

NEDLAC REVISED AND UPDATED VERSION 14 OCTOBER 2022 PREPARED BY THE JSR

EXPLANATORY MEMORANDUM

Prepared by the Joint Strategic Resource (JSR) (14 October 2022)

1. PURPOSE OF BILL

The aim of the Bill is to regulate public procurement through a comprehensive statute and regulatory framework consistent with the Constitution that:

- a) defines and articulates a procurement system as envisaged in section 217 of the Constitution including targeted procurement;
- b) allows for the flexible, strategic, and effective pursuit of policy objectives which redress the imbalances of the past and simultaneously commit to sustainable public procurement and economic development;
- c) combats corruption in the procurement space; and
- d) provides for public procurement which is developmental in economic nature and outlook, aspiring to expand the local productive base of the economy and to support innovation and investment.

2. BACKGROUND

2.1 Section 195 of the Constitution of the Republic of South Africa ("the Constitution") requires national legislation must, among others, ensure the promotion in public administration of the following principles:

- (a) A high standard of professional ethics;
- (b) efficient, economic and effective use of resources; and
- (c) development-oriented, accountability and transparency.

2.2 Section 216(1) of the Constitution requires national legislation to prescribe measures to ensure both transparency and expenditure control in each sphere of government by introducing, among others, uniform treasury norms and standards.

2.3 Section 217(1) of the Constitution stipulates that, procurement by organs of state and identified institutions, must occur in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Section 217(2) allows for organs of state to implement a procurement policy providing for categories of preference in the allocation of contracts and the protection or advancement of persons disadvantaged by unfair discrimination. Section 217(3) requires national legislation to prescribe a framework within which the procurement policy must be implemented.

2.4 The public procurement regime in South Africa is currently badly fragmented. There are several laws which regulate procurement across the different spheres of public administration. Such legislation is accompanied by a plethora of regulations, instructions, practice notes, guidelines and the like. This situation has led to ambiguities and differences

in understanding and interpretation of regulation, policy and practice and wide-spread confusion as to what precisely the law requires of or allows to a procuring institution. Furthermore, nearly all procurement rules are framed around a supply chain management system within the office of a chief financial officer. In almost all institutions, this SCM unit functions as a back office performing an administrative, clerical function, leading over time to increasing rigidity and ossification of the rules. All of this has contributed to disappointing procurement outcomes, facilitated corruption, and has seriously undermined the efficient, effective and economic delivery of those public projects which require a strategic approach to procurement such as public infrastructure projects.

2.5 The National Infrastructure Plan 2050 (NIP 2050), published during March 2022 for implementation in terms of the Infrastructure Development Act of 2014 (Act 23 of 2014), calls for a regulatory framework which enables effective infrastructure procurement and delivery management enabling procuring institutions to operate at the highest global standard and to enter into partnerships and alliances with the private sector. It calls for an overhaul of the current regulatory regime whilst ensuring good governance. It furthermore proposes that the procurement of infrastructure be differentiated from that of other goods and services to enable a strategic approach to be adopted, risks to be managed and value for money to be optimised in the delivery of infrastructure projects. This is challenging to achieve as infrastructure procurement extends beyond the confines of the construction industry and the difficulties associated with formulating a sufficiently robust definition for infrastructure for regulatory purposes. A simpler and more effective way of dealing with strategic procurement is to create a bill which accommodates the major differentiators between the types of procurement in a pragmatic manner. Strategic procurement can be accommodated by providing accounting officers / authorities with flexibility to deal with:

- (a) delivering project through contracts where project value is only realised when each contributing contract is successfully completed or new technology is central to a project; and
- (b) risk i.e. exposure to the chance of loss, harm or failure to achieve objectives.

2.6 The traditional approach to managing the integrity of the procurement process through an internal committee (quality management) system also needs to be reconsidered. Modern digital technology enables disclosure of open, accessible and timely information on public contracting at all stages of the contracting process which can be used, modified, and shared. Open contracting, which has been embraced in multiple national jurisdictions, is an approach to open up and reimagine public procurement by promoting transparency, collaboration, and achieving results. It is about engaging public, private, civil society or other sectors to use procurement information and smarter processes to deliver better public goods, works, and services. This provides the opportunity to develop analytical dashboards (intelligence tools) which provide opportunities for effective data management and the subsequent visualisation of data which reveals information which is easy to understand. This in turn can assist in informing decision-making processes aimed at improving performance at the level of the project, a procuring entity or a sector.

