contracts worth R30 million or more must be subcontracted to small black firms. In response, self-styled 'business forums' in KwaZulu-Natal began both threatening and using violence to buttress their demands for their 30% 'share' of major construction contracts. Soon, virtually every substantial project in the province was affected in this way, while a wider 'construction mafia' began using the same coercive tactics in the Eastern Cape, Gauteng, Mpumalanga, and other provinces.

[87] *Minister of Finance* v *AfriBusiness NPO* [2022] ZACC 4

By 2019 more than 180 construction projects, cumulatively worth more than R63 billion, had been disrupted in this way. Construction companies had secured more than 50 interdicts against intimidation and violence, but the police had generally failed to enforce them. In practice, businesses were often compelled either to abandon projects or to accommodate the construction mafia. The upshot was a decline in violence after 2019, but an increase in extortion and escalating economic damage. 'Businesses cannot afford to part with 30%, especially if they aren't getting any value, and many will disappear because of it,' said Dominic Collett, chairperson of the KwaZulu-Natal Business Chambers Council.

The Constitutional Court was not asked to rule on the validity of the 30% subcontracting rule in the *AfriBusiness* case. However, when the Court struck down the 2017 regulations, it also put an end to the sub-contracting requirement. The Bill is thus intended to restore this rule too. This is why sub-clause 17(2)(c) requires a procuring institution to include, in its preferential procurement policy, 'measures to set sub-contracting as a bid condition' and why it also demands 'subcontracting by suppliers awarded bids'.[88])

8 Ramifications of the Bill

When the ANC urged the introduction of BEE in 1994, it said this was aimed at 'removing all the obstacles to the development of black entrepreneurial capacity' and 'unleashing the full potential of all South Africans to contribute to wealth creation'. But BEE requirements have in fact eroded black entrepreneurship, while constraining growth and fostering dependency.

Richard Maponya, a veteran black businessman who started out as a clothing salesman in Soweto in the 1950s and established his own dairy business in the 1970s, warned in 2012 that BEE was significantly harming black business. He urged that all BEE requirements be scrapped – and particularly the preferential procurement system. Said Mr Maponya: 'In my day there was nothing like a tender turning people into billionaires overnight. It's a terrible system that has created corruption from top to bottom, and it's a system which should be done away with.'[89]

Professor William Gumede, Associate Professor at the Wits University School of Governance, agrees, saying that BEE has created 'a select group of political fixers' who pretend to be 'genuine entrepreneurs' but are nothing more than middlemen with 'access to government contracts'. The government should have focused on helping 'the five million real black entrepreneurs who have been running their own micro-, small- and medium-sized businesses since the apartheid era', whether in the form of 'taverns, spaza shops, butcheries, or taxi companies'. This group already has 'business experience and skills' but needs more access to finance to 'transition up the value chain'. But these businesspeople are 'not connected to the ANC' and are thus excluded both from policy formulation and the state assistance supposed to be available to black South Africans.[90]

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[88] Clause 17(2)(c)(ii) and (iii

[89] *Financial Mail*, 16 November 2012

[90] https://www.wits.ac.za/news/latest-news/opinion/2020/2020-11/how-real-bee-can-help-ordinary-folk.html

Adds Professor Gumede: ‘By focusing on empowering political capitalists, BEE has killed off legitimate black and white small and medium-sized businesses; and discouraged existing and potential black entrepreneurship. BEE…is wasteful, unfair, and actually disadvantages both capable white and black people. It does nothing to address the structural issues which prevent capital accumulation and wealth building in the black community. [These include] issues around education, [thanks to which] almost all black children do not graduate from high school and are functionally illiterate and innumerate.’[91]

BEE is a key part of the reason South Africa’s real economic growth rate – at 1.3% of GDP on average since 2008 – has lagged so far behind those of its emerging market peers. Had it not been for this damaging policy (and a host of other ill-advised interventions), South Africa could have matched the growth rates notched up by other emerging markets and sub-Saharan African countries between 2010 and 2017. If it had succeeded in doing so, said the Bureau for Economic Research (BER) at the University of Stellenbosch in an October 2018 report, ‘the South African economy could have been up to 30% or R1-trillion larger, and created 2.5 million more jobs’, while tax receipts would have risen by around R1 trillion too.[92]

As the BER’s research underscores, what business most needs for increased success is not the race-based preference system envisaged in the Bill but a much faster rate of economic growth. Ideally, growth should rise to at least 5% of GDP a year, which would see the economy doubling in size every 14 years. This would vastly expand economic opportunities while generating millions more jobs and greatly increasing domestic consumer demand.

