



NATIONAL ECONOMIC DEVELOPMENT AND LABOUR COUNCIL

DRAFT NEDLAC REPORT ON THE PUBLIC PROCUREMENT BILL

OCTOBER 2022

1. BACKGROUND

- 1.1. In December 2014, Cabinet directed National Treasury to accelerate modernisation of the public procurement system through a legal framework that introduces broader policy reforms. The Office of the Chief Procurement Officer (OCPO) at National Treasury developed the conceptual framework for draft Public Procurement Bill for discussions with stakeholders.
- 1.2. Engagements with stakeholders commenced at national, provincial and local spheres of government. Following Cabinet's approval, a draft Bill was published for public comment on 19 February 2020 until 31 May 2020. The period for comment was extended till 30 June 2020. More than 4000 public submissions were considered, and a revised draft Bill prepared (the Bill).
- 1.3. National Treasury submitted the Bill for engagement at Nedlac on 13 April 2022. The Nedlac Public Finance and Monetary Policy Chamber in collaboration with the Trade and Industry Chamber established a task team comprised of Government, Business and Labour to engage on the Bill. The list of task team members is referenced as **Annexure A**.
- 1.4. The task team met 15 times between 06 May 2022 and 07 October 2022. This excludes several 1-a-sides and bi-laterals held between the social partners to find alignment on key issues.
- 1.5. The task team developed this Nedlac Report which provides a summary of the process, outlines the areas of agreements and disagreements reached, and

highlights some of the inputs made by social partners as well as by the Joint Strategic Resources (JSRs) which gave inputs in the process.

2. OBJECTIVES OF PUBLIC PROCUREMENT BILL

2.1 The main objectives of the Bill are to:

- i. Introduce uniform treasury norms and standards for all procuring institutions to implement their supply chain management systems as envisaged in section 217(1), read with section 216(1), of the Constitution;
- ii. Determine a preferential procurement framework for all procuring institutions within which to implement their procurement policies as envisaged in section 217(2) and (3) of the Constitution;
- iii. Ensure value for money in the use of public funds through, among others, the assessment of the costs, benefits and risks;
- iv. Advance ethical conduct and combat corruption through publication of procurement information and other transparency measures and introducing enforcement and appropriate sanctions for transgressors;
- v. Stimulate economic growth by promoting (a) local manufacturing; (b) procurement which is developmental in nature; (c) innovation; and (d) investment.
- vi. Improve efficiency in procurement by streamlining procurement processes, amongst others through the use of technology;
- vii. Provide for effective and expedited dispute resolution of procurement-related decisions; and
- viii. Promote a sustainable environment.

3. PROCESS AT NEDLAC

- 3.1. National Treasury tabled the Public Procurement Bill at Nedlac on 02 June 2022.
- 3.2. The task team met on the following dates:
 - i. 06 May 2022
 - ii. 02, 10, and 29 June 2022;
 - iii. 08 and 22 July 2022;
 - iv. 04, 22, and 29 August 2022;
 - v. 05, 12, 19 and 30 September 2022;
 - vi. 05 and 07 October 2022.

- 3.3. The task team invited a team of various experts in areas related to procurement to assist it in a technical and strategic advisory capacity. These experts were collectively referred to as the Joint Strategic Resources (JSR), and they provided guidance on issues including addressing anti-corruption measures; the supply chain management process, and enhancing service delivery and infrastructure development, amongst other things. This was after a workshop which was held on 10 June 2022 where the various experts presented. The experts came from the Public Affairs Research Institute (PARI), Corruption Watch, University of Stellenbosch, and University of the Witwatersrand.
- 3.4. The task team reviewed the Bill in several ways. This included: focussing on thematic areas, and reviewing the orientation of the Bill in relation to key objectives such as procurement reform, service delivery and anti-corruption measures. The task team also debated the question of whether a statute should provide greater guidance around procurement as opposed to within sub-ordinate legislation like regulations and instructions. Business and Labour believed it would serve to place greater emphasis on key areas, would harmonise different legislation, and would create better coherence around public procurement rules and laws, if there was more substance explicitly located in the Bill as opposed to being left to subordinate legislation, which in any event is not considered through the Nedlac process.
- 3.5. The thematic areas explored were:
- 3.5.1. Definitions, objects, application and administration of the proposed Act;
 - 3.5.2. Public procurement office, institutions and governance as well as the principles and implications of centralization vs decentralization in relation to provinces and institutions;
 - 3.5.3. Preferential procurement including localisation and achieving other socio-economic objectives;
 - 3.5.4. Supply chain management and bidding processes including e-procurement, transparency and how to address infrastructure procurement;
 - 3.5.5. Reflection on administrative vs. strategic procurement approaches; and
 - 3.5.6. Dispute resolution and oversight as well as considering Zondo commission recommendations and their incorporation into the Bill.