3 Approach adopted by the JSR in crafting the Bill

The approach to achieving the above purposes of the Bill through enabling procuring institutions to adopt a strategic or an administrative (or both) approach to procurement is in

four steps as follows:

- 1) First, formulate and embed **in primary legislation rather than in subordinate legislation** the policy principles for procurement and establish checks and balances framed around Section 217 of the Constitution. Having clear procurement principles at the level of statute enables effective and strategic action by procuring institutions as well as facilitating across-government coordination, eliminates reliance on regulations and instructions to interpret and apply the constitutional principles.
- 2) Second, require procuring institutions governed by the statute to:
 - (i) develop and implement their procurement system (policies and associated standard operating procedures) around the purposes of the Act, the principles embedded in the Act, and the decision to select from the range of procurement options given in the Act; and
 - (ii) make data and document disclosures at specified points within the procurement cycle on an open online platform established by the Public Procurement Office as well as to upload on that open platform the procurement implementation policies and associated operating procedures the institutions develop.
- 3) Third, mandate and require the Public Procurement Office to put in place an open contracting system, develop and make available model policies and associated operating procedures and procurement documents for different categories of institutions (especially those with weak capacity or small budgets) and for different categories of procurement, and also to develop objective procuring institution capability and capacity indicators and issue instructions and declare a particular procurement practice to be prohibited should it be necessary to do so.
- 4) Finally, ensure consequences by requiring procuring institutions which fail to meet the objective standards of capability and capacity established by the Public Procurement Office to adopt a suitable model policy and associated standard operating procedures issued by the PPO.

5 Clause by clause explanations (ss 1-32I, excludes Chapters 6 & 7)

JSR s1: Definitions

This section provides definitions for the entire Bill. It gives statutory meaning to terms used in the Bill, aiming to facilitate the interpretation and clear understanding of the Bill and drawing a number of key terms from the Constitution including “procurement”. Other terms are not sourced from the Constitution such as “risk” which is defined here as exposure to the chance of loss, harm or failure to achieve the objectives of a procurement process. Some of these definitions are referred to in the clause by clause explanations below.

JSR s2: Objects of Act

This section specifies three main objects of this Act: to provide in statute a comprehensive set of statutory principles for the implementation of public procurement by public procuring institutions including a paradigm of strategic procurement; to specify in statute a policy of targeted procurement including mechanisms to provide redress for persons historically disadvantaged under apartheid; and to provide for transparency and other institutions to effectively govern the public procurement system put into place.

This section also details the purposes of the Act, working on the basis of and giving further detail to the five constitutional principles of section 217 of the Constitution: fairness, equity, transparency, competitiveness, and cost-effectiveness. The detailing of these principles assist to give purposive interpretations to substantive provisions of the Bill.

JSR s2A. Purposive Interpretation of Act

This section confirms that this Act defines the public procurement system referred to in s 217 of the Constitution and provides that the Act shall be purposively interpreted in order to promote the five principles listed in subsection 1 of section 217. The Constitutional Court has determined that purposive interpretation is appropriate when interpreting the Constitution and implementing its provisions.

JSR s3. Application and administration of Act

This section identifies the public bodies to which the Act applies and which thus constitute the Act's key implementation agents: procuring institutions. This set of approximately 1000 procuring institutions is identified on the basis of the Public Finance Management Act and the Municipal Finance Management Act. This provision includes higher education institutions and also allows for inclusion of further categories of public bodies.

The clause also makes provision to deal with conflicts between a provision of the Bill and a procurement rule of a donor or a funding agency as well as conflict between a provision of the Bill and a provision of an international agreement envisaged in section 231 of the Constitution.

JSR s4. Establishment of Public Procurement Office

This section establishes the Public Procurement Office (PPO) within National Treasury. This is done to put the existing Office of the Chief Procurement Officer onto a statutory basis, although still in National Treasury. The section also gives some statutory protections and duties to the Head and staff of the PPO.