At the same time, the quality of schooling must be greatly improved. Some 80% of public schools are dysfunctional, while almost half the pupils who start school in Grade 1 drop out in time without ever reaching Grade 12 or passing their matric examinations. Mainly because their schooling leaves most students poorly prepared, completion rates at universities are dismal too, averaging a mere 21% for undergraduate degrees in 2020.[93]

The country’s defective public education system, coupled with its unemployment crisis, puts the most vulnerable people at a particular disadvantage. As research by the FinMark Trust has shown, the people most likely to succeed in business are those who come from stable two-parent families, have the benefit of solid schooling, obtain university degrees, work for several years in existing firms, have a strong entrepreneurial spirit – and branch out on their own when they already developed significant skills and experience on which to draw. If such entrepreneurs are to build up their businesses, they must also have the benefit of a rapidly expanding economy with low unemployment rates and growing consumer markets.

This is a proven formula for success. In South Africa, however, only 30% of black youngsters grow up in two-parent homes, while the great majority attend dysfunctional public schools

[91] Ibid
[92] John Endres, https://irr.org.za/reports/occasional-reports/irr-growth-strategy, August 2023
[93] Centre for Risk Analysis, 2023 Socio-Economic Survey of South Africa, p449

which often fail to equip them with even the most basic skills. Not surprisingly, many then battle to find jobs. This is partly because South Africa's growth rate has long been too low. Also relevant, however, are minimum wage and other labour laws which raise entry level salaries so high as to price the inexperienced and poorly skilled right out of the jobs market.

These factors – coupled with a crippling burden of red tape, high crime rates, often poor infrastructure, and limited access to venture capital – combine to put black entrepreneurs at a severe disadvantage. These fundamental obstacles to their success cannot be overcome through a simplistic reliance on preferential state procurement.

9 Unconstitutionality of the Bill

As earlier noted, various provisions of the Bill are inconsistent with Section 1 of the Constitution (confirming the supremacy of the rule of law) as well as Section 217 with its rules on public procurement. These inconsistencies have already been highlighted in Section 6 of this document, which describes the content of the Bill. However, the Bill is unconstitutional for another reason too: because it does not comply with any of the three *Van Heerden* tests laid down by the Constitutional Court in 2004.

The *Van Heerden* dispute dealt with the validity of differing pension rules for pre- and post-1994 MPs under Section 9 of the Constitution (the equality clause). According to the Constitutional Court's judgment, affirmative action measures cannot be presumed to be unfair – notwithstanding the Constitution's prohibition of unfair discrimination on race or other listed grounds – because they are 'authorised remedial measures'. Instead, their validity depends on the three-fold test of whether (1) they target the disadvantaged, (2) are designed to 'advance' them, and (3) promote 'the achievement of equality'.[94]

Since these tests are conjunctive, all three must be met. In addition, though the tests were laid down in the context of the equality clause, they apply equally to preferential procurement policies under Section 217(2), which also seek to bring about the 'advancement' of those 'disadvantaged' by unfair discrimination. However, the Bill fails all the *Van Heerden* tests and is unconstitutional for this reason too.

9.1 The first test: targeting 'the disadvantaged'

As regards the first *Van Heerden* test, most beneficiaries of the Bill will not be 'the disadvantaged'. Rather, they will the most advantaged group within the black population: the roughly 15% with the best skills and/or political connections.

Like similar affirmative action interventions all around the world, the Bill will help only a relatively small elite within the previously disadvantaged group – or what critics of affirmative action in India call 'the creamy layer'.[95]

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[94] *Minister of Finance and Other* v *Van Heerden* [2004] SACC 3, para 37; De Vos and Freedman, *South African Constitutional Law in Context*, p536; Dave Steward, 'Tightening the screws: the true significance of the Employment Equity Amendment Bill', *Politicsweb.co.za*, 14 December 2018
[95] *Business Day* 7 May 2010, 21, 30 September 2010

By contrast, the 10.8 million black people[96] who are currently unemployed on the expanded definition – and who generally lack a matric, pertinent skills, relevant business experience, and strong links to the ruling party – will have little or no realistic prospect of ever being awarded state procurement contracts under the Bill.