- 3.6. At the request of Business and Labour, the JSR's were asked to provide guidance to Business and Labour on the Public Procurement Bill and the effect of reforming procurement away from an administrative to a strategic approach that prioritised delivery and efficiency (and anti-corruption measures), while retaining its transformational, developmental and industrialisation objectives.
- 3.7. The JSR, in attempting to provide the requisite guidance, presented a complete re-drafted version of the Bill to the Social Partners on 10 September 2022. This re-drafted Bill (referred to as the "JSR version of the Bill") was debated during the engagements. Government reflected upon the elements which it believed were useful to be incorporated into the Bill and those which it believed can be used to shape regulations at a later stage. For reference, the JSR version of the Bill and its explanatory memo are attached to the Nedlac Report as **Annexures B and C** respectively. Attached as **Annexure D** is the government's response to the JSR version of the Bill, and **Annexure E** is the revised government Bill with tracked changes.
- 3.8. The task team further received an update on government's plan regarding the implementation of the Zondo commission recommendations relating to public procurement. The update is attached as **Annexure F**.
- 3.9. At the end of the process, while there were areas of agreement, there were also significant areas of disagreement and concerns as well as differing proposals on the next steps. These are detailed in the next sections.

4. CONCERNS AND PROPOSALS ON THE NEXT STEPS

- 4.1. Organised business and labour viewed the draft Procurement Bill as one of the most important and necessary pieces of legislation to arise in many years and provided an opportunity to put in place improved measures to tackle corruption.
- 4.2. They believed that the Bill also provided an opportunity to improve the efficiency and outcomes of public procurement in terms of its ability to deliver in a timely and efficient manner, quality goods, services and infrastructure to the South African state and its population in a manner consistent with constitutional imperatives. With the above in mind, Business and Labour were of the view that more time should have been afforded to engage on a Bill of this significance.

- 4.3. They argued that the Bill had been in development by Government for over five years but that they were being given only six months to make comments and proposals. For its part, Government believed the timeframes were sufficient and indicated its concern that any more time taken at Nedlac would impact the remaining short lead times in the legislative process.
- 4.4. One of the key concerns was the orientation of the Bill. Both Business and Labour believed that greater guidance around procurement should be in statute as opposed to within sub-ordinate legislation.
- 4.5. Government's position was that the Bill should contain (a) the broad and critical principles concerning procurement and (b) then clear and circumscribed provisions in the Bill to enable detailed prescripts for these principles in subordinate instruments. They believed that this will permit the required flexibility to adjust these prescripts according to prevailing circumstances with the desired speed.
- 4.6. Business in particular remained concerned that the Bill in its current form will not solve some of the fundamental challenges relating to efficient and speedy delivery of quality goods, services and in particular infrastructure. Without addressing these challenges, Business was concerned the country faces enormous risks in terms of ensuring the State is able to provide for its needs and those of its citizens. It was the view of Business that a broader re-write of the Bill was desirable.
- 4.7. The main concern from Labour was that anti-corruption measures in the Bill should be strengthened. As a result, one of their areas of disagreement, amongst others, is the lack of provision made in the Bill for incentivised whistle blowing.
- 4.8. All social partners were of the view that there was a need for stronger consequence management as a measure to combat corruption in procurement. They argued that cases relating to procurement corruption must not get stuck in excessively long bureaucratic and administrative delays in the judicial system. For this reason, the Social Partners agreed that government needed to adopt specialised courts for procurement corruption. This was however not an outcome which can be enabled through the Public Procurement Bill. The Task Team, therefore, recommended that this matter should be elevated by Nedlac to the relevant structures for action and implementation.

4.9. In terms of the way forward:

4.9.1. Government proposed that, where Labour and Business remained concerned with elements of the Bill, they could still make use of the other existing steps in the legislative process to raise these concerns. It indicated that the next steps, once the required internal Government processes are completed, was to seek Cabinet's approval for introducing the Bill in Parliament. The Bill also provides for an opportunity for consultation process for the development of regulations.

4.9.2. Business proposed that Social Partners continue to negotiate at Nedlac on the regulations and instructions to address perceived gaps in the Bill relating to the differentiation between administrative processes and strategic processes that may need to be adopted to fully achieve the objects of the bill.

4.9.3. Labour proposed that Social Partners adopt a multi-phased approach to the way forward: (i) the current Bill should be strengthened in critical areas (such as incentivised whistle-blowing) and then proceed to Cabinet and Parliament to be enacted during the current administration. (ii) Within 6 months Government should return to Nedlac to engage the Social Partners on a broader and longer substantive review of the Bill framed through the lens of procurement reform. (iii) Government should engage the Social Partners when developing critical regulations and instructions (including anti-corruption measures and infrastructure delivery).

4.10. The report makes some recommendations in this regard at the end of the report.

5. AREAS OF AGREEMENTS

5.1. This section outlines the areas of agreements reached by social partners during the engagements.

SECTION AS PER THE PUBLIC PROCUREMENT BILL	AMENDED SECTIONS AS A RESULT OF THE NEDLAC INPUT
Chapter 1 – Definitions	The following definitions were amended to read:

