

**DRAFT- NEDLAC REVISED AND UPDATED VERSION 14**  
**OCTOBER 2022 PREPARED BY JSR**

REPUBLIC OF SOUTH AFRICA

**PUBLIC PROCUREMENT BILL**

**Note: 1) This version does not yet include the Schedule but does include an explanatory memorandum on the Public Procurement Bill, 2022**

**2) The numbering of the Sections corresponds as far as possible with that used in the 7 October NEDLAC version of the Bill**

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

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(MINISTER OF FINANCE)

## **BILL**

**To regulate public procurement; to prescribe a framework within which preferential procurement policy must be implemented; and to provide for matters connected therewith.**

### **PREAMBLE**

**WHEREAS** the Constitution stipulates that the contracting of goods and services by organs of state in the national, provincial and local spheres of government, and by other institutions identified in national legislation, must occur in accordance with a system which is fair, equitable, transparent, competitive and cost-effective;

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

**AND WHEREAS** the Constitution provides that national legislation must:

- promote an efficient administration;
- promote the efficient, effective and economic use of resources in an accountable, ethical and development orientated manner; and
- promote the provision of timely, accessible and accurate information to the public.

**AND WHEREAS** the Constitution requires the environment to be protected for the benefit of present and future generations through reasonable legislative and other measures

**AND WHEREAS** 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;

**AND IN ORDER TO** create a single regulatory framework consistent with the Constitution that:

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

**AND RECOGNISING** that legislation regulating procurement in the public sphere is fragmented and that there is an urgent need for a specialised authority empowered to drive coherently the modernisation of the public procurement system around the above Constitutional principles and provisions as well as those regulatory principles contained in this Bill

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

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## CHAPTER 1

### DEFINITIONS, OBJECTS, APPLICATION AND ADMINISTRATION OF ACT

#### Definitions

- 1.** (1) In this Act, unless the context indicates otherwise—
- “accounting authority”** means an accounting authority as defined in section 1 of the Public Finance Management Act;
- “accounting officer”** means—
- (a) in relation to a department or constitutional institution, the accounting officer as defined in section 1 of the Public Finance Management Act;
  - (b) in relation to a municipality, the municipal official referred to in section 60 of the Municipal Finance Management Act; or
  - (c) in relation to a municipal entity, the official of the entity referred to in section 93 of the Municipal Finance Management Act;
  - (d) in relation to an institution of higher learning, the principal as defined in section 1 of the Higher Education Act;
  - (e) in relation to any other institution of any other institution or category of institutions included in the definition of “organ of state” in section 239 of the Constitution and recognised by the Minister by notice in the *Government Gazette* as an institution or category of institutions to which this Act applies, the person named in such notice;
- “contract”** means a contractual agreement concluded as result of a procurement process.
- “Constitution”** means the Constitution of the Republic of South Africa, 1996.
- “credentialing”** means the process as provided for in Section 53B of providing, through examinations and assessment, a certificate that shows that an individual holds the defined and standardized competencies in their area of training and assessment to implement discrete aspects of this Act.
- “days”** means any days other than Saturdays, Sundays or public holidays as defined in the Public Holidays Act, 1994 (Act No. 36 of 1994);
- “data standard”** means a document which defines the structure and meaning of data which is required in terms of the Act to be disclosed at prescribed points in the procurement cycle on the online portal
- “decision”** means—
- (a) a decision by a procuring institution, the Public Procurement Office or a provincial treasury in terms of this Act (herein referred to as “the decision”);
  - (b) an omission to take the decision within the period prescribed or specified in this Act;
  - (c) an omission to take the decision within a reasonable period, if this Act does not prescribe or specify a period;
  - (d) an action taken as a result of the decision; or
  - (e) an omission to take action as a result of the decision within the prescribed period or if not prescribed, within 30 days;
- “donor”** means a foreign party to a project established as a result of an international donor funding agreement to which the Government of the Republic is a party, to supply goods, infrastructure, or services to beneficiaries;

**“emergency”** an event which is unexpected and requires immediate action to alleviate one or more of the following:

- (a) human injury, death or suffering or deprivation of human rights;
- (b) serious damage to property or financial loss;
- (c) livestock suffering or death;
- (d) serious environmental damage or degradation; or
- (e) interruption of essential services.

**“infrastructure”** includes construction and other works and information technology systems;

**“limited competitive procurement procedure”** means the procedure described in subsection 28(1);

**“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;

**“member of the Tribunal”** means a member of the Tribunal referred to in section 38;

**“Minister”** means the Cabinet member responsible for financial matters;

**“municipal entity”** has the meaning assigned to it in section 1 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000);

**“Municipal Finance Management Act”** means the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003);

**“municipality”** when referred to as—

- (a) a corporate body, means a municipality as described in section 2 of the Local Government: Municipal Systems Act, 2000; or
- (b) a geographic area, means a municipal area determined in terms of the Local Government: Municipal Demarcation Act, 1998 (Act No. 27 of 1998);

**“national security”** includes the protection of the people of the Republic and the territorial integrity of the Republic against—

- (a) the threat of use of force or the use of force;
- (b) foreign acts directed at undermining the constitutional order of the Republic;
- (c) terrorism or terrorist related activities;
- (d) espionage;
- (e) exposure of a state security matter with the intention of undermining the constitutional order of the Republic;
- (f) exposure of economic, scientific or technological secrets vital to the Republic;
- (g) sabotage; and
- (h) serious violence directed at overthrowing the constitutional order of the Republic;
- (i) acts directed at undermining the capacity of the Republic to respond to the use of, or the threat of the use of, force and carrying out of the Republic’s responsibilities to any foreign country and international organisation in relation to any of the matters referred to in this definition, whether directed from, or committed within, the Republic or not, but does not include lawful political activity, advocacy, protest, or dissent;

**“National Treasury”** means the National Treasury established by section 5 of the Public Finance Management Act;

**“official”** means an employee of a procuring institution;



**“online portal”** means at least one of the central online portals operated by the PPO;  
**“open competitive procurement procedure”** means the procedure described in subsection s 27(1);

**“organ of state”** has the meaning assigned to it in section 239 of the Constitution;

**“panel”** means a panel of the Tribunal constituted in terms of section 46;

**“panel member”** means a member of a panel;

**“prescribed”** means prescribed by regulation in terms of section 64;

**“project”** means a temporary endeavour to achieve one or more defined objectives through one or more contracts;

**“proactively disclose information”** means to make information automatically available within the meaning of section 15 of the Promotion of Access to Information Act 2 of 2000 and to publish such information on an online portal;

**“procurement”** means the process which creates, manages and fulfils contracts which are concluded following the application of a selection method in Part 2 of Chapter 5;

**“procurement document”** means a document used to solicit tenders from the market and / or to conclude a contract;

**“procuring institution”** means an institution referred to in section 3(1);

**“Promotion of Administrative Justice Act”** means the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000);

**“provincial treasury”** means a provincial treasury established by section 17 of the Public Finance Management Act;

**“Public Finance Management Act”** means the Public Finance Management Act, 1999 (Act No. 1 of 1999);

**“public office bearer”** means—

- (a) a member of Cabinet or a Deputy Minister;
- (b) a member of the National Assembly;
- (c) a permanent delegate to the National Council of Provinces;
- (d) a member of an Executive Council;
- (e) a member of a provincial legislature;
- (e) a judicial officer envisaged in section 174 of the Constitution;
- (f) a member of a Municipal Council;
- (g) a member of the National House of Traditional and Khoi-San Leaders;
- (h) a member of a provincial house of Traditional and Khoi-San leaders;

**“Public Procurement Office”** means the Public Procurement Office established by section 4;

**“related”** means persons who are connected to one another in any manner contemplated in section 2(1)(a) to (c), read with section 2(2), of the Companies Act, 2008 (Act No. 71 of 2008);

**“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;

**“risk”** means exposure to the chance of loss, harm or failure to achieve objectives;

**“set-aside”** means only tenderers who are eligible for targeted treatment in a specific procurement may submit a tender and have their tenders evaluated;

**“single-source procurement procedure”** means the procedure described in subsection s 29A(1);

**“supplier”** means a party that enters into a procurement contract with a procuring institution and includes a party offering to do so;

**“tender”** means a written offer for the provision of goods, services or disposals or any combination thereof

**“tenderer”** means any person or joint venture that submits a tender in terms of this Act;

**“township”** means an urban living area that any time from the late 19<sup>th</sup>-century until 27 April 1994, was reserved for black people, including areas developed for historically disadvantaged individuals post 27 April 1994;

**“transversal term contract”** means a contract arranged by the relevant treasury for procurement that is required by one or more ‘procuring institutions’;

**“treasury”** means the National Treasury or a provincial treasury;

**“Tribunal”** means the Public Procurement Tribunal established by section 36;

**“Tribunal rules”** means rules made in terms of section 47;

**“this Act”** includes the regulations, codes of conduct and data standards made in terms of this Act but does not include the procurement implementation policy of section 9;

**“youth”** has the meaning assigned to it in section 1 of the National Youth Development Agency Act, 2008 (Act No. 54 of 2008).

(2) Any decision, approval, determination, instruction, notification, notice, report or request in terms of this Act must be in writing.

## **Objects of Act**

2. (1) The objects of this Act are to—
- (a) define, provide for, and regulate the system for public procurement as contemplated in section 217 of the Constitution;
  - (b) prescribe a framework as contemplated in section 217(2) and (3) of the Constitution in order to define, provide for, and regulate (i) categories of preference in the allocation of contracts and (ii) the protection and advancement of persons and categories of persons disadvantaged by unfair discrimination.
  - (c) provide for powers and authority for the Minister, National and Provincial Treasuries, and the Public Procurement Office to exercise regulatory roles and responsibilities in the national, provincial, and local spheres of government; and
  - (d) provide for uniform treasury norms and standards for all procuring institutions as contemplated in section 216(1), read with section 217, of the Constitution to ensure transparency and expenditure control in the implementation of the procurement system.

## **Purposive Interpretation**

2A. (1) This Act defines the system for public procurement as contemplated in section 217 of the Constitution and is to be purposively interpreted to promote —

- (a) fairness in public procurement by
  - (i) ensuring equal treatment of all suppliers to procuring institutions;

- (ii) advancing ethical conduct;
  - (iii) combating corruption by all role players;
  - (iv) providing a framework for preferential procurement;
  - (iv) providing for effective and expedited dispute resolution of procurement related decisions; and
  - (v) introducing enforcement and appropriate sanctions for transgressors of procurement rules, norms and standards;
- (b) equitable public procurement by
  - (i) ensuring that public procurement is sustainable and has the most positive environmental, social and economic impacts possible over its entire life cycle;
  - (ii) ensuring the protection and advancement in public procurement of persons disadvantaged by unfair discrimination;
  - (iii) stimulating economic growth by promoting—
    - (aa) local manufacturing;
    - (bb) innovation; and
    - (cc) investment;
  - (iv) promoting the protection of the environment for the benefit of present and future generations; and
  - (v) ensuring that the public procurement system is reasonable, fair and just;
- (c) transparency in public procurement by
  - (i) ensuring accountability for decisions;
  - (ii) making procurement data and information publicly available, and usable, through an electronic system designed specifically for this purpose;
  - (iii) providing tenderers, suppliers and the public with timely, accessible and accurate information; and
  - (iv) requirements for engaging in the public procurement system are presented to tenderers in a clear, unambiguous, comprehensive and understandable manner;
- (d) competitive public procurement by
  - (i) providing for open competition as the default procurement method;
  - (ii) ensuring that contracts are concluded at open market prices; and
  - (iii) creating a range of procurement methods to facilitate appropriate levels of competition within particular procurement contexts to attain cost effective outcomes; and
- (e) cost-effectiveness in public procurement by
  - (i) focussing decision making on the attainment of value for money through the evaluation of relevant costs and benefits together with the assessment of risks
  - (ii) ensuring cost-effective project outcomes in the use of public funds;
  - (iii) standardising processes, procedures and methods with sufficient flexibility enabling best-value outcomes in respect of quality, timing and cost and least resources to effectively manage and control procurement processes.
  - (iv) enabling accounting officers and accounting authorities to efficiently manage project risks; and

- (v) improving efficiency in procurement by streamlining procurement processes including that achieved through the use of technology.