9.2 The second test: 'advancing' the disadvantaged

Under the second *Van Heerden* test, an affirmative action measure is valid if it is 'designed to advance' the disadvantaged. The Bill fails this test too, for it has little capacity to 'advance' the great majority of black people – and will hurt them instead.

BEE preferential procurement has already greatly encouraged and facilitated corruption. It is the main reason why the prices paid by the state for goods and services are often so absurdly high: R40m for a school that should have cost R15m, as Pravin Gordhan said in 2009, R27 for a bottle of water that should have cost R7, as Gwede Mantashe added in 2012 – and a staggering R238 000 for a wooden mop, as Eskom reported in 2021.[97]

These are not isolated instances, moreover. Rather, as Mr Mathebula told the Zondo commission in 2018, Treasury procurement rules intended to ensure cost-effectiveness are deliberately not followed in at least half of all state contracts. And, once some excuse has been found to bypass normal procurement requirements – often in the form of an alleged 'emergency' – a contract 'which starts at R4m is soon sitting at R200m', as Mr Mathebula warned.

Inflated pricing wastes scarce tax revenues, adds to public debt, pushes up debt servicing costs, and reduces the money left over for the delivery of vital goods and services. Often, too, what is delivered is partial and deficient, adding to the wastage. The people who bear the brunt of this defective delivery are the majority of black South Africans, who cannot afford to buy from the private sector and are compelled to rely on the government for such core needs as electricity, water, education, housing, healthcare, and sanitation.

In addition, BEE rules have long been so unduly onerous – and so constantly in flux – as to deter fresh investment, encourage disinvestment, and hobble the economic growth and expanding employment so vital to upward mobility. The people who suffer the most from this economic malaise are again the majority of black South Africans.

9.3 The third test: promoting the achievement of equality

According to the third *Van Heerden* test, an affirmative action measure is valid only if it 'promotes the achievement of equality'. The Bill fails this test as well.

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[96] https://www.statssa.gov.za/publications/P0211/P02112ndQuarter2023.pdf, p41

[97] *Business Day* 22 August 2012

If BEE preferential procurement was able to promote the achievement of equality for the great majority of black people, this would have become apparent in the 23 years since the PPPFA (and other BEE legislation) took effect. Instead, income inequality, as measured on the Gini coefficient, has increased significantly. This is largely because BEE, including its procurement element, has widened inequality within the black majority by helping a small and often politically connected group to forge ahead, even as some 10.8 million black South Africans have remained jobless and mired in destitution.

Growing inequality within the black majority is particularly severe, as the South African Communist Party (SACP) has pointed out. Intra-black inequality is far higher than inter-racial inequality and is the main reason – given the size of the black population – why South Africa is currently an even more unequal country than it was in 1994. Then its Gini co-efficient was 59. Now it stands at 67, making South Africa the most unequal nation among the 164 countries the World Bank measures.[98]

Official figures on changes in South Africa's income distribution further confirm that preferential procurement has not helped achieve equality for the poorest black people. In 2015, according to Statistics South Africa, the bottom 40% among black South Africans obtained a mere 3.7% of national income. This small share of national income was almost identical to the meagre 3.4% this group had gained in 2006.[99]

By contrast, the top 10% among blacks gained 26% of national income in 2015, up from 19% in 2006, while the remaining 50% of blacks obtained 22% of the total (up from 16% in 2006). If so-called 'coloureds' and Indians are counted too, the top 10% among black South Africans obtained 32% of national income in 2015. By contrast, the top 10% among whites gained 11% (down from 18% in 2006) – or three times less.[100]

This decline among the white top 10% is generally ignored by the government as it contradicts its preferred narrative of unbroken white economic power and privilege since 1994. The ANC has also declined to acknowledge that BEE's preferential procurement and other requirements have clearly not worked for the bottom 40% of black South Africans – whose share of national income has stagnated even as BEE rules have been ever more stringently applied.[101]

Since the Bill fails all three of the *Van Heerden* tests, they are unconstitutional and cannot lawfully be adopted.