JSR s5. General functions of Public Procurement Office

This section outlines the organizational functions of the PPO which include to provide guidance to procuring institutions in interpreting and complying with the Act, to supervise and administer the open data system and central databases of the Act, to issue directions countering abuse of the Act, to administer the debarment register, and to monitor the public procurement system established by the Act. It provides for the PPO to issue model policies, to establish data requirements, and to consider complaints from the public.

JSR s6. Functions of Provincial treasuries

This section gives powers and functions to provincial treasuries to oversee and to promote effective management in the public procurement system within its province, including municipalities within a province. The provincial treasuries are also given the duty to provide information to the PPO, to intervene in procuring institutions in certain instances, and to build capacity in provincial procuring institutions.

JSR s7. Implementing the public procurement system

This key section details how a procuring institution will implement the Act through a set of documents and policies (the procurement implementation framework), a planning system,

and a monitoring/tracking process. The procurement implementation framework includes procurement documents, which themselves include tender documents that often serve as the foundation for a standard procurement in the default mode of the open competitive tendering procedure.

Procuring institutions are required by this section to take into account guidelines and model documents from the PPO and to disclose information during the procurement process in terms of processes and standards devised by the PPO. This section thus prescribes a number of duties on the procuring institutions to align and connect with the decisions of the PPO and, to some extent, of the provincial treasuries.

The section also makes clear that, as with the PFMA and MFMA, the accounting officer or accounting authority is responsible at procuring institution level for decisions made in terms of this Act. This is done to integrate public financial management with public procurement management.

JSR s8. Governance arrangements

This section requires a procuring institution to have a specified procurement decision-making process with clear authority and specific points of decision. At the discretion of the procuring institution, this clause would allow for governance of a strategic procurement process with extensive planning and multiple stages as well governance of more straightforward administrative procurement process or both. Additionally, the clause requires (for procurement via competitive and limited competitive tender procedures) a procurement committee system with documentation, evaluation, and tender committees.

JSR s9. Procurement implementation policies and standard operating procedures

This clause fleshes out the high-level requirements of s 7, mandating that procuring institutions have a comprehensive procurement implementation policy and that such policy is disclosed. Additionally, the institution must develop standard operating procedures.

JSR 9A. Procurement documents

The minimum requirements for procurement documents are laid out in this clause, in order that an institution specifies what is to be procured and how the procurement will operate and be judged. The section also allows an accounting officer to amend a contract, provided a justification is published.

JSR s9B. Contract management system

A contract management system is occupied primarily with contracts once concluded, keeping track of their terms and assisting in holding suppliers to compliance. This clause requires an institution to have and specify such a system.

JSR s9C. Data retention

This clause requires an institution to have and operative a system of procurement record keeping, with records kept for five years. Institutional record keeping enables good procurement practices.

JSR s9D. Reporting framework

This clause provides for a regular and additionally for annual reporting on the procurement function of an institution. This includes the achievement of targets in targeted

procurement as well as other matters specified by the PPO. This clause also specifies the reporting by accounting officers and authorities to executive authorities.

JSR s9E. Measures to prevent abuse of the procurement system

This clause empowers the accounting officer/authority of an institution to take measures to prevent abuse of the procurement system including investigating, rejecting recommendations, and cancelling a contract.

Part 4
Ancillary systems and actions

JSR s9F. Delivery Management

This clause covers a procuring institution engaged in projects and ensures that there is proper management, coordination and control of such projects.

JSR s9G. Infrastructure asset management system

This clause requires an institution to have an infrastructure asset management system, an important support to maintenance and to planning by an institution. It is an ancillary system with respect to procurement and its significance will vary across procuring institutions.

JSR s9H. Logistics management system

This clause requires institutions to provide for a logistics management system, a further system ancillary to procurement.

JSR s9I. Disposal of fixed or moveable assets

Another ancillary system is dispose of fixed and moveable assets. This clause identifies a set of factors the head of the institution needs to consider in disposing of moveable assets and allows for such disposal to an organ of state without a procurement process.

JSR s9J. Lease contracts

This clause provides for a form of contracting -- leasing -- appropriate for some uses of state-held property. It places conditions on the use of such property by a private entity for its own commercial use.