### **Application and administration of Act**

**3.** (1) This Act applies to—

- (a) a department as defined in section 1 of the Public Finance Management Act;
- (b) a constitutional institution listed in Schedule 1 to the Public Finance Management Act;
- (c) a municipality or a municipal entity;
- (d) a public entity listed in Schedule 2 or 3 to the Public Finance Management Act;
- (e) public higher education institution as defined in the Higher Education Act 101 of 1997; and
- (f) any other institution or category of institutions included in the definition of “organ of state” in section 239 of the Constitution and recognised by the Minister by notice in the *Government Gazette* as an institution or category of institutions to which this Act applies.

(2) Despite subsection (1), Chapter 4 of this Act applies to Parliament and provincial legislatures.

(3) This Act applies—

- (a) to all procurement carried out by a procuring institution, including procurement through donor funding; and
- (b) any person who submits a tender or has been awarded a contract.

(4) In the event of a conflict between a provision of this Act and—

- (a) a provision of any other legislation, the provision of this Act prevails;
- (b) a procurement rule of a donor, that rule prevails; or
- (c) a provision of an international agreement envisaged in section 231 of the Constitution, the provision of that agreement prevails.

(5) The Minister is responsible for the administration of this Act.

## CHAPTER 2

### A PUBLIC PROCUREMENT OFFICE, PROVINCIAL TREASURIES AND PROCURING INSTITUTIONS

#### *Part 1*

#### *Public Procurement Office*

#### **Establishment of Public Procurement Office**

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

(2) The Head and other officials of the Public Procurement Office must perform functions in terms of this Act impartially, without fear, favour or prejudice on an informed basis.

#### **General functions of Public Procurement Office**

5. (1) The Public Procurement Office must, in accordance with this Act—

- (a) promote compliance with this Act by procuring institutions;
- (b) promote and implement necessary measures to maintain the integrity of the public procurement system;
- (c) guide and support officials and procuring institutions to ensure compliance with this Act and in doing so
  - (i) provide advice and assistance to procuring institutions; and
  - (ii) ensure the appropriate and sector specific professional development, training and credentialing of officials involved in procurement and the delivery management of projects
- (d) establish or recognise credentialing schemes which are operated in accordance with the principles and requirements for a body certifying persons against specific requirements as provided for in Section 53B;
- (e) develop and implement measures to ensure transparency of procurement, including the establishment of a system for the proactive disclosure of data and documents by procuring institutions according to a common data standard and on online portals including a central online portal;
- (e) promote standardisation of procurement policies, methods and procedures, forms of contract and procurement documents;
- (f) monitor and integrate innovations and learning in procurement from procuring institutions towards the modernisation of the procurement system;
- (g) promote the use of technology in procurement;
- (h) monitor the implementation of this Act by procuring institutions;
- (i) intervene by taking appropriate steps to address material breach of this Act by a procuring institution;
- (j) establish and maintain a national debarment register in terms of section 16 and publish the names of debarred persons;
- (k) create, maintain and publish one or more central databases and online portals as envisaged in this Act;
- (l) request procuring institutions to provide information relating to procurement in terms of this Act in the format determined by the Public Procurement Office;

- (m) ensure cooperation and coordination with and among organs of state on all procurement related matters;
- (n) ensure effective procurement within the infrastructure sector by regularly consulting with, among others, the:
  - (i) Council for the Built Environment established in terms of the Council for the Built Environment Act of 2000 (Act 43 of 2000) on public procurement matters which have an impact on the built environment;
  - (ii) Construction Industry Development Board established by the Construction Industry Development Board Act of 2000 (Act 38 of 2000) on public procurement matters which have an impact on the construction industry; and
  - (iii) the Presidential Infrastructure Coordinating Commission established in terms of the Infrastructure Development Act of 2014 (Act 23 of 2014) on matters which are related to the national infrastructure plan and its implementation; and
- (o) promote coherence of the procurement system by monitoring, engaging with and harmonising changes effected to the procurement system by the courts; and
- (p) perform other duties imposed by this Act.

(2) The Public Procurement Office may, in accordance with this

Act—

- (a) determine, issue, review and amend model policies and associated operating procedures and procurement documents for different categories of institutions and different categories of procurement;
- (b) establish data retention and reporting requirements applicable to procuring institution including the format for such reporting;
- (e) issue non-binding guidelines to assist procuring institutions with the implementation of this Act or any other procurement related matter;
- (f) declare certain procurement practices as undesirable;
- (g) review the procurement policy applied by a procuring institution;
- (h) consider complaints by a member of the public regarding procurement; and
- (i) exercise other powers conferred by this Act.

(3) The Public Procurement Office must, in respect of procuring institutions in the national sphere of government—

- (a) exercise oversight over the implementation of the procurement function; and
- (b) promote and enforce effective management and transparency in respect of the procurement function.

(4) The Public Procurement Office shall consult and be advised by a panel of experts who have collectively have expertise covering the different categories of procurement encountered in the public procurement system and appropriate sector or industry expertise. The Public Procurement Office shall constitute the panel following a call for nominations from procuring institutions. The term of the panel shall not exceed 3 years.

## **Part 2**

### **Provincial treasuries**

#### **Functions of provincial treasuries**

6. (1) A provincial treasury must—

- (a) within its provincial administration:
    - (i) exercise oversight over the implementation of the procurement function by a procuring institution; and
    - (ii) promote and enforce effective management and transparency in respect of the procurement function of procuring institutions;
  - (b) intervene by taking appropriate steps to address a material breach of this Act by a procuring institution within its provincial administration;
  - (c) provide any information required by the Public Procurement Office in terms of this Act;
  - (d) perform other duties imposed by this Act.
- (2) A provincial treasury, within its provincial administration, may—
- (a) issue non-binding guidelines to assist procuring institutions with the implementation of this Act or any other procurement related matter;
  - (b) assist procuring institutions in building their capacity for efficient, effective and transparent procurement management;
  - (c) review the procurement policy applied by a procuring institution;
  - (d) exercise other powers conferred by this Act.
- (3) A provincial treasury may, after consultation with the Public Procurement Office, investigate the procurement policy applied by a procuring institution which is a municipality or municipal entity in its province.

### **Part 3** ***Procuring institutions***

#### **Implementing the public procurement system**

7. (1) A procuring institution must implement the public procurement system provided for in the Act through —
- (a) the institution's procurement implementation framework comprising:
    - (i) an implementation policy and associated standard operating procedures;
    - (ii) governance arrangements; and
    - (iii) procurement documents.
  - (b) an effective and efficient planning system which:
    - (i) provides for the identification and analysis of the procurement needs of the institution;
    - (ii) ensure that procurement needs support the strategic and operational commitments of the institution;
    - (iii) integrates provisions for procurement related expenditure as part of the institution's operating expenses and capital projects into the budgeting process of the institution; and
    - (iv) considers the total cost of owning an asset over its useful life from its acquisition to its disposal including its acquisition, operating, maintenance and disposal costs as well as indirect costs such as those associated with environmental and social impacts.
  - (c) a suitable means for the tracking of the progress of projects, the monitoring of performance and at least quarterly reporting to the accounting officer or accounting authority as the case may be, and where relevant, to a

municipality.

(2) The procurement implementation framework referred to in subsection (1) must —

- (a) be consistent with the objects, purposes and provisions of this Act and any other legislation prescribing a framework for the planning or budgeting of activities to which the procurement implementation framework applies;
- (b) enable risks which threaten project outcomes to be appropriately and proactively mitigated;
- (c) enable expenditure to be readily accounted for;
- (d) be capable of being audited;
- (e) ensure that what is procured:
  - (i) aligns with institutional mandates and strategic priorities; and
  - (ii) is affordable in terms of existing budgets and future budgetary projections after considering life cycle costs; and
- (f) timeously disclose data and information at prescribed disclosure points within the procurement cycle on the central online portal in terms of the data standard.

(3) A procuring institution must—

- (a) conduct procurement in accordance with the provisions of this Act;
- (b) take into account guidelines and model documents issued by the Public Procurement Office in the development of its implementation framework and the implementation of the public procurement system;
- (c) refrain from engaging in procurement practices which the Public Procurement Office have prohibited in terms of this Act;
- (d) compile and revise as necessary an annual procurement plan of all planned procurement which is aligned to the budget of the institution and disclose such plans on the online portal by a date determined by the Public Procurement Office;
- (e) formulate appropriate procurement strategies and tactics for projects aimed at achieving value for money and cost effective project outcomes taking into account risks, policy objectives and the total cost of ownership or the life cycle of that which is procured;
- (g) develop suitable procurement documents and, where possible, make use of suitable standard forms of contract and standard component documents;
- (h) clearly state the methodology and evaluation criteria to be used in the evaluation of tenders in procurement documents, evaluate tenders strictly in accordance with such methodologies and criteria and document the outcome of the evaluation in each tender in terms of the criteria in an evaluation report for record and audit purposes;
- (i) following the award of a contract, confirm compliance with contractual requirements, manage contracts in terms of the agreed administrative procedures including those dealing with risk events for which the procuring institution is at risk and close out contracts;
- (j) disclose procurement information and data at prescribed points in the procurement cycle on the online portal in accordance with the provisions of the data standard or which may be required by a relevant treasury and in the format specified by such treasury; and
- (k) take all necessary steps to prevent non-compliance with this Act.

(4) The accounting officer or accounting authority, as the case



may be—

- (a) is responsible for making decisions on behalf of the procuring institution in terms of this Act;
- (b) must in a manner that is consistent with the Public Finance Management Act, 1999, the Local Government: Municipal Finance Management Act, 2003 or the Higher Education Act, 1997, as the case may be;
  - (i) establish clear delegations of authority to enable timeous decision-making and individual and institutional accountability for the delivery of projects; and
  - (ii) allocate roles and duties associated with the full procurement cycle; and
  - (iii) must approve the procuring institution's procurement implementation policies and associated standard operating procedures.
- (5) Where a procuring institution fails to meet or exceed objective indicators of capacity, performance, compliance, and transparency determined by the Public Procurement Office, that Office shall designate that institution for procurement intervention and the institution must implement the public procurement system provided for in the Act in accordance with a procurement intervention implementation framework prescribed by the Public Procurement Office.

### **Governance arrangements**

**8.** (1) A procuring institution must identify decision points that form the major boundaries to activities within the different stages of the procurement system to provide an opportunity to—

- (a) authorise the proceeding with an activity within a process, or commencing of the next process;
- (b) confirm conformity with requirements before completing processes; or
- (c) provide information which creates an opportunity for corrective action to be taken to change the performance of the activity to bring it closer to what was planned or to change the plan so that it more closely reflects the changed situation brought about by the departure from the plan.

(2) The procuring institution must establish a procurement committee system as part of the institution's governance arrangement to oversee all competitive and restricted tenders of a procurement process above a prescribed threshold which consists of at least a—

- (a) a procurement documentation committee to approve procurement documents including the evaluation criteria contained therein,
- (b) an evaluation committee to evaluate submissions strictly in accordance with the provisions of the approved procurement documents; and
- (c) a tender committee to consider any residual risks associated with the award of a contract and approve the recommendations of the evaluation committee if the report is complete and the reasons for the elimination of tenderers are valid and reasonable.

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

### **Procurement implementation policies and standard operating procedures**

**9.** (1) A procuring institution must—

- (a) develop and document procurement implementation policies to govern the implementation of the public procurement system for the procuring institution which includes preferential treatment within the framework of section 20 and covers the entire procurement cycle as well as any associated upstream and downstream processes such as those relating to planning and budgeting, asset management and logistics management; and
- (b) disclose the latest version of its procurement implementation policy on a central online portal together with its associated standard operating procedures.

(2) The procurement implementation policy identified in subsection (1) must, within the framework of this Act, as a minimum—

- (a) determine the procuring institution's procurement goals including those relating to the utilisation and leveraging of procurement to support its policy objectives and how such goals will be measured, quantified, verified and monitored for compliance;
- (b) establish the governance arrangements for the exercise of its procurement functions and the management of procurement processes;
- (c) allocate responsibilities for taking the necessary actions at decision points within processes;
- (d) identify the procurement procedures and methods which may be applied to different categories of procurement;
- (e) identify the nature of contracts where the term of the contracts exceeds 3 years and stipulate the maximum term which may be applied to such contracts;
- (f) establish requirements for recording, disclosing and reporting;
- (g) establish ethical standards which are consistent with the code of conduct contained in this Act; and
- (h) identify the standard forms of contract and industry standards that may be incorporated by reference in procurement documents;

(3) Standard operating procedures, which may be based on national and international standards which are consistent with objectives of this Act, must be developed to—

- (a) execute specific tasks or to react to specific situations, processes or sets of circumstances; and
- (b) provide institutional rules and guidelines to enable the policy to be efficiently and effectively implemented.