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[98] Editorial, *The African Communist*, 1st Q 2017, Issue 116, February 2017; Steward, 'Tightening the screws', 14 December 2018; https://www.businesslive.co.za/bd/opinion/editorials/2022-03-15-editorial-give-serious-thought-to-the-world-banks-recommendations-on-inequality-and-policy-failures/
[99] Gabriel Crouse, 'Why race is not a proxy for disadvantage', *The Daily Friend*, 12 November 2020
[100] Ibid
[101] Ibid

10 No credible SEIA report made available

Since September 2015 all legislation and regulation in South Africa must be subjected to a 'socio-economic impact assessment' before it is adopted. This must be done in terms of the Guidelines for the Socio-Economic Impact Assessment System (SEIAS), developed by the Department of Planning, Monitoring, and Evaluation in May 2015. The aim of this system is to ensure that 'the full costs of regulations and especially the impact on the economy' are fully understood before new rules are introduced.[102]

According to the Guidelines, the SEIA system must be applied at various stages in the policy process. Once new legislation (or other rules) have been proposed, 'an initial assessment' must be conducted to identify different 'options for addressing the problem' and making 'a rough evaluation' of their respective costs and benefits. Thereafter, 'appropriate consultation' is needed, along with 'a continual review of the impact assessment as the proposals evolve'.[103]

A 'final impact assessment' must then be developed that 'provides a detailed evaluation of the likely effects of the legislation in terms of implementation and compliance costs as well as the anticipated outcome'. When the legislation is published 'for public comment and consultation with stakeholders', the final assessment must be attached to it.[104]

However, no credible SEIA report on the Bill has been made available, as the Guidelines require. A final SEIA report on the Bill was published on 15th December 2022, but is far too superficial to satisfy what the Guidelines specify.

The SEIA report identifies the 'socio-economic problem to be solved' as 'the historical discrimination in the allocation of government contracts in terms of race, gender, disability, etc'.[105] It ignores the many preferential contracts that have been awarded to black people, in particular, over the past 23 years.

The SEIA report adds that there are more than 30 'pieces of legislation' dealing with public procurement and that this 'fragmentation' makes for 'overlap, duplication, and uncertainty, along with 'opportunities for corruption'.[106] However, it also acknowledges that the PPPFA is 'the only legislation that specifically regulates procurement'. It also claims that this statute, with its points system, is too 'inflexible' and has thus 'stymied well-conceived local industrialisation and empowerment initiatives'.[107] However, it gives no substantiating details, while ignoring the extent to which the intended limits on price inflation in the PPPFA have been ignored in practice.

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[102] SEIAS Guidelines, p3, May 2015
[103] Guidelines, p7
[104] Guidelines, p7
[105] Clause 1.2, SEIA report, 15 December 2022
[106] Clause 1.1, ibid
[107] Clause 1.2, ibid

It fails to provide any substantiating evidence, but nevertheless claims that the Bill 'provides for integrity and ethical conduct in procurement'.[108] It also claims that the Bill will 'advance [those] historically disadvantaged by unfair discrimination', while promoting 'local industrialization [sic] for job creation' and 'building up the capacity of procurement practitioners'. It also claims that the Bill has no relevance to the 'national priority' of 'consolidating the social wage through reliable and quality basic services'[109] – even though preferential procurement has in fact played a large part in the breakdown of services and the wasting of scarce tax resources.

The SEIA report pretends to consider an alternative to the Bill – ie, providing for 'a blanket conditional exemption' from the PPPFA – but quickly brushes this aside as 'having its limitations'.[110] It also fails to acknowledge that preferential procurement is discretionary rather than mandatory for state institutions under Section 217(2) of the Constitution.

The SEIA report also notes that many other laws will have to be changed to accord with the Bill – but makes no attempt to explain or evaluate the likely impact of the proposed amendments.[111] It claims that the Bill will ensure that the requirements of Section 217(1) of the Constitution will be met[112] but fails to explain how or why. It wrongly pretends that the great majority of black South Africans will benefit from the Bill – and that the new Tribunal will help them too as they cannot easily afford litigation.[113]

The SEIA report also outlines the public consultation process that has been conducted on the Bill. According to the report, this has involved public comment, workshops with organs of state, the National Treasury's executive committee, the Department of Trade, Industry, and Competition, and the National Economic Development and Labour Council (Nedlac).[114] It claims that Nedlac and its business representatives fully support the Bill, as it will 'increase efficiency in procurement' by streamlining processes. According to the report, the sole amendments requested by Nedlac are that 'more detail on procurement methods' should be provided, especially as regards infrastructure, and that incentives for whistle-blowing should be included.[115] Neither of these changes have been made, however, says the report, as 'the details will be provided through regulations' and 'whistle-blowing is not within the mandate of the Bill'.[116]

The SEIA report also claims that many significant groups will benefit from the Bill. Benefits, it says, will go to all citizens 'through improved service delivery'; to 'black business (Black persons, women, youth, township and rural)' who will gain 'preferential access to