SECTION AS PER THE PUBLIC PROCUREMENT BILL	AMENDED SECTIONS AS A RESULT OF THE NEDLAC INPUT
	i. "accounting officer" means— (a) <u>in relation to a department or constitutional institution, and the</u> accounting; ii. "bidder" means any person or joint venture that tendering <u>submits</u> a bid in terms of this Act; iii. "emergency" means natural disaster, epidemic, riot, war, fire or any other situation that may result in a threat to life, health, welfare or safety of the public, which requires immediate action <u>an event which is unexpected and requires immediate action to alleviate one or more of the following:</u> (a) <u>human injury, death or suffering or deprivation of human rights;</u> (b) <u>serious damage to property or financial loss;</u> (c) <u>livestock suffering or death;</u> (d) <u>serious environmental damage or degradation;</u> <u>or</u> (e) <u>interruption of essential services;</u> iv. "immediate family member" means— <u>(a) the spouse, civil partner or life partner;</u> <u>(b) the previous spouse, civil partner or life partner;</u> <u>(c) children and step children and their spouse, civil partner or life partner;</u> <u>(d) parents; and</u> <u>(e) sibling and step sibling and their spouse, civil partner or life partner</u> v. "public office bearer" means— <u>(e) a judicial officer envisaged in section 174 of the Constitution;</u> vi. "supplier" means a person delivering following procurement in terms of this Act; vii. "transversal term contract" means a contract arranged by the relevant treasury for procurement that is required by one two or more procuring institutions;
Objectives of the Act	The objectives of the Act were amended as follows: Objects of Act The objects of this Act are, with due regard to sections 195, 216 and 217 of the Constitution, to— (b) prescribe determine a preferential procurement framework for all procuring institutions within which to implement their procurement policies as envisaged in section 217(2) and (3) of the Constitution.

SECTION AS PER THE PUBLIC PROCUREMENT BILL	AMENDED SECTIONS AS A RESULT OF THE NEDLAC INPUT
	subsection (1)(a) must, among others— (a) ensure value for money in the use of public funds <u>through, among others, the assessment of the costs, benefits and risks;</u> (b) advance ethical conduct and limit combat corruption by all role players through <u>increased transparency publication of procurement information and other transparency measures</u> and introducing <u>enforcement and</u> appropriate (d) improve efficiency in procurement by streamlining procurement processes, amongst others through provide for the use of technology <u>to simplify procurement processes and better leverage economies of scale;</u> The following clause was deleted: (3) — The preferential procurement framework referred to in subsection (1)(b) must, among others, advance— (a) — previously disadvantaged persons or categories of persons; (b) — women, the youth and people with disabilities; and (c) — small businesses, local suppliers and suppliers of local content.
Application and administration of Act	The following clause was deleted: 3 (1)(e) — 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 following clauses were amended as follows: 3 (2) <u>Despite subsection (1), Chapter 4 of this Act applies to Parliament and provincial legislatures.</u> (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 bid or has been awarded a bid. 3(4) (b) a procurement rule of a donor or funding agency, that rule prevails; or
Chapter 2: Public Procurement Office, Provincial Treasuries and Procuring Institutions	The following clauses were amended to read as follows: 2. The Head <u>and other officials</u> of the Public Procurement Office must perform functions in terms of this Act impartially and without fear, favour or prejudice.

SECTION AS PER THE PUBLIC PROCUREMENT BILL	AMENDED SECTIONS AS A RESULT OF THE NEDLAC INPUT
	5. (1) The Public Procurement Office must, in accordance with this Act— (b) promote and <u>implement necessary</u> take reasonable measures to maintain the integrity of the public procurement system; (d) develop and implement measures to ensure transparency in procurement, by among others, determining by instruction, access by the public to procurement processes; (e) <u>promote standardisation of the public procurement system;</u> (f) <u>promote innovation</u> monitor and integrate revisions and learning <u>towards modernisation of the public</u> procuring institutions <u>system;</u> (g) promote the use of technology in procurement; (h) <u>develop an electronic public procurement system for all</u> procurement; (i) monitor <u>and support</u> the implementation of this Act by procuring institutions; (j) intervene by taking appropriate steps to address material breach of this Act by a procuring institution <u>as may be prescribed;</u> (i) establish and maintain registers for bidders and suppliers debarred in terms of section 16; (k) publish the names of debarred bidders and suppliers; (m) request procuring institutions to provide information relating to procurement in terms of this Act in the format determined by the Public Procurement Office; and (o) perform other duties imposed by this Act (2) The Public Procurement Office may, in accordance with this Act— (a) <u>by instruction, issue review</u> determine standard bid documents; (b) establish data retention and reporting requirements applicable to procuring institutions <u>including the format for such reporting;</u> (c) require procuring institutions to— — (i) publish information on their procurement proceedings; and (ii) allow the public to observe their adjudication processes for procurement above the prescribed threshold, unless for a national security reason, the Public Procurement Office approves that the procuring institution may not allow the public to observe in a specific matter; (f) determine a model procurement policy <u>for different categories of procuring institutions and different categories of procurement;</u> (g) declare certain procurement practices as undesirable; (h) review the procurement policy applied by a procuring