## **Procurement documents**

- 9A.** (1) Procurement documents must as relevant—
- (a) require tenderers to submit particulars sufficient for the procuring institution to evaluate their tenders, to establish their credentials and to assess their capabilities and capacities to perform the contract;
  - (b) set out, in a clear and unambiguous manner, the criteria by which tenders are to be evaluated and what a tender must do to submit a responsive tender;
  - (c) define the risks, liabilities and obligations of the parties to the contract, the procedures for the administration of the contract and how the supplier is to be remunerated in terms of the contract, and

- (d) define the nature, quality and quantity of goods, services or disposals or any combination thereof to be provided in the performance of the contract.
  - (2) Procurement documents may
    - (a) include objective criteria in the evaluation of tenders which are justifiable in terms of projected procurement outcomes, enable the most economically advantageous offer to be established and enable submissions to be compared and assessed;
    - (b) include provisions for:
      - (i) a sum of money or securities to be submitted or placed in the hands of a third party to guarantee completion and recovery of the sums which the supplier is recognized as owing under the terms of the contract; and
      - (ii) the entitlement of a supplier to claim interest on late payment
  - (3) The accounting officer or accounting authority, as the case may be, may amend a contract provided that:
    - (a) such amendments do not materially expand the scope of the contract or avoid a tendering process; and
    - (b) the details of the amendment together with the justification for the amendment are promptly published on the online portal in accordance with s 53A.

### **Contract management system**

- 9B.** (1) The procuring institution must ensure that the institution has and maintains an effective and efficient contract management system that must be aimed at ensuring that -
- (a) all contracts for the procurement of goods, services, disposals and any combination thereof, are recorded in a contract register;
  - (b) contracts are monitored and regularly reported on;
  - (c) contracts are administered in accordance with the terms of the contract and performance is enforced; and
  - (d) appropriate measures are taken in the case of non-performance or underperformance.
- (2) The final contract amount together with the reasons for any increase in contract value must be disclosed on the online portal in accordance with s 53A.

### **Data retention**

- 9C.** (1) A procuring institution must implement a system of record keeping of all records pertaining to all its procurement.
- (2) The record keeping system referred to in subsection (1) must include an accessible and searchable database in accordance with s 53A in which every record can be identified and linked to the particular procurement and the category of procurement instructed by the Public Procurement Office it relates to and in which all records pertaining to a particular procurement can be identified.
- (3) All records must be kept for a minimum of five years after the procurement contract had been fully executed or the procurement cancelled.

## Reporting framework

**9G.** (1) A procuring institution must report on its procurement activities in categories of procurement and, where relevant, in a format and within such timeframes as prescribed consistent with the National Archives and Records Service of South Africa Act, 1996 (Act 43 of 1996) and any other applicable legislation.

(2) A procuring institution must at least annually report to the relevant treasury on—

- (a) an evaluation of its performance in respect of the particular year's procurement plan;
- (b) the achievement of its targets in respect of targeted procurement as set in its own annual procurement plan;
- (c) all single source procurement and all deviations from open or limited procurement procedures;
- (d) on all complaints received and all investigations conducted in relation to procurement;
- (e) a tender other than the one recommended by an evaluation committee and the reasons for doing so unless a different tender was approved to rectify an irregularity; and
- (f) on any other matter as required by the Public Procurement Office.

(3) In order to facilitate monitoring the performance of a procuring institution against its annual procurement plan, the accounting officer or accounting authority of a procuring institution must report to his or its executive authority quarterly regarding progress with the procurement plan.

## Measures to prevent abuse of the procurement system

**9E.** The accounting officer or accounting authority of a procuring institution as the case may be must—

- (a) take all reasonable steps to prevent abuse of the procurement system;
- (b) take all reasonable steps to ensure that no person interferes with the procurement system or is able to amend or tamper with any tender or contract;
- (c) investigate any allegation against an official or other role player of corruption, improper conduct or failure to comply with the procurement system, and when justified—
  - (i) take steps against that official or other role player and inform the relevant treasury of those steps; and
  - (ii) report to the South African Police Service any conduct that may constitute a criminal offence;
- (d) reject a recommendation for the award of a tender if the recommended tender has made a misrepresentation or submitted false documents in competing for a particular contract;
- (e) reject a recommendation for the award of a tender if the recommended tender has been convicted of any offence involving corruption, fraud, collusion or coercion in competing for any contract; or
- (f) cancel a contract awarded to a supplier—
  - (i) if it becomes aware that the supplier has made a misrepresentation,

- submitted falsified documents or has been convicted of any involving corruption fraud, collusion or coercion in competing for a particular tender or during the execution of the contract; or
- (ii) if any employee or other role player was convicted of any involving corruption, fraud, collusion or coercion act during the procurement process or during the execution of the contract.

## **Part 4 Ancillary systems and actions**

### **Delivery management**

- 9F.** A procuring institution engaged in projects must—
- (a) put in place effective governance processes which ensure that:
- (i) there is proper management and control of projects including demand management;
  - (ii) all the various parts of the institution which play a role in project delivery work together in a coordinated, efficient and effective manner; and
  - (iii) project delivery is, wherever possible, managed as a long term and strategic system of individual yet interlinked projects aimed at meeting the institution's objectives;
- (b) establishes clear delegations of authority to enable timeous decision-making and individual and institutional accountability for project delivery;
- (c) provides for the assignment of single point accountability to a suitably qualified and experienced individual to provide executive level leadership in the planning, specifying, procuring and overseeing of project delivery;
- (d) provides control frameworks which include decision gates to enable risks to be appropriately and proactively managed and render the system capable of being audited;
- (e) there is a separation in duties from those:
- (i) accounting for the procuring institution's expenditure and those certifying payments in accordance with the provisions of a contract; and
  - (ii) managing and accounting for the procuring institutions expenditure and those managing and accounting project expenditure

### **Infrastructure and moveable asset management system**

**9G.** (1) A procuring institution must have and maintain an infrastructure and moveable asset management system if it has the responsibility to act as the caretaker of infrastructure and moveable assets throughout its lifecycle. Such a system must seek to effectively, efficiently, economically and sustainably utilise infrastructure and moveable assets for which the institution is responsible for to serve the current and emerging needs of the institution.

(2) The infrastructure and moveable asset management system referred to in subsection (1) must be aimed at—

- (a) the progressive development of the system to incorporate an infrastructure and moveable asset register and procedures for the identification of critical infrastructure and moveable assets needs enabling reliable, consistent and updated information to inform optimised decision making;

- (b) the consideration of the entire lifecycle (service life) of such assets and the associated costs, from the identification of a need through to the final decommissioning or disposal of the asset;
- (c) ensuring that life-cycle infrastructure and moveable asset management planning is carried out for large individual assets or groups of infrastructure and moveable assets, which include operation, maintenance and refurbishment requirements; and
- (d) following a risk based approach to achieve a balance between cost, risk and performance.

### **Logistics management system**

**9H.** (1) A procuring institution must as necessary have and maintain an efficient and effective logistics management system which sets inventory levels, places orders, receives, stores and distributes goods and expedites orders.

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

- (a) effective control mechanisms are in place:
  - (i) to prevent theft, losses, wastage and misuse; and
  - (ii) to maintain stock levels at an optimum and economic level;
- (b) the logistics management system is regulated by institutional standard operating procedures on at least the following matters:
  - (i) the requisitioning of goods or services;
  - (ii) the placing of orders for goods or services;
  - (iii) the receipt of goods;
  - (iv) the distribution of goods;
  - (v) the preparation of payment vouchers;
  - (vi) the reconciliation of asset and inventory records with financial accounts; and
  - (vii) inventory management including the measurement of inventory for reporting in the annual financial statements and associated disclosures; and
- (c) the reliability of suppliers is monitored, at least in relation to:
  - (i) compliance with delivery periods;
  - (ii) quantity and quality of goods supplied; and
  - (iii) actions taken against non-performing or underperforming suppliers.

### **Disposal of fixed or moveable assets**

**9I.** (1) Before the disposal of any fixed or movable asset, the accounting officer or accounting authority as the case may be of a procuring institution must determine the appropriate methods and options for disposal of surplus, redundant and under-performing assets after at least taking the following into account—

- (a) the nature and quantity or volume of the movable asset to be disposed of;
- (b) the potential market value or trade-in price of the fixed or movable asset;
- (c) the value of the component parts of the fixed or movable asset;

- (d) whether the fixed or movable asset can be used to support any other Government programme;
- (e) environmental considerations relating to the type of fixed or movable asset; and
- (f) market conditions.

(2) The accounting officer or accounting authority of a procuring institution may transfer any fixed or movable asset free of charge to any organ of state and such transfer shall not be considered a procurement.

(3) The disposal or transfer of fixed or movable assets by a procuring institution in terms of this subsection is subject to any legislation regulating the disposal or transfer of assets of its kind.

### **Lease contracts**

**9J.** (1) An accounting officer or accounting authority of a procuring institution, as the case may be, may enter into a lease contract between a procuring institution and a private party in terms of which the private party acquires the use of state property for its own commercial purposes, provided that—

- (a) where the procuring institution is a municipality, it has complied with the Local Government: Municipal Finance Management Act 2003 and the Municipal Asset Transfer Regulations prior to concluding any lease contract;
- (b) the lease contract contains a description of the state property, the uses, if any, to which that state property has been subject and a description of the types of use that a private party may legally subject the state property to;
- (c) the rentals for immovable state property (excluding state housing for officials and political office bearers) must be at market-related tariffs, unless the relevant treasury approves otherwise. No state property may be let free of charge without the prior approval of the relevant treasury; and
- (d) rentals received by the procuring institution under the lease contract are treated as revenue in accordance with the Local Government: Municipal Finance Management Act, 2003 and the Public Finance Management Act, as applicable.

(2) The accounting officer or accounting authority as the case may be must review, at least annually when finalising the budget, all fees, charges, rates, tariffs or scales of fees or other charges of state property let under a lease contract to ensure sound financial planning and management.

(3) The implementation of a lease contract involving the use of state property by a private party does not divest the accounting officer or accounting authority of the procuring institution concerned of the responsibility for ensuring that such state property is appropriately protected against forfeiture, theft, loss, wastage and misuse.

### **Public private partnership transactions**

**9K.** (1) An accounting officer or accounting authority of a procuring institution, as the case may be, may subject to the relevant treasury approval, enter into a public-private partnership transaction between a procuring institution and a private party in terms of which—

- (a) the private party performs an institutional function or service on behalf of the procuring institution;
- (b) the private party assumes substantial technical, financial and operational risk in relation to the performance of such institutional function or service; and
- (c) receives a benefit for doing so either by way of a consideration to be paid by the procuring institution or charges or fees to be collected by the private party from users or customers of a service provided to them or a combination thereof.

(2) To determine whether a proposed public-private partnership transaction in subsection (1) is in the best interest of the procuring institution, the procuring institution must undertake a feasibility study that -

- (a) explains the strategic and operational benefits of the proposed public-private partnership transaction for the institution in terms of -
  - (i) its strategic objectives; and
  - (ii) government policy;
- (b) describes in specific terms the nature of the institutional function concerned and the extent to which that function, both legally and by nature, can be performed by a private party;
- (c) in the case of a proposed public-private partnership transaction in respect of which the procuring institution will incur financial commitments, demonstrates the affordability of the proposed transaction and the security or Government support required to finance the transaction;
- (d) sets out the proposed allocation of financial, technical and operational risks between the procuring institution and the private party;
- (e) demonstrates the anticipated value for money to be achieved by the proposed transaction; and
- (f) explains the capacity of the procuring institution to procure, implement, manage, enforce, monitor and report on the proposed transaction.

(3) The feasibility study referred to in subsection (2) must be submitted to the relevant treasury for approval. The procuring institution may not proceed with the implementation phase of the proposed commercial transaction without the prior approval of the relevant treasury.

(4) If at any time after treasury approval has been issued in terms of subsection (3), but prior to the implementation of the public-private partnership transaction, any assumptions in the feasibility study for the proposed public-private partnership transaction are materially revised, including those concerning affordability, value for money and substantial technical, operational and financial risk transfer, the accounting officer or accounting authority of the procuring institution must immediately—

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

(5) The implementation of an agreement following approval granted in subsection (3) involving the performance of an institutional function does not divest the accounting officer or accounting authority of the procuring institution concerned of the responsibility for ensuring that such institutional function is effectively and efficiently performed in the public interest.



## **CHAPTER 3 PROCUREMENT INTEGRITY**

### **Codes of conduct**

**10.** (1) An official, a member of accounting authority, a procurement committee established in terms of Section 8(2) or the Tribunal, a tender or a supplier, involved in procurement in terms of this Act, must comply with the prescribed code of conduct.