[108] Clause 1.3, ibid
[109] Clause 1.3, ibid
[110] Clause 1.4, ibid
[111] Clause 2.1, ibid
[112] Clause 2.1, ibid
[113] Clause 2.1, ibid
[114] SEIA report, page 12
[115] Ibid, page 14
[116] Ibid, page 14

government business opportunities'; local businesses, particularly SMEs; local industry, as contracts will be 'set aside…for goods manufactured in South Africa and for services provided by citizens'; the government, which will gain from 'savings (expenditure reduction) on fiscus, and value for money on contracts'; and the country as a whole, which will secure 'improved credit ratings, investor confidence, and corruption rankings'. [117] All these claims are unsubstantiated and palpably untrue.

The only 'cost bearers' (or 'groups that will bear the cost') are 'untransformed businesses' which will 'lose out on government contracts'; and the National Treasury, which will have to 'establish the Tribunal'.[118] The report also claims that government and provincial departments, along with other state entities, will incur some implementation and compliance costs (as they will need more staff and will have to train them). However, says the report, they will also benefit from 'a reduced regulatory and administrative burden' and greater 'efficiencies in the delivery of services'.[119] Again, these assertions are unsubstantiated and untrue.

According to the report, the National Treasury will incur certain costs as it will have to take on and train more staff, advertise the changes made, and establish the Tribunal. However, it will benefit from 'uniform understanding and implementation of the new legislation', along with 'direct contact with affected stakeholders'.[120] Costs for the state will otherwise be limited, as improved ICT will increase efficiency. However, foreign monopolies, in the form of original equipment manufacturers, and 'untransformed local businesses' will have to 'partner with local persons and businesses…in order to be considered for contracts'.[121]
In conclusion, the SEIA report claims that the Bill is 'constitutional, necessary to achieve the priorities of the state, as cost effective as possible, and agreed and supported by the relevant departments'.[122] No explanation – and no evidence – is provided for any of these claims.

Overall, the SEIA report is so superficial and inaccurate that it provides no help at all to the public in understanding the issues raised by the Bill and having an informed say on its proposals. This in turn has undermined the public consultation required of the National Assembly and its committees under Section 59(1) of the Constitution.

11 A better and constitutional alternative

Instead of adopting the Bill, the country needs to embrace a new system of 'economic empowerment for the disadvantaged' or 'EED'.

EED differs from BEE in two key ways. First, it no longer uses race as a proxy for disadvantage. Instead, it cuts to the heart of the matter by focusing directly on disadvantage

[117] Ibid, p15
[118] Ibid, p15
[119] Ibid, p16-17
[120] Ibid, p17-18
[121] Ibid, p24
[122] Ibid, p25

and using income and other indicators of socio-economic status to identify those most in need of help. This allows racial classification and racial preferencing to fall away, thereby helping South Africa to uphold the founding value of 'non-racialism' embedded in the Constitution.

Second, EED focuses on providing the inputs necessary to empower poor people. Far from overlooking the key barriers to upward mobility, it seeks to overcome these by focusing on all the right "**E**s". In essence, it aims at rapid **e**conomic growth, excellent **e**ducation, very much more **e**mployment, and the promotion of vibrant and successful **e**ntrepreneurship.

EED policies aimed at achieving these crucial objectives should be accompanied by a new EED scorecard, to replace the current BEE one. Under this revised scorecard, businesses would earn EED points for such contributions as:

- making direct investments in the country;
- maintaining and, in particular, expanding jobs;
- contributing to tax revenues and R&D spending;
- helping to generate export earnings; and
- topping up the tax-funded vouchers provided to low-income families to enable them to purchase the sound education, healthcare, and housing of their choice.

The voucher element in EED is particularly important because it reaches right down to the grassroots to equip poor households with the sound schooling, housing, and healthcare they need to help them get ahead.

According to the National Treasury's *Budget Review 2022*, some R827bn has been budgeted for basic schooling, healthcare, and housing/community development in the 2023/24 financial year.[123] But the state's centralised and top-down delivery system is so inefficient and mismanaged – often because racial targets are given precedence over workplace skills and cost-effective procurement – that outcomes are generally extraordinarily poor.

As regards education, 'most primary and secondary schooling is, by some metrics, even worse than it was previously', in the apartheid era.[124] Hence, even those who pass their matric examinations are often functionally illiterate and innumerate. They thus lack a sound foundation either for on-the-job training – for those lucky enough to find employment – or for success in tertiary studies.