SECTION AS PER THE PUBLIC PROCUREMENT BILL	AMENDED SECTIONS AS A RESULT OF THE NEDLAC INPUT
	institution <u>and advise on amendments;</u> (4) The Public Procurement Office must, in respect of procuring institutions. in the national sphere of government. 6. (1) A provincial treasury must— (d) review the procurement policy applied by a procuring institution <u>and advise on amendments</u> (4) A provincial treasury may, after consultation with the Public Procurement Office, investigate <u>review</u> the procurement policy applied by a procuring institution which is a municipality or municipal entity in its province <u>and advise on amendments.</u> The following clause was deleted: General procurement principles 7. (1) A procuring institution must, in the execution of its powers and duties, strive to achieve the objects of this Act. (2) A bidder may not be excluded 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. (3) A procuring institution may only award a bid to a bidder that complies with— (a) tax legislation; (b) the Employment Equity Act, 1998 (Act No. 55 of 1998); and (c) such other legislation as may be prescribed. 9. A procuring institution must— (f) identify the appropriate standard bid documents to be used by the procuring institution and bidders; (h) keep confidential the information that it obtained in relation to procurement proceedings; and (j) take all reasonable steps to prevent non-compliance with this Act.
Chapter 3: Procurement Integrity	The following clauses were amended to read as follows: 10. (1) <u>An official, a member of accounting authority, a bid committee or the Tribunal, a bidder or a supplier, member of a tribunal or any other person involved in procurement in terms of this Act, must comply with the prescribed code of conduct.</u> <u>(2) Any contravention of the prescribed code of conduct by an official or a member of accounting authority, a bid committee or the Tribunal constitutes misconduct and steps must be taken in terms of the applicable procedure.</u> Conduct of officials or other persons involved in procurement

SECTION AS PER THE PUBLIC PROCUREMENT BILL	AMENDED SECTIONS AS A RESULT OF THE NEDLAC INPUT
	11. <u>An official or a member of accounting authority, bid committee and the Tribunal</u> involved in procurement in terms of this Act must— (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 <u>prejudice to any other person;</u> (d) avoid conflict of interest; <u>and</u> (e) <u>report and disclose information relating to procurement to the Public Procurement Office and the public, in the manner provided for in this Act.</u> (e) safeguard the confidentiality of information relating to procurement, including business information of bidders; and (g) disclose any financial or other interest related to any procurement in which that official or other person participates. <u>Due diligence and declaration disclosure of interest by regarding officials and other persons involved in procurement</u> New clause 12 was added as follows: 12. (1) <u>A procuring institution must take steps in accordance with prescribed procedures to identify—</u> <u>(a) automatically excluded persons as envisaged in section 17 and their immediate family members; and</u> <u>(b) related persons as envisaged in subsection (3).</u> <u>(2) (a) The steps envisaged in subsection (1) include the prescribed declaration of interest to be made by—</u> <u>(i) all bidders, in the case of bids; and</u> <u>(ii) all applicants, in the case of applications for registration on a database created by the Public Procurement Office in terms of section 5(1)(f).</u> <u>(b) A failure to submit a declaration or submitting a false declaration renders a bid invalid.</u> The following clause was amended as follows 12 (3) If <u>a person related to</u> an official or <u>a member of accounting authority, a bid committee or the Tribunal</u> other person involved in procurement in terms of this Act, or a person related to the official or that other person, has, or intends to acquire, a direct or indirect personal interest in a procurement matter, the official or <u>a member of accounting authority, bid committee or the Tribunal</u> that person— <u>(a) must disclose such interest, as soon as possible immediately</u> after receiving the agenda of the meeting of a bid committee of the procuring institution regarding a procurement, or on notification of a matter being brought to the attention of the bid committee or at any time during the consideration of the bid when the official or other person becomes aware of the interest; and

SECTION AS PER THE PUBLIC PROCUREMENT BILL	AMENDED SECTIONS AS A RESULT OF THE NEDLAC INPUT
	Clause 13 and 14 were deleted: 13.— Bidders or suppliers— (a) — must comply with this Act and code of conduct; (b) — may not commit an offence involving corruption, fraud, collusion or coercion; and (c) — must, where considered necessary by the procuring institution and before appointment, be subjected to a vetting investigation envisaged in section 2A of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994). Declarations of interest by bidders and applicants for registration on database 14.— (1) — A declaration of interest, as determined by instruction, must be made by— (a) — all bidders, in the case of bids; and (b) — all applicants, in the case of applications for registration on a database created by the Public Procurement Office in terms of section 5(1)(f). — (2) — Failure to comply with subsection (1) or submitting a false declaration renders a bid referred to in subsection (1)(a) or an application referred to in subsection (1)(b) invalid. Further amendments were made to read as follows: 15. (1) No person may— (a) interfere with, or improper influence, the procurement process of a procuring institution; (2) <u>Subsection (1) does not apply to an official or any other person exercising a power or performing a duty in terms of legislation.</u> (3) <u>Subsection (1) may not be construed to prohibit any person from disclosing an irregularity regarding a procurement process.</u> 16. (1) <u>Before issuing a debarment order in terms of this section,</u> the Public Procurement Office (a) — may provisionally debar a bidder or supplier or any of the directors, members, — trustees or partners of that bidder or supplier; and (b) must provide the bidder or supplier or any of the directors, members, trustees or partners of that bidder or supplier with provincial debarment a notice stipulating the reasons for the <u>intended</u> debarment. (2) A provincial debarment The notice must— (a) indicate the reason for the <u>intended</u> debarment; and