(2) Any contravention of the prescribed code of conduct by an official or a member of accounting authority, a procurement committee or the Tribunal constitutes misconduct in terms of this Act.

### **Conduct of persons involved in procurement**

**11.** An official or a member of accounting authority, procurement committee and the Tribunal involved in procurement in terms of this Act must—

- (a) exercise powers and perform duties impartially and with the degree of care and diligence that a reasonable person would exercise in similar circumstances;
- (b) not use their position, or information obtained because of their position, improperly to gain an advantage for themselves or someone else or cause a detriment to a procuring institution;
- (c) not interfere with or exert undue influence on any person involved in procurement;
- (d) avoid conflict of interest; and
- (e) report and disclose information relating to procurement to the Public Procurement Office and the public, in the manner provided for in this Act.

### **Due diligence and disclosure of interest regarding persons involved in procurement**

**12.** (1) In the course of engaging the business of a supplier, the Public Procurement Office and procuring institutions must take steps, in accordance with procedures determined by the Minister, to identify—

- (a) all persons with a controlling or substantial interest in the supplier;
- (b) all sources of potential bias toward the supplier;
- (c) all automatically excluded persons, in terms of Section 17, with whom a person has a family, business, or other close relationship.

(2) The steps taken in terms of (1) must include, but are not limited to, the receipt of declarations of interest from—

- (a) all applicants, in the case of applications for registration on a database created by the Public Procurement Office in terms of section 5(1)(l);
- (b) all tenders, in the case of tenders;
- (c) all suppliers, in the process of contracting and contract management.

(3) Failure to submit or submitting a false declaration renders an application referred to in sub-section (2)(a) or a tender referred to in sub-section (2)(b) invalid.

(4) The Public Procurement Office must provide for the publication of all relationships between suppliers and public office bearers, accounting officers and authorities, and any other category of official prescribed by the Minister.

### **Declarations of interest by tenders and applicants for registration on database**

- 14.** (1) A declaration of interest, as prescribed, must be made by—
- (a) all tenders, in the case of tenders; and
  - (b) all applicants, in the case of applications for registration on a database created by the Public Procurement Office in terms of section 5(1)(l).
- (2) Failure to comply with subsection (1) or submitting a false declaration renders a tender referred to in subsection (1)(a) or an application referred to in subsection (1)(b) invalid.

### **Public liaison procurement officers**

- 14A.** (1) All procuring institutions must designate one or more members of staff to act as the primary point of contact for any member of the public and civil society organisation that may require information pertaining to a procurement or that may want to submit information to the procuring institution in respect of a particular procurement.
- (2) The member(s) of staff referred to in subsection (1) must ensure that members of the public and civil society organisations have adequate access to procurement information, including in terms of section 14B.
- (3) The contact information of the member(s) of staff referred to in subsection (1) must be clearly published on the central portal established in this Act and the website of the procuring institution.
- (4) The member(s) of staff referred to in subsection (1) must ensure that all information received from members of the public and civil society organisations in relation to procurement be conveyed without delay to the relevant decision-makers within the procuring institution.

### **Encouragement of whistleblowing in procurement**

- 14B.** (1) Any person who knowingly makes an untrue statement to gain a benefit or assist another in gaining a benefit in procurement violates this Act.
- (2) A person who commits the violation in (1) is liable for double the amount of the damages sustained by the state and to a prescribed administrative penalty; provided that if a person violating this section is the relator described in (3) then that person shall only be liable for the administrative penalty.
- (3) Any person, hereafter referred to as the relator, may file in confidence at a High Court a disclosure in good faith and with full information alleging a violation under (1).
- (4) Such a disclosure will remain in confidence for 120 days and be subject to investigation by the Special Investigative Unit or equivalent permanent institution, which must with full access to the disclosure and within the 120 days indicate whether or not it will itself take on the action.
- (5) If the Public Procurement Office takes on the action, a relator

who is an original source of new information material to the success of the action shall be eligible to receive no less than 10 percent and not more than 25 percent, as deemed just by the Court, of the damages recovered.

(7) If the Public Procurement Office does not take on the action, the relator shall be eligible to proceed with the action and to receive between 20 and 33 percent, as deemed just by the Court, of the damages recovered.

(8) The disclosure under (3) is a protected disclosure under the Protected Disclosures Act (16 of 2000), but a relator who discloses false information is liable under the terms of Section 9B of that Act.

(9) In consultation with the Minister of Justice and Constitutional Development, the Minister shall regulate the process authorized in this section.

### **Undue influence**

**15.** (1) No person may—

- (a) interfere with, or improperly influence, the procurement process of a procuring institution;
- (b) impede the accounting officer or the accounting authority or an official in fulfilling his or her responsibilities in terms of this Act; or
- (c) tamper with any tender after its submission or any tender after its award.

(2) Subsection (1) does not apply to an official or any other person exercising a power or performing a duty in terms of this or any other Act.

(3) Subsection (1) may not be construed to prohibit any person from disclosing an irregularity regarding a procurement process.

### **Debarment**

**16.** (1) The Public Procurement Office—

- (a) may provisionally debar a tender or supplier or any of the directors, members, trustees or partners of that tender or supplier; and
- (b) must provide the tender or supplier or any of the directors, members, trustees or partners of that tenderer or supplier with a provisional debarment notice stipulating the reasons for the debarment.

(2) A provisional debarment notice must—

- (a) indicate the reason for the debarment;
- (b) indicate the effective date;
- (c) invite the tender or supplier to provide reasons within 10 days why he or she must not be debarred.

(3) The Public Procurement Office must issue a debarment order against a tenderer or supplier, and may issue a debarment order against any of the directors, members, trustees or partners of that tenderer or supplier, if the tenderer or supplier—

- (a) provided false information in a tender or any other document submitted to a procuring institution in connection with a procurement process or contract;
- (b) provided false information for purposes of registration in a database as envisaged in this Act;
- (c) connived to interfere with the participation of other tenderers;
- (d) committed any offence involving corruption, fraud, collusion or coercion, price

fixing, a pattern of under-pricing or breach of confidentiality relating to procurement by a procuring institution;

- (e) accepted, delivered against, or made a claim for payment against, an order knowing that the order had not been authorised or was not in a prescribed format or had been issued by a person not authorised to do so;
- (f) refused to sign a contract without reasonable justification or to furnish a performance security in accordance with the terms of the tender;
- (g) has been convicted of an offence relating to—
  - (i) *obtaining or attempting to obtain a contract or subcontract; or*
  - (ii) business or professional activities;
- (h) attempted, or conspired with, aided, abetted, induced or incited another person to contravene a provision of this Act; or
- (i) contravened a provision of this Act.

(4) The Public Procurement Office must consider the reasons submitted in terms of subsection (2)(c), and—

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

(5) The Public Procurement Office must inform a debarred person of the decision within five days from the date of the decision.

(6) A debarment order takes effect from—

- (a) the date on which it is served on the debarred person; or
- (b) if the order specifies a later date, the later date.

(7) (a) A debarment order may not exceed the prescribed period.

(b) Different periods may be prescribed for debarment in terms of subsection (1).

(8) A debarment order prohibits the debarred person, for the period specified in the debarment order, from participating in procurement by procuring institutions generally or in circumstances specified in the order.

(9) (a) A debarred person may not engage in conduct that, directly or indirectly, contravenes the debarment order.

(b) Without limiting paragraph (a), a debarred person contravenes that paragraph if the person enters into an arrangement with another person to engage in the conduct that directly or indirectly contravenes a debarment order on behalf of, or in accordance with the directions, instructions or wishes of, the debarred person.

(10) A procuring institution must—

- (a) inform the Public Procurement Office of any tenderer or supplier alleged to have committed any of the acts listed in subsection (3) for possible debarment; and
- (b) submit the relevant evidence in support of the allegation.

(11) A procuring institution must take all reasonable steps to comply with the conditions of the debarment order.

(12) The Public Procurement Office may, after informing the relevant procuring institution, on application by a debarred person—

- (a) reduce the period of the debarment order; or
- (b) revoke the debarment order, if the order was made in error of fact or law or fraud.

## **Automatic exclusion from procurement**

**17.** (1) The following persons may not submit a tender in procurement—

- (a) a public office bearer;
- (b) a leader of a political party registered in terms of the Electoral Commission Act (Act No.51 of 1996);
- (c) a person appointed under the Public Service Act, 1994 (Proclamation No. 103 of 1994);
- (d) an official or employee of a constitutional institution listed in Schedule 1 to the Public Finance Management Act ;
- (e) an official or employee of a public entity listed in Schedules 2 and 3 to the Public Finance Management Act;
- (f) an official or employee of a municipality;
- (g) a person appointed under section 12A of the Public Service Act, 1994;
- (h) any entity in which a person mentioned in paragraphs (a) to (b) is a director or has a controlling or other substantial interest;
- (i) a tenderer or supplier subject to a debarment order in terms of section 16;
- (j) an entity in which a tenderer or supplier subject to a debarment order in terms of section 16—
  - (i) has a controlling interest; or
  - (ii) is a director or a member.
- (k) an executive member of a controlling body of a procuring institution.

(2) A non-executive member of a controlling body of a procuring institution may not submit a tender for procurement in that institution.

(3) A person related to a person referred to in paragraphs (a), (c) and (f) of subsection (1) may not submit a tender for procurement in the institution in which the person is a member or employed.

## **Prohibition of certain practices**

**18.** (1) The Public Procurement Office—

- (a) may in accordance with a prescribed process declare a particular procurement practice to be prohibited for all or a category of procuring institutions; and
- (b) must publish the declaration.

(2) The Public Procurement Office must take into account the following principles when considering whether to prohibit a practice:

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

(3) A procurement practice prohibited in terms of subsection (1) may not be applied by a procuring institution subject to the declaration.

**Directions inconsistent with Act**

**19.** (1) If an accounting officer, an accounting authority, a member of an accounting authority or an official of a procuring institution (herein called "the affected person") is directed by any person with authority over the affected person (herein called "the person with authority"), to do or omit to do anything in respect of procurement, which the affected person believes he or she is not authorised in terms of this Act, the affected person must not comply with the direction and immediately—

- (a) submit in writing to the person with authority, the objection and the reason for the objection; and
- (b) inform in writing his or her supervisor, where applicable, and the Public Procurement Office, of the direction, the objection and the reason for the objection.

(2) The affected person may not, despite any term of his or her employment, be subjected to any disciplinary measures due to the non-compliance with the direction of the person with authority.

## CHAPTER 4

### FRAMEWORK FOR PREFERENTIAL PROCUREMENT POLICY

#### Targeted treatment in procurement

**20.** (1) Procuring institutions implementing Chapter 5 of this Act must engage in targeted treatment, within the framework for preferential targeted procurement policy set out in this section, including—

- (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.

(2) The targeted treatment envisaged in subsection (1) must, with due regard to the objectives of this Act and to other legislation providing for the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination, include—

- (a) one or more targeted treatment mechanisms in procurement in subsection 3; and
- (b) one or more targeted categories in subsection 4.

(3) The targeted treatment mechanisms envisaged in subsection (2)(a) include:

- (a) set-asides;
- (b) margins of preference ;
- (c) reservations;
- (d) any combination of the mechanisms in subsections (a), (b) and (c).

(4) The targeted categories envisaged in subsection (2)(b) include—

- (a) a category or categories of persons or enterprises including;
  - (i) citizens or permanent residents of the Republic;
  - (ii) enterprises that are majority owned or controlled by citizens or permanent residents of the Republic, or both citizens and permanent residents;
  - (iii) enterprises based in townships, rural or underdeveloped areas or in a particular province or municipality;
  - (iv) black people as defined in section 1 of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);
  - (v) women;
  - (vi) people with disabilities; and
  - (vii) youth;
  - (viii) small, medium enterprises and micro enterprises;
  - (ix) enterprises aiming to use labour at a particular level of skill; and
- (b) a category or categories of goods or services, including
  - (i) goods that are produced, or services provided, in the Republic;
  - (ii) goods that are produced, or services provided, by black people as defined in section 1 of the Broad-Based Black Economic Empowerment Act or by enterprises certified in terms of that Act;
  - (iii) goods or services meeting specified environmental characteristics; and
  - (iv) goods or services meeting a minimum threshold established by the

Minister for trade for local production and content.