In the housing sphere, the state's 'free' RDP homes are tiny and often badly built, while delivery has flagged to the point where the housing backlog (at 2.2 million units) is bigger than it was in 1994 (1.5 million). In public health care, most hospitals and clinics are so badly

[123] National Treasury, Consolidated spending, in Budget Review, February 2023, Highlights; https://www.treasury.gov.za/documents/national%20budget/2023/review/FullBR.pdf
[124] David Benatar, The Fall of the University of Cape Town: Africa's leading university in decline', https://www.amazon.com/Fall-University-Cape-Town-university/dp/3982236428

managed that only about 15% adequately meet minimum standards on such essentials as infection control and the availability of medicines.[125]

EED recognises that state spending is already high and cannot be increased. Hence, the key need is rather to get far more bang for every tax buck. This can be achieved by redirecting much of the revenue now being badly spent by bureaucrats to tax-funded vouchers for schooling, housing, and healthcare for the poor. Low-income households empowered in this way would have real choices available to them. Schools and other entities would have to compete for their custom, which would help to hold costs down and push quality up.

In the schooling sphere, dysfunctional public schools would have to up their game, while many more independent schools would be established to help meet burgeoning demand. In the housing arena, people could stop waiting endlessly on the state to provide and start building or upgrading their own homes. In the healthcare sphere, people could join low-cost medical schemes or take out primary health insurance policies, giving them access to sound private care.[126]

Unlike BEE, these vouchers would truly empower the poor – as ordinary South Africans seem well aware. In 2022, for example, some 93% of black respondents in an IRR opinion poll supported the idea of schooling vouchers, 89% endorsed healthcare vouchers, and 78% were in favour of housing vouchers. In a similar opinion poll conducted in 2020, moreover, 74% of black respondents said schooling, healthcare, and housing vouchers would be more effective than BEE in helping them to get ahead. [127]

After two decades of damaging preferential procurement and other BEE policies, it is time to call a halt. South Africa cannot hope to expand opportunities for the disadvantaged unless it raises the annual growth rate to 5% of GDP or more. A shift to EED will help achieve this. By contrast, the Bill will be so damaging as to keep the economy mired in its current low- or no-growth path.

12 The way forward

Many of the clauses in the Bill are unconstitutional, for all the reasons earlier outlined. In addition, the Bill fails all three of the *Van Heerden* tests and is unconstitutional for this reason too.

The solution lies not in the Bill but in recognising that preferential procurement is discretionary rather than mandatory under Section 217(2) of the Constitution – and that the

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[125] *Business Day* 6 December 2017, *Sunday Times* 6, 14 January 2018, *The Citizen* 19 September 2018; IRR, *2019 South Africa Survey*, p761; *Financial Mail* 19 July 2018; Office of Health Standards Compliance, *Annual Inspection Report 2016/17*, p31

[126] Anthea Jeffery, 'EED is for real empowerment, whereas BEE has failed', *@Liberty*, IRR, Issue 31, April 2017, pp5-8

[127] IRR, *2020 Race Relations Survey*; https://irr.org.za/reports/occasional-reports/files/irr-growth-strategy-2023.pdf, pp17-19

most important need is to restore an emphasis on ‘value for money’ in state procurement – as Section 217(1) of the Constitution requires and Judge Zondo has urged.

Said Judge Zondo: ‘Ultimately in the view of the Commission the primary national interest is best served when the government derives the maximum value-for-money in the procurement process and procurement officials should be so advised.’[128]

Given the Bill’s emphasis on localisation, it is also worth noting Judge Zondo’s views on this issue. Judge Zondo also said: ‘The same problem is encountered when a choice must be made between the competing virtues of localisation and lower cost. Again, the view of the Commission is that the legislation should make it clear that in such a case the critical consideration is value-for-money.’[129]

An emphasis on ‘value-for-money’ as the overarching national priority will protect the poor black majority from the fraud, inflated pricing, and defective delivery that have long plagued so much of state procurement. Together with the speedy adoption of EED, this approach offers the best mechanism to empower the truly disadvantaged, help bring about their ‘advancement’ – and start narrowing the gap between the 15% of black people who benefit from BEE and the 85% of black South Africans who are greatly harmed by it instead.n approach

South African Institute of Race Relations NPC **11th September 2023**

[128] Judicial Commission of Inquiry into State Capture, (Zondo Report)
[129] Ibid