SECTION AS PER THE PUBLIC PROCUREMENT BILL	AMENDED SECTIONS AS A RESULT OF THE NEDLAC INPUT
	(b) — indicate the effective date; (b) invite the bidder or supplier <u>or any of the directors, members, trustees or partners of that bidder or supplier</u> 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 bidder or supplier, and may issue a debarment order against any of the directors, members, trustees or partners of that bidder or supplier, if the bidder or supplier— (b) provides <u>provided</u> false information for purposes of registration in a database as envisaged in this Act; (4) (a) The Public Procurement Office must consider the reasons submitted in terms of subsection (2) (c) <u>(b)</u>, and (a) Confirm the <u>decide whether to issue a</u> debarment and issue a final debarment order. (b) withdraw the provisional debarment (b) The Public Procurement Office must inform a debarred <u>person</u> of the decision within five days from the date of the decision. (5) A debarment order takes effect from— (7) A debarment order prohibits the bidder or, supplier <u>or any of the directors, members, trustees or partners of that bidder or supplier</u>, for the period specified in the debarment order, from participating in procurement by procuring institutions generally or in circumstances specified in the order. (8) (a) A <u>debarred</u> bidder or supplier subject to a debarment order, may not engage in conduct that, directly or indirectly, contravenes the debarment order. (b) Without limiting paragraph (a), a <u>debarred</u> bidder or supplier subject to a debarment order contravenes that paragraph if the bidder or supplier enters into an arrangement with another person to engage in the conduct that directly or indirectly contravenes a debarment order on behalf of, or in accordance with the directions, instructions or wishes of, the <u>debarred</u> bidder or supplier. subject to debarment order. (9) A procuring institution must— (a) inform the Public Procurement Office of any bidder 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. (10) A procuring institution must take all reasonable steps to comply with the conditions of the debarment order. (11) The Public Procurement Office may, after informing the relevant procuring institution, on application by a debarred bidder or supplier—

SECTION AS PER THE PUBLIC PROCUREMENT BILL	AMENDED SECTIONS AS A RESULT OF THE NEDLAC INPUT
	(12) <u>The Public Procurement Office must—</u> <u>(a) establish and maintain a debarment register for bidders and suppliers debarred in terms of this section; and</u> <u>(b) make the register publicly available.</u> 17. (1) The following persons may not submit a bid in procurement: <u>(a) A member of Parliament public office bearer;</u> <u>(b) a leader of a political party registered in terms of the Electoral Commission Act (Act No. 51 of 1996) member of Cabinet;</u> <u>(c) a person appointed under the Public Service Act, 1994 (Proclamation No. 103 of 1994 member of Provincial Legislature or member of a Provincial Executive Council ;</u> <u>(d) an official or employee of a constitutional institution listed in Schedule 1 to the Public Finance Management Act</u> <u>councillor as defined in section 1 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998);</u> <u>(e) an official or employee of a public entity listed in Schedules 2 and 3 to the Public Finance Management Act</u> <u>judicial officer envisaged in section 174 of the Constitution;</u> <u>(f) an official or employee of any organ of state a municipality;</u> <u>(g) a person appointed under section 12A of the Public Service Act, 1994;</u> <u>(h) any entity in which a person mentioned in paragraphs (a) to (f) (b) is a director or has a controlling or other substantial interest;</u> <u>(i) a bidder or supplier subject to debarment debarred in terms of section</u> <u>(j) an entity in which a bidder or supplier debarred in terms of section 16— (aa) has a controlling interest; or</u> <u>(bb) is a director or a member.</u> (2) A non-executive member of a controlling body of a procuring institution may not submit a bid in <u>for</u> procurement in that institution. <u>(3) A person related to a person referred to in paragraphs (a), (c) and (f) of subsection (1) may not submit a bid for procurement in the institution in which the person is a member or employed.</u> <u>Declaration by Prohibition public procurement office of certain practices as undesirable</u> 18. (1) The Public Procurement Office— <u>(a) may in accordance with a prescribed process declare a particular procurement practice to be undesirable prohibited for all or a category of procuring institutions; and</u> (2) The Public Procurement Office must take into account the following principles when considering whether to declare <u>prohibit</u> a

SECTION AS PER THE PUBLIC PROCUREMENT BILL	AMENDED SECTIONS AS A RESULT OF THE NEDLAC INPUT
	practice as undesirable: (3) A procurement practice declared undesirable <u>prohibited</u> in terms of subsection (1) may not be applied by a procuring institution subject to the declaration. 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 (a) —— a public office bearer; or any person with authority over the affected person (<u>herein called "the person with authority"</u>), 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) <u>submit in writing to</u> the public office bearer or other person <u>in-with</u> authority, the objection and the reason for the objection; and (b) <u>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.</u> (2) If after receiving the objection and the reason referred to in subsection (1), the public office bearer or other person directs the affected person, in writing, to comply with the direction concerned, the affected person— (a) —— must comply with the direction and immediately submit a written report to the —— Minister; and (b) —— despite any term of employment of the affected person, may not be subjected to any disciplinary measures for complying with the direction. (2) <u>The affected</u> public office bearer or any other person <u>may not,</u> fails or refuses to provide the direction in writing, the affected person— (a) —— must not comply with the instruction; and (a) despite any term of <u>his or her</u> employment, be subjected to any disciplinary measures due to the non-compliance with the direction <u>of the person with authority.</u>