JSR s9K. Public private partnership transactions

This clause governs potential transaction between procuring institutions and private parties where the procurement is concerned with an institutional function of the institution, assumption of risk by the private party, or where the private party receives a benefit. The clause identifies factors to be considered to determine whether the transaction is in the best interest of the procuring institution.

CHAPTER 3
PROCUREMENT INTEGRITY

JSR s10. Codes of conduct

This clause requires officials, tenderers, suppliers, members of the Tribunal and any other person involved in a procurement process to comply with the applicable codes of conduct prescribed by the Minister.

JSR s11. Conduct of persons involved in procurement

This clause places certain outer limits on the conduct of procurement officials including a duty not to unduly influence a procurement process or create an information advantage for any person.

JSR s12. Due Diligence and Disclosure of interest regarding persons involved in procurement

This section requires officials or other persons involved in procurement or a person related to the official or that other person to disclose a direct or indirect personal interest in a procurement. This ensures the fairness of the procurement process.

JSR s14. Declarations of interest by tenderers and applicants for registration on database

In order to support the integrity of the procurement process, this clause requires tenderers and applicants for registration on a database to publish their declarations of interest as prescribed on a PPO database.

JSR s14A. Public liaison procurement officers

As a further integrity measure with efficiency benefits, this section requires procuring institutions to designate a member of their staff as a public liaison officer, serving as a primary point of contact for members of the public.

JSR s14C. Encouragement of whistleblowing in procurement

This clause entrenches a provision for incentivized whistleblowing in the procurement space, allowing for an award to persons who provide material information leading to recovery of funds in civil proceedings due to procurement fraud. This mechanism has proved successful in other jurisdictions facing fraud and organized schemes of corruption in procurement. With this clause, the state is thus required and enabled to establish rewards for whistleblowers, the rewards are at a high enough level to encourage whistleblowing because the rewards amount to a percentage of successful civil and criminal recoveries enhanced by administrative penalties.

JSR s15. Undue influence

This clause prohibits any person from unduly influencing a procurement process.

JSR s16. Debarment

This section provides for the issuing of a debarment order to tenderers or suppliers by a procuring institution under specified circumstances. A debarment order prohibits the tenderer or supplier, for the period specified in the order, from participating in procurement generally or in circumstances specified in the order. The Public Procurement Office is required to publish the names of debarred tenderers or suppliers and make such names available to procuring institutions upon request.

JSR s17. Automatic exclusion from procurement

This clause automatically excludes certain persons from participating in certain procurement processes.

JSR s18. Prohibition of certain practices

This clause empowers the PPO to identify and prohibited certain practices – often ways of subverting the purposes of the Act – after publishing the prohibition.

JSR s19. Directions inconsistent with Act

This section allows for a procurement official to question on ethical grounds an instruction given to him or her in terms of this Act. Protection is thus provided for employees who refuse to take directions inconsistent with the Bill.

CHAPTER 4 FRAMEWORK FOR PREFERENTIAL PROCUREMENT POLICY

JSR s20. Targeted treatment in procurement

This significant clause in the Bill puts into place at statutory level a regime of targeted treatment in procurement that realizes the power for preferential procurement entrenched in the Constitution, particularly in sections 217(2) and (3). This clause determines such a framework rather than empowering the Minister to prescribe such a framework. The clause thus determines the mechanisms and the categories that can be used by procuring institutions in targeted treatment. The mechanisms are defined by this clause read with section 1 and include set-asides, margins of preference, reservations, and any combination of those three. The categories of persons and of subject matter of procurement contracts are also defined. The section further provides that targeted treatment must be reasonable and legislatively determines several instances where targeted treatment is to be presumed reasonable, including reservations for goods with local content.

In this Bill, “margin of preference” means an adjustment within predetermined limits made to a tenderer’s price in terms of a prescribed system to enable a tenderer who is eligible for targeted treatment to be awarded a contract when his or her price is higher than the lowest acceptable tender within a prescribed margin. Also, “reservation” means a portion of a contract is subcontracted to suppliers who are eligible for targeted treatment or the whole or part of a contract is reserved for goods or services or any combination thereof which are eligible for targeted treatment. And “set-aside” means only tenderers who are eligible for targeted treatment in a specific procurement may submit a tender and have their tenderers evaluated.