(5) Notwithstanding the provisions of subsection (3), set-asides may only be used in conjunction with targeted categories in subsection (4) for targeted treatment relating to subsection (1)(b)

(6) The use of a targeted treatment mechanism or a combination of targeted treatment mechanisms in conjunction with a particular targeted category must be reasonable, taking into account the objectives of the Act and the sphere of government of the procuring institution.

(7) To the extent that targeted treatment consists of the targeted treatment mechanism of reservations, as envisaged in subsection 3(c) implemented in conjunction with goods or services meeting a minimum threshold established by the Minister responsible for trade for local production and content, such targeted treatment is presumed reasonable.

(8) The Minister may prescribe a regulatory framework for the implementation of this section by procuring institutions.

(9) The Minister must consult with the relevant Minister before making a regulation under this Chapter affecting the powers or functions assigned to that Minister.

## **Local Production and Content**

**20A.** (1) When procuring goods or services, a procuring institution must determine whether such goods or services are in a designated sector for local production and content as envisaged in this section.

(2) The Department of Trade and Industry may, in consultation with the National Treasury—

- (a) designate a sector, sub-sector or industry or product in accordance with national development and industrial policies for local production and content and taking into account economic and other relevant factors; and
- (b) stipulate a minimum threshold for local production and content for locally produced goods or services or locally manufactured goods.

(3) The National Treasury must inform procuring institutions of any designation made in terms of this section.

(4) Subject to section 20, a procuring institution must, in the case of procuring goods or services in a designated sector, engage in targeted treatment using margins of preference and/or reservations in conjunction with a category or categories of goods or services meeting a minimum threshold established by the Minister for Trade for local production and content.

(5) A procuring institution may where there are justifiable reasons for not complying with the minimum thresholds for local production and content established in subsection (4) such as capacity to deliver the required goods and services within project timelines, technical considerations and availability of input materials and components, apply to the Department of Trade and Industry on a prescribed form for an exemption from such thresholds. The Department of Trade and Industry must respond to the request for an exemption within 5 days giving reasons for their decision, failing which approval will be deemed to be granted.



## **CHAPTER 5**

### **PROCUREMENT PRACTICES, PROCEDURES AND METHODS**

#### ***Part 1: Procurement practices***

#### **Prohibited exclusion of tenderers from participating in procurement**

**21.** A procuring institution may not exclude a tenderer from participating in procurement on the basis of citizenship and permanent residence status, race, religion, gender or any other criterion not related to his or her eligibility or qualification, except to the extent provided in this Act.

#### **Rejection of tender**

**22. (1)** A tender may be rejected only in accordance with this Act.

**(2)** A procuring institution must, before the conclusion of a contract, reject a tender if—

- (a) the tender is non-responsive to the requirements set out in the procurement documents;
- (b) there is evidence of collusion among tenderers;
- (c) the tenderer is included in the list of persons automatically excluded from eligibility to tender in terms of section 17 of this Act;

**(3)** Before awarding any tender, a procuring institution must verify if a preferred tenderer, or any of that tenderer's directors, members, trustees or partners, is listed on the register for tenderers and suppliers debarred in terms of section 16.

#### **Negotiations prior to award**

**22A.** Procuring institutions may negotiate with a preferred tenderer or preferred tenderers before the award of the contract, if these negotiations—

- (a) are fair;
- (b) do not allow the tenderer concerned a second (unfair) opportunity to amend the tender; and
- (c) do not result in the final agreed terms differing materially from the invitation to tender.

#### **Award of tenders**

**23. (1)** A procuring institution—

- (a) may only award a tender to a tenderer that:
  - (i) complies with tax legislation; and such other legislation as may be prescribed;
  - (ii) is listed on a data base of prospective suppliers as prescribed; and
  - (iii) if it is satisfied that the tenderer's prices are market related and the tenderer has the necessary capabilities and capacity to perform the procurement contract.

(2) Subject to section 25, a procuring institution must, in the absence of an application for reconsideration or review envisaged in section 35(1) or section 37(1) by any other tenderer, award a tender to a tenderer that—

- (a) submits a tender which, in all respects, complies with the provisions of the procurement document; and
- (b) is the most advantageous offer ascertained on the basis of the evaluation criteria specified and in the manner indicated in the procurement documents, unless the award is made in terms of single-source procurement procedure

(3) In evaluating tenders and determining the successful tenderer, the procuring institutions shall use only those criteria and procedures that have been set out in the procurement documents and shall apply those criteria and procedures in the manner that has been disclosed in those procurement documents. No criterion or procedure shall be used that has not been set out in accordance with this provision.

(4) If the tenderer who has been awarded the contract—

- (a) fails to sign the contract; or
- (b) fails to provide any required security for the performance of the contract, within the prescribed period, a procuring institution may select another tenderer from amongst the remaining valid tenders and apply the provisions of subsections (1) and (2).

### **Provision of written reasons for decisions taken**

**23.** A procuring institution must, in terms of section 5 of the Promotion of Administrative Justice Act, provide reasons for any decisions that are taken during the acquisition phase of a procurement process.

### **Cancellation of procurement process**

**24.** (1) Procuring entities may prior to the award decision, cancel a procurement process only if—

- (a) due to changed circumstances, there is no longer a need for the goods or services requested;
- (b) funds are no longer available to cover the total envisaged expenditure;
- (c) no acceptable tenders are received; or
- (d) there is a material irregularity in the tendering process.

(2) The reasons for the cancellation of a procurement process must be disclosed on the online portal.

### **Re-advertising of tender**

**25.** (1) A procuring institution may re-advertise a tender if—

- (a) all tenders have been rejected; or
- (b) the procurement process has been cancelled in terms of section 24.

(2) Before re-advertising, a procuring institution must—

- (a) examine and record the reason for the rejection of all the tenders or the cancellation of the tendering process; and

- (b) review and suitably modify the procurement documents.

## ***Part 2 Range of selection methods***

### **Selection and range of procurement methods**

**26A.** (1) Except as otherwise provided for in this Act, a procuring institution must procure goods, services and any combination thereof or undertake disposals through an open competitive procurement procedure.

(2) A procuring institution may procure goods, services and any combination thereof by means of the following methods only in accordance with sections (28) to (32C) of this Act—

- (a) limited competitive procurement procedure;
- (b) single-source procurement procedure;
- (c) framework agreements;
- (d) electronic reverse auctions;
- (e) requests for quotations;
- (f) transversal contracting;
- (g) unsolicited tenders.

(3) A procuring institution may only utilise methods (a), (b) and (g) in subsection 2 where authorised to do so by the Public Procurement Office. Procuring institutions wishing to utilise such methods must submit an application for authority to do so to the Public Procurement Office on the prescribed form and provide evidence that the institution—

- (a) has in place a suitable procurement implementation framework in accordance with the provisions of section 7 and appropriate delegations of authority,
- (b) is disclosing data in accordance with the provisions of this Act,
- (c) has suitably qualified staff to implement the procedures; and
- (d) has over the previous 12 months had an ability to evaluate tenders and to close out contracts efficiently.

(4) The Minister must prescribe procedures for the method of public advertising of invitations to tender and the minimum content of invitations to tender.

### **Open competitive procurement procedure**

**27.** In terms of open competitive procurement procedure, procuring institutions must—

- (a) publicly advertise tenders in the prescribed manner for a minimum prescribed period;
- (b) open tenders at the same time and in the manner as set out in the procurement documents;
- (c) subject to section 23, award the tender to the tenderer that submitted the most advantageous tender ascertained on the basis of the criteria and procedures for evaluating tenders specified in the procurement documents; and
- (d) notify all tenderers that submitted tenders before the closing time for submissions at the same time of the outcome of the evaluation process.

### **Limited competitive procurement procedure**

**28.** (1) A procuring institution may procure by means of limited competitive procurement procedure which maximizes competition to the extent feasible when—

- a) the subject matter of the procurement, by reason of its highly complex, specialised nature, compatibility with existing systems or components or performance characteristics, is available only from a limited number of suppliers, provided that the procuring institution has undertaken market research to confirm such conditions;
- b) the procurement is conducted as the second stage of an open competitive procurement procedure;
- c) a rotating database of prequalified suppliers is in place which allows potential inclusion onto the database at regular intervals and which affords all prequalified suppliers an opportunity over time to tender on the subject matter of the procurement; or
- d) the scope of the procurements falls within the scope of an existing framework agreement;

provided that the provisions of section 27 (b), (c), and (d) are complied with at the conclusion of the processes associated therewith.

(2) Procuring institutions must publish the justification for the adoption of the limited competitive procurement procedure on the online portal.

### **Single-source procurement procedure**

**29A.** (1) A procuring institution may deviate from the use of open or limited competitive procurement procedures and use a single-source procurement procedure when—

- (a) a rapid response is required due to the presence of, or the imminent risk of, emergency, and there is insufficient time to be dealt with, or to mitigate the risks relating thereto using the open or restricted competitive procedure.
- (b) only one supplier has been identified as possessing the necessary experience and qualifications or product in relation to a particular need;
- (c) the goods or services or any combination thereof being procured are largely identical to work previously executed by a supplier and cannot technically or economically be separated from a previous contract and it is not in the interest of the public or procuring institution to obtain other tenders;
- (d) the nature of the required goods or services or any combination thereof, or the risks attached thereto, do not permit prior overall pricing;
- (e) none or only one responsive tender is received;
- (f) it is impractical to pursue an open or restricted competitive selection procedure due to artistic or technical reasons, or exclusive rights;
- (g) specialist or strategic inputs are required to address gaps and shortcomings in initiating and implementing projects which threaten project outcomes; or
- (h) the procurement falls below a prescribed threshold value.

(2) Procuring institutions must publish the justification for the adoption of the single-source procedure on the online portal.

## Electronic reverse auctions

**29B.** (1) A procuring institution may engage in procurement by means of an electronic reverse auction under the following conditions—

- (a) it is feasible for the procuring institution to formulate a detailed description of the subject matter of the procurement;
- (b) there is a competitive market of suppliers anticipated to be qualified to participate in the electronic reverse auction, such that effective competition is ensured;
- (c) the criteria to be used by the procuring institution in determining the successful submission are quantifiable and can be expressed in monetary terms; and
- (d) the procuring institution has the necessary capacity and electronic systems in place to operate an electronic reverse auction, as certified by the Public Procurement Office.

(2) When inviting tenders under a procedure involving an electronic reverse auction, the procuring institution shall, in addition to all information to be made available to potential tenderers, publish the following information as a minimum about the auction:

- (a) the mathematical formula that will be used in the evaluation procedure during the auction;
- (b) how the auction can be accessed, including appropriate information regarding connection to the auction;
- (c) the deadline by which the tenderers must register for the auction and requirements for registration;
- (d) the date and time of the opening of the auction and requirements for the identification of tenderers at the opening of the auction;
- (e) criteria governing the closing of the auction;

(3) During the auction:

- (a) all bidders shall have an equal and continuous opportunity to present their bids;
- (b) there shall be automatic evaluation of all bidders in accordance with the criteria, procedure and formula set out in the procurement documents;
- (c) each bidder must receive, instantaneously and on a continuous basis during the auction, sufficient information allowing it to determine the standing of its bid vis-à-vis other bidders; and
- (d) there shall be no communication between the procuring institution and the bidders or among the bidders, other than as provided for in (a) and (c) of this subsection.

(4) The procuring institution shall not disclose the identity of any bidder during the auction.

## Framework agreements

**30.** (1) A procuring institution may conclude framework agreements with one or more suppliers for goods and services or any combination thereof following a suitable procedure set out in subsections 28A, 28B or 29A subject to—

- (a) the term of a framework agreement not exceeding four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement and where provided for in the procuring institution's procurement implementation policy`;
- (b) orders issued to perform work in terms of contracts based on the agreement not being issued or entered into after the expiry of the term of the agreement;
- (c) the terms of the agreement not being amended during the term of the contract;
- (d) the procuring institution not being obliged to make use of the agreement and being free to approach the market for goods or services, or a combination thereof, whenever it considers that better value in terms of time, cost or quality may be obtained; and
- (e) orders issued or contracts awarded in terms of such agreements are disclosed on the online portal in accordance with the provisions of the data standard.

(2) Orders based on an agreement concluded in terms of subsection (1) where the agreement sets out all the terms governing the provision of the work may be issued within the limits of the terms laid down in the agreement provided that where more than one supplier has an agreement covering the same scope, the award may be made—

- (a) without reopening competition based on objective conditions for determining which of the suppliers is to perform the work; or
- (b) with the reopening of competition amongst suppliers included under the framework.