SECTION AS PER THE PUBLIC PROCUREMENT BILL	AMENDED SECTIONS AS A RESULT OF THE NEDLAC INPUT
Chapter 4: Preferential Procurement	Amendment on the following clauses were made to read as follows: Preferential framework and procurement policies policy 20. (1) The Minister must prescribe a framework for preferential treatment <u>When implementing a procurement policy</u> providing for— (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination, <u>a procuring institution must do so in accordance with the objects of this Act, this Chapter and section 10(1)(b) of the Broad-Based Black Economic Empowerment Act, 2003.</u> (2) The framework <u>policy</u> envisaged in subsection (1) must with due regard to macro-economic stability and growth objectives of the Republic include— (b) measures regarding preference for— (ii) goods or infrastructure that are produced <u>in the Republic</u>; and (c) measures— (ii) <u>to limit the</u> negative economic impact of <u>importation of goods or services; and</u> (iii) <u>to advance a sustainable environment.</u> <u>(3) Regulations—</u> <u>(a) must be made regarding the application of subsection (2)(a) and (b)(ii) and (iii); and</u> <u>(b) may be made regarding any other provision of this Chapter.</u> (4) Without limiting the generality of subsection (1)(b)(i), the framework <u>policy</u> may include preferences for (5) Persons referred to in this subsection <u>subsections (1)(b) and (2)(b)(i)</u> include, but are not limited to— (a) <u>black people as defined in section 1 of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003)</u> black people as defined in the Employment Equity Act, 1998 (Act No. 55 of 1998); (b) women, <u>people with disabilities</u> and youth <u>as defined in section 1 of the National Youth Development Agency Act, 2008 (Act No. 54 of 2008) between, and who are citizens of the Republic.</u> The following clause was deleted: (5)(a) A procuring institution must determine a procurement policy in accordance with the framework envisaged in this Chapter and its determination and implementation of the policy must ensure that the economic costs do not outweigh the objectives of the preferential measures in its policy.

SECTION AS PER THE PUBLIC PROCUREMENT BILL	AMENDED SECTIONS AS A RESULT OF THE NEDLAC INPUT
	(b) — The framework envisaged in subsection (1) must provide a criteria to assist procuring institutions in determining a procurement policy complying with paragraph (a). (c) — The Public Procurement Office or a provincial treasury may, as prescribed, direct a procuring institution to adjust its procurement policy or its implementation of the policy if there is evidence that it negatively impacts on macro-economic stability or growth of the Republic or that the economic costs outweigh the objectives of the preferential measures in the policy. (6) — For purposes of reviewing the — (a) — the framework envisaged in subsection (1); and (b) — procurement policies; a procuring institution must submit information relating to procurement in terms of this framework and its policy, as determined by instruction to — (i) — the Public Procurement Office; and (ii) — in case of a procuring institution in a province, to the provincial treasury of that province.
Chapter 5: Supply Chain Management and Bidding Process	The following clause were amended to read as follows: 21. (1) The Minister must prescribe— (a) a supply chain management system for— (i) procurement <u>of goods or services;</u> (ii) <u>procurement of infrastructure and capital assets and goods or services related to infrastructure and capital assets; and</u> (f) contract management, <u>including assessment of projects against outcomes;</u> 22. The accounting officer or accounting authority of a procuring institution must— (a) all reasonable <u>take necessary</u> steps to prevent abuse of the supply chain management system; (b) take all reasonable <u>necessary</u> steps to ensure that no person interferes with the supply chain management system or is able to amend or tamper with any bid or contract; (c) investigate any allegation against an official or other role player of corruption, improper conduct or failure to comply with the supply chain management system, and when justified — (i) <u>where necessary,</u> take steps against that official or other role player, and inform the relevant treasury of those steps; and 26. If <u>When</u> the bid adjudication committee makes a recommendation, the accounting officer or accounting authority may— (a) in the absence of an application for reconsideration or review in terms of — section 35(1) or 37(1) award the bid, taking into account the recommendations of the bid evaluation committee and bid adjudication committee; or

SECTION AS PER THE PUBLIC PROCUREMENT BILL	AMENDED SECTIONS AS A RESULT OF THE NEDLAC INPUT
	(b) decide not to proceed or to start afresh with the <u>adjudication</u> process <u>as prescribed; or</u> <u>(c) decide to cancel the procurement process in terms of section 30.</u> 27. (1) A bid may be rejected only in accordance with this Act. (2) A procuring institution must, before the conclusion of a contract, reject a bid if— (c) the bidder <u>is included in the list of persons automatically excluded from eligibility to bid in terms of section 17 of this Act</u> (i) an official of a procuring institution to which this Act applies; (ii) a company as defined in section 1 of the Companies Act, 2008 (Act No. 71 of 2008) and a director of the company is an official of a procuring institution, unless the official is a director by virtue of his or her office, or in his or her official capacity; (iii) a close corporation incorporated under the Close Corporations Act, 1984 (Act No. 69 of 1984) and a member of the close corporation is an official of a procuring institution; (iv) a co-operative registered under the Co-operatives Act, 2005 (Act No. 14 of 2005) and a member of the co-operative is an official of a procuring institution; or (v) a partnership, if a partner is an official of a procuring institution; 30. (1) A procuring institution may cancel the procurement process only if— <u>(i) there is noncompliance with a provision of the Act.</u> <u>(2) The Public Procurement Office may cancel the procurement of a procuring institution only if—</u> <u>(a) following an investigation, the Public Procurement Office is satisfied that an irregularity occurred in the procurement process;</u> <u>(b) cancellation is considered to be in the interest of national security as advised by the State Security Agency.</u> (2) The reason for cancelling a bid <u>procurement</u> must be noted in the record of the procurement process and promptly communicated to the bidders. (3) A procuring institution <u>or the Public Procurement Office</u> is not liable to a bidder by reason only of cancellation of the procurement in terms of section.