JSR s20A. Local Production and Content

This clause provides legislative authority for the power of the Minister of Trade, Industry and Competition to designate goods of certain thresholds of local content as the subject matter of targeted procurement. This clause thus serves a similar function to one of the Preferential Procurement Policy Framework Act Regulations of 2017.

CHAPTER 5 PROCUREMENT PRACTICES, PROCEDURES AND METHODS

Part 1 Procurement practices

JSR s21. Prohibited exclusion of tenderers from participating in procurement

This clause prohibits arbitrary exclusion of tenderers from participation in procurement.

JSR s22. Rejection of a tender

This clause outlines in the statute the principles for rejecting a tender in the procurement process involving tenders, where the grounds include collusion and non-responsiveness.

JSR s22A. Negotiations prior to award

This clause puts into place statutory principles for a procuring institution to conduct negotiations prior to award, requiring such negotiations to be fair, not allowing an unfair opportunity to amend a tenderer's tender, and not resulting in a material change from the original ones of the procurement.

JSR s23. Award of a tender

This clause provides conditions for the award of tenders and additional conditions as prescribed, mandating that a compliant and most advantageous tenderer should be awarded with the contract. The section also outlines the process when a successful tenderer fails to sign the contract.

JSR s24. Provision of written reasons for decisions taken

This clause requires an institutional to provide written reasons for decisions taken in the procurement process.

JSR s25. Cancellation of procurement process

This section provides clear rules for the cancellation of a procurement process, allowing for such only if there are changed circumstances, funds are no longer available, there are no acceptable tenders, or there was a material irregularity.

JSR s26. Re-advertising of tender

This clause regulates the re-advertising of tenders in procurement processes, providing for review and modification of the procurement documents by the institution.

Part 2**Range of selection methods****JSR s26A Selection and range of procurement methods**

This key clause outlines the process by which institutions may be allowed to select the procurement method they will engage in for a procurement process. Procuring institutions that are recognized (upon application) by the Public Procurement Office to have the capacity to use the full range of procurement methods may follow the Act to do so. The default procurement method is open competitive tendering. Institutions given authority to do so may follow the Act to use seven other methods or other combinations of the eight statutorily defined methods. Procuring institutions who have not successfully applied to the Public Procurement

Office are limited to only four other methods or combinations in addition to the default of open competitive tendering procedure.

JSR s27. Open competitive procurement procedure

This clause outlines the procedures for open competitive tendering procedure – the default method a procuring institution must follow -- including public advertisement in terms of methods prescribed by the Minister.

JSR s28 Limited competitive procurement procedure

This section allows for an institution to follow limited competitive tendering procedure in certain circumstances including where the procurement is specialized and highly complex or the second stage of an open competitive tendering procedure or a rotating database of prequalified suppliers is in place or where the procurement is done in terms of a framework agreement. The justification for the use of a limited competitive tendering procedure must be published.

JSR s28A Single-source procurement procedure

This clause allows for procurement from a single source (that is to deviate from open or limited competitive tendering procedure) when certain conditions exist: a rapid response is needed due to an emergency, where only one supplier possesses the necessary experience or qualifications and other circumstances. In such instances, the procuring institution may opt to pursue single-source procurement and must publish the justification for doing so.

JSR s29B. Electronic reverse auctions

This section outlines the conditions for electronic reverse auctions, which include the condition that it is feasible to formulate a detailed description of the subject matter of the procurement.

JSR s30. Framework agreements

This section allows for procuring institutions to procure through framework agreements, which are well suited for strategic procurement. Framework agreements have similarities with term service and transversal contracts, but are different in several important aspects. The purpose of a framework agreement between a procuring institution and one or more parties is to establish the terms governing orders to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

JSR s31 Requests for quotations

This clause provides statutory principles for institutions to procure through request for quotations below a certain value threshold and under other conditions as prescribed.

JSR s32A Transversal contracts

This clause addresses a perennial topic of contestation in public procurement – the participation of procuring institutions in procuring goods and services common across government. It allows for compulsory participation upon a determination by the Minister and subject to exemption by the PPO. The clause also regulates the form of such transversal contracts.

JSR s32B Unsolicited tenders

This clause sets out certain conditions upon satisfaction of which a procuring institution may respond positively to an unsolicited offer from a tenderer to enter into an agreement.