(3) Contracts based on an agreement concluded in terms of subsection (1) where the agreement does not set out all the terms governing the provision of the work may be awarded within the limits of the terms laid down in the agreement following the reopening of competition between those admitted to a framework agreement. Such contracts may under no circumstances entail substantial modifications to the terms laid down in that framework agreement.

(4) A procuring institution may permit other procuring institutions to make use of such an agreement provided that such institutions are identified by name or category during the procurement process

## **Requests for quotations**

**31.** (1) Procuring institutions may use a limited procurement procedure by means of requests for quotations for procurements below a threshold value and under such other conditions as prescribed.

(2) Where the procuring institution engages in procurement by means of request for quotations, it shall request written quotations from as many suppliers as practicable.

(3) Requests for quotations must be solicited by means of the electronic platform prescribed by Public Procurement Office and from suppliers registered on the central supplier database, except where an insufficient number of suppliers are registered for the particular goods or services requested.

(4) Each supplier must submit a quote with a firm price and is not permitted to change its quotation. No negotiations shall take place between the procuring institution and a supplier or with respect to a quotation presented by the supplier during the adjudication of quotations submitted.

(5) The successful quotation must be the lowest-priced quotation meeting the needs of the procuring institution as set out in the request for quotations.

## Transversal contracts

**32A.** (1) A relevant treasury may assess potential transversal contracts covering common goods and services in terms of cost and quality and other determined criteria and approve those contracts which meet such criteria.

(2) The Minister may after consultation with the relevant treasuries provide for the compulsory participation of procuring entities in transversal contracts regarding common goods and services unless the Public Procurement Office has exempted the procuring institution from such participation.

(3) The Public Procurement Office must maintain and make accessible a list of the approved transversal contracts of the relevant treasuries and provide procuring entities with a list of goods or services that are required to be procured in the next financial year through transversal contracts no later than six months before the commencement of the next financial year in order to determine the extent of the need for such goods or services that may be provided for in such contracts.

(4) Transversal contracts must be concluded in terms of the open competitive procurement procedure or the limited procurement procedure, either in a single stage or in two-stages, depending on whether the conditions for the use of either of those procedures have been met.

(5) Transversal contracts may take the form of framework agreements as provided for in the Act.

## Unsolicited tenders

**32B.** (1) Procuring entities are not obliged to consider unsolicited tenders.

(2) A procuring institution may decide to consider an unsolicited tender, only if—

- (a) the goods or service that is offered in terms of the tender is a demonstrably or proven unique innovative concept;
- (b) proof of ownership of design, manufacturing, intellectual property, copyright or any other proprietary right of ownership or entitlement is vested in the tenderer;
- (c) the tender presents a value proposition which demonstrates a clear, measurable and foreseeable benefit for the procuring institution;
- (d) the tender is in writing and clearly sets out the proposed cost;
- (e) the person who made the tender is the sole provider of the goods or service; and
- (f) the procuring institution is satisfied that adequate reasons exist for not going through normal procurement processes.

(3) The procuring institution must reject an unsolicited tender if -

- (a) the tender relates to known institutional requirements that can, within reasonable and practical limits, be acquired through normal procurement processes;

- (b) the goods or service is used for or relates to a matter that does not fall within the mandate or function of the procuring institution; and
- (c) the tender does not comply with subsection (2).

(4) The accounting officer or accounting authority may only approve the award of an unsolicited tender if the tender committee of the procuring institution has made a recommendation on the unsolicited tender.

(5) If a procuring institution decides to consider an unsolicited tender that complies with subsection (2), the procuring institution must publish the reasons for accepting an unsolicited tender on the online portal.

### **Disposal methods**

**32C.** (1) Disposals may be undertaken using the open or restricted competitive selection methods, the single-source selection methods, a public auction, transfers to other organs of state; and controlled dumping.

(2) Where the auction procedure is utilized—

- (a) the assets or items which are to be auctioned must be displayed in public for a reasonable time before the date of the auction; and
- (b) prospective bidders must be informed of any requirements for deposits, eligibility criteria and the procedures for making payment and taking delivery of the purchased items in advance of the auction

(3) If movable assets are disposed of by means of written price quotations or auctions, the award must be made to the tenderer who offers the highest price

### **Electronic Procurement**

**32D.** (1) The Public Procurement Office must progressively implement electronic systems for each of the procurement methods in this Act.

(2) Procuring institutions must use electronic systems envisaged in subsection (1) to implement any of the procurement methods in this Act.

## **Part 3: Procurement committees**

### **Appointment of procurement committee members**

**32E.** (1) The accounting officer or accounting authority of a procuring institution must, in writing, appoint the members of the institution's procurement committees to perform the functions assigned to a committee in the institution's implementation policy and standard operating procedures.

(2) The following persons may not be appointed to a procurement committee—

- (a) a public office bearer;
- (b) a person appointed in terms of section 12A to the Public Service Act and
- (c) any person having a conflict of interest.

(3) The accounting officer or accounting authority of a procuring institution may, in writing, appoint technical advisors and subject experts to assist a procurement committee with any technical aspect related to a tender.



(4) Technical advisers and subject experts referred to in subsection (3) do not have voting rights in any procurement committee.

### **Composition of procurement committees**

**32F.** (1) An evaluation committee must consist of at least three employees of the procuring institution.

(2) A person that served as a member of the procurement documentation committee may also serve as a member of the evaluation committee for the particular procurement.

(3) No member of a procurement documentation committee or evaluation committee may serve on the tender committee for the same procurement process.

### **Decisions of accounting officer or accounting authority on recommendations of tender committee**

**32G.** (1) If the tender committee makes a recommendation, the accounting officer or accounting authority must—

- (a) award the tender, taking into account the recommendations of the evaluation committee and tender committee; or
- (b) decide not to proceed in terms of section 25; or
- (c) decide to start afresh with the adjudication process.

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

**32H.** (1) The accounting officer or accounting authority must report any award made, to the relevant treasury, where—

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

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

- (a) submitted within 30 days of the decision to award; and
- (b) accompanied by the reasons for the award.

(3) The relevant treasury must make the report in terms of subsection (1) publicly available on an online portal.

**CHAPTER 6**  
**DISPUTE RESOLUTION**  
*Part 1*  
***Reconsideration and review***

**Reconsideration or review of decision**

**33.** (1) A tenderer or procuring institution may, in accordance with section 35 or 37, seek a reconsideration or review of a decision by a procuring institution in terms of this Act.

(2) The Minister may prescribe decisions which qualify for a reconsideration or a review in terms of this Act.

(3) A tenderer seeking a reconsideration or review of a decision must pay the prescribed fee.

(4) Reconsideration and review in terms of sections 35 and 37 are considered internal remedies for purposes of section 7(2) of the Promotion of Administrative Justice Act 3 of 2000.

**Prohibition on concluding contract during reconsideration or review proceedings**

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

- (a) a reconsideration in accordance with section 35, a procuring institution may not conclude a contract with the successful tenderer within 5 days after completion of the reconsideration or review process; or
- (b) review in accordance with section 37, a procuring institution may not conclude a contract with the successful tenderer prior to completion of the review process.

(2) Despite subsection (1), if an emergency requires procurement—

- (a) in the case of a procuring institution in the national sphere of government, the Public Procurement Office; or
- (b) in the case of a procuring institution in the provincial or local sphere of government, the relevant provincial treasury,

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

(3) The conclusion of a contract, referred to in subsection (2), must be limited to the quantity required to meet the emergency until the completion of the reconsideration or review process.

(4) The request of the procuring institution referred to in subsection (2) must—

- (a) state the emergency that require the conclusion of contract or extension;
- (b) state the grounds for the emergency;
- (c) specify the quantity required to meet the emergency; and
- (d) recommend the supplier with whom the contract or extension is to be concluded.

**Part 2**  
***Reconsideration by procuring institution***

**Reconsideration by procuring institution**

**35.** (1) A tenderer may submit an application for reconsideration to the procuring institution if not satisfied with a decision made in terms of this Act by that institution.

(2) An application envisaged in subsection (1) must be submitted to the procuring institution within 5 days of the date the tenderer became aware of the circumstances giving rise to the application.

(3) A procuring institution may dismiss an application for reconsideration if the application was not submitted within 5 days of the date the tenderer became aware of the circumstances giving rise to the application or of the date when that tenderer should have become aware of those circumstances, whichever is earlier.

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

- (a) immediately institute an investigation; and
- (b) make a decision and inform the tenderer within 10 days after the submission of the application.

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

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

(6) A procuring institution may reconsider a decision it made in terms of this Act if the decision was based upon a material irregularity.

**Part 3**  
***Review***

**Establishment of Tribunal**

**36.** (1) The Public Procurement Tribunal is hereby established to review decisions taken by—

- (a) a procuring institution in terms of section 35;
- (b) a procuring institution upon application by the accounting officer or accounting authority of that institution in terms of section 37(4);
- (c) the Public Procurement Office to debar a tenderer or supplier in terms of section 16.

(2) The Tribunal—

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

### **Review of decision of procuring institution**

**37.** (1) If a tenderer is not satisfied by a decision made by a procuring institution in terms of section 35, that tenderer may, within 10 days of being informed of the procuring institution's decision, submit an application for review to the Tribunal.

(2) Despite the period stated in subsection (1), a tenderer may request the Tribunal to consider an application for review filed after the expiry of the period mentioned in subsection (1), but not later than five days of being informed of the procuring institution's decision, on the ground that the application raises public interest considerations.

(3) The Tribunal must inform the tenderer of its decision in terms of subsection (2) and the reasons within five days from the date of receipt of the request.

(4) An accounting officer or accounting authority may submit an application for review of a decision of its procuring institution—

- (a) if the accounting officer or accounting authority is of the view that there was a material irregularity in the taking of the decision; and
- (b) within 10 days of becoming aware of the circumstances giving rise to the application.

### **Review of decision to debar**

**38.** (1) A person debarred in terms of section 16(1) may, within 10 days of being informed of the decision to debar, submit an application for review to the Tribunal.

(2) Despite the period stated in subsection (1), a tenderer may request the Tribunal to consider an application for review filed after the expiry of the period mentioned in subsection (1), but not later than five days of being informed of the decision, on the ground that the application raises public interest considerations.

(3) The Tribunal must inform the tenderer of its decision in terms of subsection (2) and the reasons within five days from the date of receipt of the request.

### **Composition of Tribunal**

**38.** (1) The Tribunal consists of as many members as the Minister appoints with due regard to section 46(1)(b).

(2) The members of the Tribunal must include—

- (a) one person who is a retired judge who must be the Chairperson;
- (b) a sufficient number of persons with five years' experience in law; and
- (c) a sufficient number of persons with five years' experience in procurement.

(3) The Minister must appoint a member of the Tribunal referred to in subsection (2)(b) as the Deputy Chairperson.

### **Qualification of members of Tribunal**

**39.** A person may be appointed as a member of the Tribunal if that person—

- (a) possesses the necessary skills, expertise and knowledge; and
- (b) is a citizen or permanent resident of the Republic.

### **Functions of Chairperson and Deputy Chairperson of Tribunal**

- 40.** (1) The Chairperson—
- (a) must preside at meetings of the Tribunal; and
  - (b) is responsible for managing the work of the Tribunal.
- (2) The Deputy Chairperson performs the functions of the Chairperson—
- (a) on delegation by the Chairperson;
  - (b) in the absence of the Chairperson; or
  - (c) if the office of the Chairperson is vacant.

### **Disclosure of interest by members of Tribunal**

- 41.** (1) Subject to subsection (2), a member of the Tribunal may not participate in the proceedings at any meeting of the Tribunal, if in relation to any matter before the Tribunal—
- (a) the member or a person related to him or her is a director, member or partner of, or has controlling interest or any financial interest in the business of the tenderer or any person who made representations in relation to the application by the tenderer; or
  - (b) the member has any interest which precludes him or her from performing his or her functions as a member in a fair, unbiased and proper manner.
- (2) If at any stage during the proceedings before the Tribunal it appears that a member has or may have any interest envisaged in subsection (1):
- (a) The member must immediately fully disclose the nature of the interest and leave the proceedings to enable the remaining members to determine whether the member must be precluded from participating in the proceedings by reason of a conflict of interest.
  - (b) The disclosure envisaged in paragraph (a) and the decision taken by the remaining members regarding the determination must be recorded in the minutes of the proceedings.
  - (c) If any member fails to disclose any interest envisaged in subsection (1) or if, having such interest, the member attends or in any manner contributes to the proceedings of the Tribunal, the contribution must be disregarded, but the decision of the Tribunal is not invalid.