SECTION AS PER THE PUBLIC PROCUREMENT BILL	AMENDED SECTIONS AS A RESULT OF THE NEDLAC INPUT
Chapter 6: Dispute Resolution	The following clauses were amended to read as follows: 34 (2) Despite subsection (1), if an emergency requires procurement— (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 of an existing contract prior to the lapse of the period referred to in subsection (1)(a) or completion of the review process. (4) The request of the procuring institution referred to in subsection (2) must— (a) state the emergency that require the conclusion of <u>the</u> contract or extension; (d) recommend the supplier with whom the contract or extension is to be concluded. 35. (1) A bidder may submit an application for reconsideration to the procuring institution if not satisfied with a decision made in terms of this Act <u>to award a bid</u> by that institution. (2) An application envisaged in subsection (1) must be submitted to the procuring institution within 10 days of the date the bidder became aware of the circumstances giving rise to the application to <u>decision to award a bid.</u> (3) A procuring institution may dismiss an application for reconsideration if the application was not submitted within 10 days of the date the bidder became aware of the <u>decision to award a bid</u> circumstances giving rise to the application or of the date when that bidder should have become aware of those circumstances <u>the decision</u>, whichever is earlier. (b) make a decision and inform the bidder within 10 days after the submission of the application <u>the prescribed timeframes.</u> 36. (1) The Public Procurement Tribunal is hereby established to review decisions taken by— (b) <u>the Public Procurement Office to debar a bidder or supplier in terms of section 16.</u> <u>Review process of decision of procuring institution</u> 44. The Chairperson may— (a) for the work <u>effective functioning</u> of the Tribunal— (i) appoint persons as employees <u>and determine their conditions of service in accordance with the Public Service Act, 1994 (Proclamation No. 103 of 1994);</u>

SECTION AS PER THE PUBLIC PROCUREMENT BILL	AMENDED SECTIONS AS A RESULT OF THE NEDLAC INPUT
	(d) do anything else necessary for the <u>effective functioning</u> performance of the Tribunal's functions. 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 his or her work for the Tribunal <u>to impede the Tribunal's ability to perform its functions</u> (a) improperly benefit himself or herself or another person; or (b) impede the Tribunal's ability to perform its functions. 49. (1) In review proceedings <u>in terms of section 36(1)(a)</u>, the panel may, by order— <u>(2) In review proceedings in terms of section 36(1)(b), the panel may, by order—</u> <u>(a) confirm the debarment order of the Public Procurement Office;</u> <u>(b) substitute the debarment order for its own order;</u> <u>(c) set aside the debarment order of the Public Procurement Office; or</u> <u>(d) dismiss the application.</u> A new clause 38 was added as follows: <u>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.</u> <u>(2) Despite the period stated in subsection (1), a bidder may request the Tribunal to consider an application for review filed after the expiry of the period mentioned in subsection (1), but not later than five days of being informed of the procuring institution's decision, on the ground that the application raises public interest considerations.</u> <u>(3) The Tribunal must inform the bidder of its decision in terms of subsection (2) and the reasons within five days from the date of receipt of the request.</u>
Chapter 7	A new clause 53A and 53B were added as follows: <u>Disclosure of procurement information by Public Procurement Office and procuring institutions</u> <u>53A. (1) The Public Procurement Office must by instruction determine requirements to disclose procurement information</u> <u>(2) The instruction envisaged in subsection (1) must, among others, require—</u>

SECTION AS PER THE PUBLIC PROCUREMENT BILL	AMENDED SECTIONS AS A RESULT OF THE NEDLAC INPUT
	<u>(a) the categories of information to be disclosed to enable effective monitoring of procurement, which includes, among others—</u> <u>(i) the reasons for the decision, where a decision is made to not follow an open competitive tender process;</u> <u>(ii) all information regarding a bid;</u> <u>(iii) the identity of each entity registered to participate in procurement and which submits a bid, including information relevant to that entity contained in the companies register established under section 187(4) of the Companies Act, 2008 (Act No. 71 of 2008);</u> <u>(iv) the date, reasons for and value of an award to a bidder, including the record of the beneficial ownership of that bidder required under section 56(12) of the Companies Act, 2008;</u> <u>(iv) contracts entered into with a supplier and invoices submitted by the supplier;</u> <u>(b) that the information referred to in paragraph (a) be published as quickly as possible—</u> <u>(i) on an easily accessible central online portal that is publicly available free of charge;</u> <u>(ii) in a format that—</u> <u>(aa) enables tracking of information relevant to the entire process of a specific procurement;</u> <u>(bb) is electronic and interoperable;</u> <u>(cc) if it contains confidential information, only that information is severed.</u> <u>(3) For purposes of this section “confidential information” means—</u> <u>(a) personal information protected in terms of the Protection of Personal Information Act, 2013 (Act No. 4 of 2013);</u> <u>(b) commercial information, the disclosure of which is likely to damage a commercial interest of a bidder;</u> <u>(c) information that is likely to endanger the life or safety of a person;</u> <u>(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;</u> <u>(e) information that is likely to prejudice law enforcement or legal proceedings;</u> <u>(f) information that is likely to prejudice national security.</u> 53B. <u>The Public Procurement Office must determine by instruction measures for the public, civil society and the media to—</u> <u>(a) access procurement processes;</u> <u>(b) scrutinise procurement;</u> <u>(c) monitor high-value or complex procurement that entail significant risks of mismanagement and corruption.</u>