JSR s32C Disposal methods

Disposals are where a procuring institution sells (disposes of) an asset, which usually may be moveable or immoveable property. This provision identifies the methods these disposals may be accomplished, which includes an auction procedure.

JSR s32D. Electronic procurement

This clause provides that the PPO must progressively implement electronic systems for each of the procurement methods in the Bill.

Part 3 Procurement committees

JSR s32F. Appointment of procurement committee members

This clause empowers the PFMA authority of a procuring institution to appoint procurement committee members, restricting certain classes of persons such public office bearers from such appointments and allowing for the appointment of technical experts as committee members.

JSR s32G. Composition of procurement committees

This clause specifies certain rules for the composition of procurement committees including that a procurement evaluation committee shall have at least three employees of the procuring institution and that the membership of the procurement adjudication committee must not overlap with that of the procurement specification or evaluation committees.

JSR s32H. Decisions of accounting officer or accounting authority on recommendations of procurement adjudication committee

This clause specifies three options for a procurement authority when considering a recommendation from a procurement adjudication committee: to award, to decide in terms of section 25 not to proceed, and to decide to start afresh.

JSR s32I. Relevant treasuries to be notified in event of awards deviating from recommendations

This clause requires that the PPO or a provincial treasury as relevant be notified when awards made by the accounting authority are not aligned with the recommendation of the procurement adjudication committee. Such notice is required to be within 30 days and to constitute a report with written reasons.

CHAPTER 6 DISPUTE RESOLUTION

Part 1 Reconsideration and review

- 33. Reconsideration or review of decision
- 34. Prohibition on concluding contract during reconsideration or review proceedings

Part 2

Reconsideration by procuring institution

- 35. Reconsideration by procuring institution

Part 3

Review

- 36. Establishment of Tribunal
- 37. Review of decision of procuring institution
- 38. Review of decision to debar
- 38. Composition of Tribunal
- 39. Qualification of members of Tribunal
- 40. Functions of Chairperson and Deputy Chairperson of Tribunal
- 41. Disclosure of interest by member of Tribunal
- 42. Term of office, re-appointment, termination of membership and terms and conditions of service of members of Tribunal
- 43. Finances of Tribunal
- 44. Resources of Tribunal
- 45. Conduct of persons involved in work of Tribunal
- 46. Panels of Tribunal
- 47. Tribunal rules
- 48. Review proceedings
- 49. Tribunal orders
- 50. Judicial review and enforcement of Tribunal orders

CHAPTER 7

GENERAL PROVISIONS

- 51. Investigation by Public Procurement Office
- 52. Power to enter and search premises
- 53. Warrants

53A. Access to Procurement Information and Procurement Data Standard

This clause establishes a right of access to procurement information and implements that right by instituting a data standard as part of an open contracting approach to public procurement. The data standard is supervised by the Public Procurement Office and specifies the data points that must be proactively disclosed by procuring institutions during the process of procurement transaction and the data points that must be disclosed upon request. It includes a list of data points that must be included for proactive disclosure within the data standard, including information about the directors and the legal and beneficial owners of suppliers.

53B. Credentialing individuals involved in implementing standard procurement processes, procedures, and methods

This clause allows for the training through credentialing of persons involved in implementing public procurement processes.

- 54. Generally applicable regulatory instruments to be published
- 55. Access to information held by Public Procurement Office
- 56. Non-Disclosure of procurement information

- 57. Use of technology
- 58. Function performed by another person or organisation
- 59. Delegation
- 60. Limitation of liability
- 61. Offences
- 62. Exemption
- 63. Deviation
- 64. Regulations
- 65. Transitional measures
- 66. Repeal of laws and saving
- 67. Short title and commencement

Annexure B1 below is a list of members from the JSR.

Annexure B1 – List of JSR members

Name and Surname	Organisation
1. S. Meny-Gibert	Public Affairs Research Institute
2. J. Klaaren	Public Affairs Research Institute in partnership with the University of the Witwatersrand
3. R. Brunette	Public Affairs Research Institute
4. G. Quinot	Stellenbosch University
5. R. Watermeyer.	University of Witwatersrand
6. K. Singh	Corruption Watch