### **Term of office, re-appointment, termination of membership and terms and conditions of service of members of Tribunal**

- 42.** (1) A member of the Tribunal holds office for a period of three years, or the shorter period that the Minister determines.
- (2) A member of the Tribunal may be re-appointed at the expiry of a term for a further term not exceeding three years.
- (3) A member of the Tribunal may resign by giving at least three-months' notice to the Minister, or such shorter period as the Minister may approve.

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

- (a) the member is unable to perform the functions of office due to ill health or other reasons accepted by the Minister;
- (b) the member fails to disclose an interest in terms of section 41(2); or
- (c) an independent inquiry by the Minister has found that the member has—
  - (i) failed in a material way to discharge his or her responsibilities; or
  - (ii) acted in a way that is inconsistent with continuing to hold office.

(5) Subject to the Promotion of Administrative Justice Act, if an independent inquiry has been undertaken in terms of subsection (4)(c), the Minister may suspend the affected member from office pending a decision.

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

### **Finances of Tribunal**

**43.** The Tribunal is financed from—

- (a) money that is appropriated by Parliament; and
- (b) prescribed fees for the Tribunal.

### **Resources of Tribunal**

**44.** The Chairperson may—

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

### **Conduct of persons involved in work of Tribunal**

**45.** A member of the Tribunal or a person referred to in section 44(a) may not use his or her position or any information by virtue of his or her work for the Tribunal to—

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

### **Panels of Tribunal**

**46.** (1) The Chairperson must constitute a panel for each application envisaged in section 37.

(2) Any reference in this Act to the Tribunal must be construed as including a reference, where appropriate in the case of an application envisaged in section 37, to a panel to whom a review is or was assigned.

(3) The panel—

- (a) is the decision-making body for that particular application; and
- (b) performs the functions of the Tribunal when hearing the application.

(4) A panel consists of—

- (a) a member of the Tribunal to preside over the panel;
- (b) a member of the Tribunal referred to in section 38(2)(b);
- (c) a member of the Tribunal referred to in section 38(2)(c); and
- (d) such other members of the Tribunal as the Chairperson of the Tribunal decides.

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

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

### **Tribunal rules**

**47.** (1) The Tribunal must make rules regarding proceedings for an application envisaged in section 36 and may amend or revoke such rules.

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

### **Review proceedings**

**48.** (1) In review proceedings—

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

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

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

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

(5) (a) A Chair of a panel—

- (i) may, on good cause shown, by order, subpoena a specified person to appear before the panel at a time and place specified in the order to give evidence, to be questioned or to produce any document; and
  - (ii) must administer an oath to, or accept an affirmation from, any person called to give evidence.
- (b) A person subpoenaed in terms of paragraph (a) may not—

- (i) without just cause, fail to appear before the panel at the time and place specified in the subpoena;
  - (ii) refuse to be sworn in or to be affirmed as a witness;
  - (iii) without just cause, fail to answer fully and satisfactorily to the best of his or her knowledge all questions lawfully put to him or her; or
  - (iv) fail to produce any object or information, including but not limited to any working papers, statements, correspondence, books or other documents in his or her possession or custody or under his or her control, which he or she has been required to produce.
- (c) A person subpoenaed in terms of paragraph (a) must be reimbursed for incidental costs for providing information and appearing before the panel by the person who requested the subpoena.
- (6) A person giving evidence or information, or producing documents, has the protections and liabilities of a witness giving evidence in proceedings before the High Court.

### **Tribunal orders**

**49.** (1) In review proceedings in terms of section 36(1)(a) and (b), the panel may, by order—

- (a) confirm the decision subject to review;
- (b) set aside the decision subject to review and refer the matter back to the relevant procuring institution for further consideration;
- (c) order a procuring institution not to make an award or cancel an award made for the procurement under review;
- (d) order that the procurement proceedings be terminated;
- (e) take such alternative action as is appropriate in the circumstances;
- (f) require the payment of compensation for any reasonable costs incurred by the tenderer submitting an application as a result of an act or decision of, or procedure followed by, the procuring institution in procurement that does not comply with this Act; or
- (g) dismiss the application.

(2) In review proceedings in terms of section 36(1)(c), the panel may, by order—

- (a) confirm the debarment order of the Public Procurement Office;
- (b) substitute the debarment order for its own order;
- (c) set aside the debarment order of the Public Procurement Office; or
- (d) dismiss the application.

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

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

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

(5) The decision of a panel in terms of subsection (1) is regarded



as a decision of the Tribunal.

(6) The Tribunal must make an order in terms of subsection (1) within 10 days of the receipt of the referral.

### **Judicial review and enforcement of Tribunal orders**

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

(2) A party to proceedings may file with the registrar of a competent court a certified copy of an order made in terms of section 49(1) if—

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

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

## CHAPTER 7 GENERAL PROVISIONS

### Investigation by Public Procurement Office

**51.** (1) The Public Procurement Office may, if requested by the relevant treasury or on its own initiative, investigate any procurement related matter in accordance with this Act.

(2) The Public Procurement Office must, if an investigation in terms of subsection (1) indicates—

- (a) non-compliance with this Act:
  - (i) instruct the procuring institution to take steps to stop or prevent the non-compliance; and
  - (ii) direct that appropriate action be taken against the official responsible for the non-compliance.
- (b) commission of an offence by an official of a procuring institution, refer the matter to the relevant law enforcement body.

(3) Where a procuring institution is required to act in terms of subsection (2), the procuring institution must, as required by the Public Procurement Office, report on the progress made.

### Power to enter and search premises

**52.** (1) The Public Procurement Office may, for purposes of investigating a procurement related matter in terms of section 51, authorise one or more suitably qualified persons (herein referred to as ‘the authorised person’) to enter and search any premises of a—

- (a) procuring institution;
- (b) an official of a procuring institution; or
- (c) tenderer or supplier to whom a tender has been awarded in accordance with this Act.

(2) The authorised person referred to in subsection (1) may enter premises of an official referred to subsection (1)(b) or a tenderer or supplier referred to in subsection 1(c)—

- (a) with the prior consent of—
  - (i) in the case of a private residence:
    - (aa) of an official; or
    - (bb) the person apparently in control of the business reasonably believed to be conducted at the private residence, and the occupant of the private residence or the part of the private residence to be entered; or
  - (ii) in the case of any other premises, the person apparently in control of the premises, after informing that person that:
    - (aa) granting consent will enable the authorised person to enter the premises and for the authorised person to subsequently search the premises and to do anything contemplated in subsection (8); and

- (bb) he or she is under no obligation to admit the authorised person in the absence of a warrant; or
- (b) without prior consent and without prior notice to any person if the entry is authorised by a warrant.
  - (3) (a) The Public Procurement Office must issue the person authorised in terms of subsection (1) with a certificate stating that the person has been authorised in terms of subsection (1).
- (b) When exercising powers in terms of this section, the authorised person must:
  - (i) be in possession of a certificate of appointment; and
  - (ii) immediately show that certificate to any person who is affected by the authorised person's actions in terms of this section or who requests to see the certificate.
- (4) The authorised person has the authority to search the premises and to do anything contemplated in subsection (8).
- (5) The authorised person exercising powers in terms of this section must do so with strict regard to—
  - (a) an affected person's right to:
    - (i) dignity;
    - (ii) freedom and security;
    - (iii) privacy; and
    - (iv) other constitutional rights; and
  - (b) decency and good order as the circumstances require, in particular by:
    - (i) entering and searching only such areas or objects as are reasonably required for the purposes of the investigation;
    - (ii) conducting the search discreetly and with due decorum;
    - (iii) causing as little disturbance as possible; and
    - (iv) concluding the search as soon as possible.
- (6) An entry or search of premises in terms of this section may be done with or without the prior notification of the accounting officer or accounting authority of a procuring institution.
- (7) The authorised person may be accompanied and assisted during the entry and search of any premises for an investigation by a person designated by the Public Procurement Office.
- (8) (a) While on the premises in terms of this section, the authorised person has access to any part of the premises and to any document or item on the premises, and may do any of the following:
  - (i) Open or cause to be opened any strongroom, safe, cabinet or other container in which the authorised person reasonably suspects there is a document or item that may afford evidence required for the investigation;
  - (ii) examine, make extracts from and copy any document on the premises;
  - (iii) question any person on the premises to find out information relevant to the investigation;
  - (iv) require a person on the premises to produce to the authorised person any document or item that is relevant to the investigation and is in the possession or under the control of the person;
  - (v) require a person on the premises to operate any computer or similar system on or available through the premises to:

- (aa) search any information in or available through that system; and
  - (bb) produce a record of that information in any media that the authorised person reasonably requires;
- (vi) if it is not practicable or appropriate to meet a requirement in terms of subparagraph (v), operate any computer or similar system on or available through the premises for a purpose set out in that subparagraph; and
- (vii) take possession of, and take from the premises, a document or item that may afford evidence required for the investigation.
- (b) The authorised person must, on request, allow the person apparently in charge of the premises a reasonable opportunity to make copies of any document or item before it is taken as mentioned in paragraph (a)(vii).
- (c) The authorised person must give the person apparently in charge of the premises a written receipt for documents or items taken as mentioned in paragraph (a)(vii).
- (d) Subject to paragraph (e), the Public Procurement Office must ensure that any document or item taken by the authorised person as mentioned in paragraph (a)(vii) is returned to the procuring institution when:
  - (i) retention of the document or item is no longer necessary to achieve the object of the investigation; or
  - (ii) all proceedings arising out the investigation have been finally disposed of.
- (e) A document or item need not be returned to the procuring institution which produced it if it is not in the best interest of the public or any member or members of the public for the documents or items to be returned.
- (f) A procuring institution from whose premises a document or item was taken as mentioned in paragraph (a)(vii), or its authorised representative, may, during normal office hours and under the supervision of the authorised person or another person designated by the Public Procurement Office, examine, copy and make extracts from the document or item.

(9) The authorised person or any person assisting that person as provided for in subsection (6), may use reasonable force to exercise any power in terms of this section.

(10) The law relating to privilege, as applicable to a witness subpoenaed to provide a book, document or object in a civil trial before a court applies, with the necessary changes, in relation to the production of any information, including but not limited to any working papers, statements, correspondence, books or other documents, to the Public Procurement Office acting in accordance with this section.

- (11) (a) A person who is questioned or required to produce a document or information during an investigation in terms of this section, may object to answering the question or to producing the document or the information on the grounds that the answer, the contents of the document or the information may tend to incriminate the person.
- (b) The authorised person must inform the person of the right to object in terms of this section at the commencement of the investigation.

- (c) On such an objection, the authorised person may require the question to be answered or the document or information to be produced, in which case the person must answer the question or produce the document.
- (d) Subject to paragraph (e), an answer given or a document or information produced, as required in terms of paragraph (c), may be used for the purposes of an investigation or other legal proceedings in terms of this Act.
- (e) An incriminating answer given, and an incriminating document or information produced, as required in terms of paragraph (c), is not admissible in evidence against the person in any criminal proceedings, except in criminal proceedings for perjury or in which that person is tried for a contravention of section 63 based on the false or misleading nature of the answer.

## Warrants

**53.** (1) (a) A judge or magistrate who has jurisdiction may issue a warrant for the purposes of section 52(2) of this Act on application by a person authorised in terms of section 52(1) of this Act.

- (b) The judge or magistrate may issue a warrant in terms of this section:
  - (i) on written application by the person authorised in terms of section 59(1) of this Act setting out under oath or affirmation why it is necessary *to enter and investigate the premises; and*
  - (ii) if it appears to the magistrate or judge from the information under oath or affirmation that:
    - (aa) there are reasonable grounds for suspecting that improper conduct has occurred; and
    - (bb) entry and search of the premises are likely to yield information pertaining to the improper conduct.

(2) A warrant must be signed by the judge or magistrate issuing it.

(3) The person authorised in terms of section 59(1) of this Act who enters premises under the authority of a warrant must—

- (a) if there is apparently no one in charge of the premises when the warrant is executed, fix a copy of the warrant on a prominent and accessible place on the premises; and
- (b) on reasonable demand by any person on the premises, produce the warrant or a copy of the warrant.

(4) The warrant must identify the premises that may be entered and searched and specify the parameters within which the person authorised in terms of section 59(1) may perform an entry, search or seizure.

(5) A warrant is valid only until—

- (a) the warrant is executed;
  - (b) the warrant is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;
  - (c) the purpose of issuing it has lapsed; or
  - (d) the expiry of one month after the date it was issued,
- whichever occurs first.

## **Access to procurement information and procurement data standard**

**53A.** (1) There is a right of access to procurement information as established in this section.

(2) The Public Procurement Office must establish a procurement data standard which must include but not be limited to—

- (a) specifying data points for proactive disclosure which are to the greatest feasible extent useful for effective public monitoring of procurement processes and systems;
- (b) specifying data points for upon request disclosure appropriate for the public procurement system; and
- (c) facilitating the timeous and permanent publication of the data points in (a) on a central online portal that:
  - (i) is easily and freely accessible;
  - (ii) enables tracking across a specific procurement process or system of all data points relevant to that procurement process or system; and
  - (iii) publishes data in a format that enables machine processing, interoperability, and free use, reuse, and redistribution of data; and
- (d) facilitating the disclosure upon request of the data points in (b).

(3) The information to be disclosed as part of the data standard envisaged in subsection (2) must, among other categories, include—

- (a) where a decision is made to not follow an open competitive tender process, the reasons for the decision;
- (b) all advertisements and procurement documents issued by the procuring institution for a procurement;
- (c) the identity of each entity registered to participate in procurement and which makes a submission, including the particulars of the directors and the legal and beneficial owners of that entity recorded in terms of the Companies Act, 2008 (Act No. 71 of 2008);
- (d) the date, reasons for and value of an award to a tenderer; and
- (e) all contracts entered into with a supplier and final amounts paid to the supplier.

(4) Confidential information may not be proactively disclosed. For purposes of this section “confidential information” means—

- (a) personal information protected in terms of the Protection of Personal Information Act, 2013 (Act No. 4 of 2013), but excluding the exempted personal information contained under (3)(c) of this section;
- (b) commercial information, the disclosure of which is likely to damage a commercial interest of a tenderer;
- (c) information that is likely to endanger the life or safety of a person;
- (d) information that is likely to prejudice or impair the security of a building, structure or critical system, including but not limited to, a computer system, a communication system and a transportation system;
- (e) information that is likely to prejudice law enforcement or legal proceedings; and
- (f) information that is likely to prejudice national security.

(5) The right of access to information set out in this Section is in addition to, and not in substitution for, any rights a person may have to access information in terms of—

- (a) section 32 of the Constitution;

- (b) the Promotion of Access to Information Act, 2000 (Act 2 of 2000); or
- (c) any other law.

(6) Tenderers, suppliers and members of the public may appeal to the Tribunal from a decision by a procuring institution or the Public Procurement Office limiting the proactive disclosure of procurement information in terms of the data standard established in this section.

(7) Tenderers, suppliers, and members of the public may appeal to the Tribunal from a decision by a procuring institution refusing a request for access to procurement information.

### **Credentialing individuals involved in implementing standard procurement processes, procedures and methods**

**53B.** (1) Credentialing of individuals engaged in standard tasks associated with the implementation of an institution's procurement implementation framework as provided for in Subsection 7(a) must take place through a certification body which operates in accordance with the principles and requirements for a body certifying persons against specific requirements in accordance with the provisions of SANS 17024.

(2) The credential issued by a certification body operating in accordance with subsection (1) must be—

- (a) linked to procurement processes, procedures and methods which are consistent with this Act;
- (b) recertified at intervals of 3 years; and
- (c) subject to adherence to a code of conduct which is consistent with the purposive interpretation of this Act set out in section 2A and the prescribed code of conduct issued in terms of section 10.

(3) The certification body identified in subsection (1) must maintain a list of all individuals who are credentialed in terms of their scheme or schemes on a publicly accessible website.

### **Generally applicable regulatory instruments to be published**

**54.** The Public Procurement Office must ensure that copies of all regulations, determinations, guidelines, model documents and codes of conduct that are issued in terms of this Act and having general application are accessible at the offices of the Public Procurement Office and on the online portal.

### **Access to information held by Public Procurement Office**

**55.** (1) Subject to any applicable law, the Public Procurement Office or the provincial treasury may make information pertaining to this Act in its possession available to—

- (a) an investigating authority in the Republic;
- (b) the National Prosecuting Authority;
- (c) an intelligence division in an organ of state;
- (d) the Public Protector;

- (e) the Auditor-General;
- (f) the South African Revenue Service;
- (g) an investigating authority outside of the Republic subject to the approval of the Minister;
- (h) a person who is entitled to receive such information in terms of an order of court or other national legislation, including the Promotion of Access to Information Act 2 of 2000.

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

- (a) at the initiative of the Public Procurement Office, the relevant provincial treasury or the request of an authorised official of the entity; and
- (b) if the Public Procurement Office or the relevant provincial treasury reasonably believes such information is required to investigate suspected unlawful activity or if the Public Procurement Office reasonably believes it is in the public interest to provide such information.

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

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

(5) A person who obtains information from the Public Procurement Office or the relevant provincial treasury may use that information only—

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

(6) The Public Procurement Office or the relevant provincial treasury must make information in its possession available to the appropriate Intelligence Structure, as defined in section 1 of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994), if it reasonably believes that the information relates to any potential threat or threat to the national security.

### **Non-Disclosure of procurement information**

**56.** In order to maintain the integrity of the selection processes of this Act and of the public procurement system, no person may disclose procurement information except—

- (a) for the purpose of carrying out the provisions of this Act;
- (b) in terms of other legislation including the Promotion of Access to Information Act;
- (c) with the permission of the Public Procurement Office or the relevant provincial treasury;
- (d) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or
- (e) in terms of an order of court or the Tribunal.



## Use of technology

**57.** Procuring institutions must, to the extent possible, use information and communication technology in the implementation of this Act.

## Function performed by another person or organisation

**58.** If a procuring institution transfers funds to a person or organisation other than an organ of state to perform a function on behalf of the procuring institution in terms of legislation authorising it, any procurement required to perform the function must be in accordance with this Act.

## Delegation

- 59.** (1)
- (a) The Minister may—
    - (i) delegate to the Director-General: National Treasury any power conferred on the Minister by this Act, except the making of regulations; or
    - (ii) authorise that Director-General to perform any duty imposed on the Minister by this Act.
  - (b) The Director-General: National Treasury may—
    - (i) delegate to any official of the National Treasury any power delegated to him or her in terms of paragraph (a); or
    - (ii) authorise that official to perform any duty he or she is authorised to perform in terms of paragraph (a).
- (2) The accounting officer or accounting authority of a procuring institution may—
- (a) delegate to any official of the procuring institution any power conferred on the accounting officer or accounting authority by this Act; or
  - (b) authorise that official to perform any duty imposed on the accounting officer or accounting authority by this Act.
- (3) The Public Procurement Office may—
- (a) delegate to a provincial treasury any power conferred on the Public Procurement Office by this Act; or
  - (b) authorise a provincial treasury to perform any duty imposed on the Public Procurement Office by this Act.
- (4) A provincial treasury may—
- (a) delegate to any of its officials any power conferred on the provincial treasury by this Act; or
  - (b) authorise any of its officials to perform any duty imposed on the provincial treasury by this Act.
- (5) Any person to whom a power has been delegated or who has been authorised to perform a duty under this section must exercise that power or perform that duty subject to the conditions imposed by the person who made the delegation or granted the authorisation.
- (6) Any delegation of a power or authorisation to perform a duty in

terms of this section—

- (a) must be in writing;
- (b) does not prevent the person who made the delegation or granted the authorisation from exercising that power or performing that duty himself or herself; and
- (c) may at any time be withdrawn in writing by that person.

### **Limitation of liability**

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

### **Offences**

- 61.** (1) A person who—
- (a) knowingly gives false or misleading information under this Act;
  - (b) interferes with or exerts undue influence on any official of a procuring institution or member of the Tribunal in the performance of his or her functions or in the exercise of his or her power under this Act;
  - (c) without authorisation opens any sealed tender, including such tenders as may be submitted through an electronic system and any document required to be sealed, or divulges their contents prior to the appointed time for the public opening of submissions;
  - (d) connives or colludes to commit a corrupt, fraudulent, collusive or coercive or obstructive act related to procurement under this Act;
  - (e) contravenes section 15;
  - (f) contravenes section 16(9)(a); or
  - (g) causes loss of public assets or funds as a result of a wilful act or negligence in the implementation of this Act,

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

- (2) A person who—
- (a) without reasonable excuse fails or refuses to give information, produce any document, records or reports required in terms of this Act;
  - (b) delays, without justifiable cause, the evaluation of a tender or the awarding of a tender;
  - (c) fails to comply with a subpoena issued in terms of section 48(5) of this Act, commits an offence and is liable on conviction to a fine or to imprisonment for a term not exceeding three years or both.

(3) An accounting officer or accounting authority who fails to take reasonable steps to implement the supply chain management system of the procuring institution commits an offence in terms of this Act and is liable on conviction to a fine or to imprisonment for a term not exceeding three years or both.

(4) A member of the Tribunal who fails disclose an interest in terms of section 48(2) commits an offence and is liable on conviction to a fine or to imprisonment for a term not exceeding three years or both.

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

## **Exemption**

**62.** (1) The Minister may, with or without conditions, exempt a procuring institution from any provision of this Act, if national security is likely to be compromised.

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

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

(3) For purposes of this section, this Act excludes a regulation made in terms of section 64 or an instruction.

## **Deviation**

**63.** (1) The Public Procurement Office may, with or without conditions, authorise a deviation from a provision of a regulation made in terms of section 64 or an instruction if—

- (a) it is impossible, impractical or uneconomical to comply with the regulation or instruction;
- (b) market conditions or behaviour do not allow effective application of the regulation or instruction;
- (c) required by an international agreement binding on the Republic in terms of section 231 of the Constitution;
- (d) a disaster is declared in terms of the Disaster Management Act, 2002 (Act No. 57 of 2002); or
- (e) national security is likely to be compromised.

(2) If a deviation is authorised in terms of subsection (1), the Public Procurement Office must, within 14 days, inform the Auditor-General.

## **Regulations**

**64.** (1) The Minister—

- (a) must make regulations regarding—
  - (i) any matter required by this Act to be prescribed;
  - (ii) procurement thresholds;
  - (iii) the setting of market related price ceilings for procurement;
  - (iv) measures for the participation of a manufacturer of goods in a tender to supply the goods it manufactures;
  - (v) procurement by procuring institutions from other procuring institution
  - (v) procedures for procurement from another organ of state;
  - (vi) competency requirements of officials involved in procurement;

- (vii) the use of information and communications technology in procurement;
  - (viii) procedures for procurement under transversal term contracts;
  - (ix) circumstances under which procuring institutions must participate in a transversal term contract;
  - (x) procedures for quotations
  - (xi) disclosure points within the procurement cycle
  - (x) the requirements for security vetting of—
    - (aa) officials employed by the Public Procurement Office, a provincial treasury and procuring institution;
    - (bb) a tenderer before the award of a tender.
  - (xi) procedures for lodging complaints regarding procurement in terms of this Act by a member of the public;
  - (xii) fees for services rendered by the Tribunal;
  - (xx) procedures for advertisements and publication of tender notices by procuring institutions;
- (b) may make regulations—
- (i) permitted by this Act to be prescribed;
  - (ii) regarding any procedural or administrative matters that are necessary to implement the provisions of this Act; and
  - (iii) lifestyle audits of persons automatically excluded in terms of section 17 and their immediate family members and related persons, if an immediate family member or a related person is awarded a tender above a threshold stipulated in the regulations.
- (2) The Minister may not make a regulation unless the Minister has published—
- (a) a draft of the regulation;
  - (b) a statement explaining the need for and the intended operation of the regulation;
  - (c) a statement of the expected impact of the regulation; and
  - (d) a notice inviting submissions in relation to the regulation and stating where, how and by when submissions are to be made.
- (3) Regulations made in terms of this Act must be submitted to Parliament for parliamentary scrutiny at least 30 days before their promulgation.
- (4) A regulation comes into effect—
- (a) on the date that it is published; or
  - (b) if the regulation provides that it takes effect on a later date, on the later date.
- (5) (a) With each regulation, the Minister must publish a consultation report.
- (b) A consultation report must include—
- (i) a general account of the issues raised in the submissions made during the consultation; and
  - (ii) a response to the issues raised in the submissions.
- (6) The Minister may make different regulations for—
- (a) different categories of procuring institutions;
  - (b) different categories of procurement.

### **Transitional measures**

**65.** A tender awarded or advertised before the commencement of this Act must be dealt with in terms of the law applicable at the time of the award or advertisement.

### **Repeal of laws and saving**

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

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

### **Short title and commencement**

**67.** (1) This Act is called the Public Procurement Act, 2022, and takes effect on a date determined by the Minister by notice in the *Gazette*.

(2) Different dates may be determined by the Minister in respect of the effective date of—

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