SECTION AS PER THE PUBLIC PROCUREMENT BILL	AMENDED SECTIONS AS A RESULT OF THE NEDLAC INPUT
	Amendments were made as follows: 56. (1) No person may disclose confidential information held by or obtained from the Public Procurement Office or a provincial treasury <u>for purposes of this Act</u>, except— (a) for the purpose of carrying out the a provision of this Act <u>or any other legislation;</u> 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— <u>(2) If a deviation is authorised in terms of subsection (1), the Public Procurement Office must, within 14 days, inform the Auditor-General.</u> 64. (1) The Minister— (b) may make regulations— (ii) <u>regarding negotiations with a preferred bidder or bidders prior to the award of the bid;</u> <u>(iii) regarding requirements for bidders to comply with specified legislation;</u> <u>(iv) 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 bid above a threshold stipulated in the regulations; and</u> (6) The Minister— (a) may make different regulations for— <u>(ii) different categories of procurement; and</u> <u>(b) must make regulations regarding the procurement of—</u> <u>(i) infrastructure and capital assets; and</u> <u>(ii) goods or services related to infrastructure and capital assets.</u>

6. AREAS OF DISAGREEMENT

6.1. This section outlines the areas of disagreements by Social Partners during the engagements.

SECTION/CHAPTER AS PER THE BILL	RECORDED DISAGREEMENT
Chapter 3: Procurement Integrity	i. Labour proposed the need for a provision that enables incentivised whistle-blowing to be incorporated in the Public Procurement Bill ii. Business agreed with Labour's proposal. iii. Government was not in agreement with including incentivised whistle blowing in the Public Procurement Bill. Instead it proposed that this provision must be considered when amendments are made to the Public Disclosures Act. Annexure G of this report details the Labour proposal and Governments concerns.
Chapter 3: Procurement Integrity – Clause 12	i. Labour was of the view that Clause 12 should be strengthened to create better public monitoring of politically exposed persons and their networks. Labour argued that the amendments to Clause 12 should require a. both the PPO and the procuring institutions to take steps to identify all the persons with a controlling or substantial interest in a supplier; b. both the PPO and the procuring institutions to identify the automatically excluded persons as per Clause 17 linked to suppliers as well as linked by family, business, or other close relationships to suppliers; and c. that relationships between suppliers with public office bearers, accounting officers and other categories identified by the Minister must be publicly disclosed on the central online portal for the purposes of better monitoring and accountability. ii. Business agreed with Labour's proposal. iii. Government disagreed with Labour's proposal.

SECTION/CHAPTER AS PER THE BILL	RECORDED DISAGREEMENT
Chapter 7: General provisions – Clause 53A	i. Labour proposed that Clause 53A should be strengthened by: a. ensuring “proactive disclosure” of procurement information by procuring institutions. It was of the view that proactive disclosure would strengthen the position of the public and civil society with regards to tender information transparency as this would place the burden of disclosure of information on procuring institutions so that such must be done without request. b. including an explicit reference to the Promotion of Access to Information Act, 2000 (PAIA), and c. creating a more practically transparent eco-system for public monitoring by including a requirement that published data must be “machine processable” (to allow information to be searched and found by the public). d. To support further transparency, Labour also proposed strengthening Clause 5(1)(g) to specifically refer to a “<u>single</u> electronic public procurement for all public procurement” ii. Business agreed with Labour’s proposals. iii. Government was not in support of Labour’s proposals. Government’s view was that clause 53A enabled the Public Procurement Office “PPO”) to determine by instruction, requirements for disclosure of procurement information, the concerns raised by social partners will be addressed when the PPO determines the requirements for disclosure of information by procuring institutions.
Infrastructure provisions in the Bill, and movable capital assets	i. Business was of the view that the current Bill has not dealt with underlying structural weaknesses in the public procurement system which undermine efficient and effective delivery, particularly of infrastructure. In this

SECTION/CHAPTER AS PER THE BILL	RECORDED DISAGREEMENT
	regard, Business proposed that the Nedlac Social Partners should be adopting the alternative draft of the Bill as produced by the Joint Strategic Resources (JSR's). Annexure H is Business input on this matter. ii. Labour did not have a mandated position on this matter, but agreed that everything possible must be done to ensure the Bill addresses the challenges of service delivery by the State, including of infrastructure Labour proposed a further engagement by the Social Partners at Nedlac on this matter. iii. Government disagreed with Business, and it was of the view that the infrastructure procurement was sufficiently provided for, and that the Bill compels the Minister to make regulations on infrastructure procurement.

7. CONCLUSION AND RECOMMENDATIONS

7.1. This report therefore concludes consideration at Nedlac on the Public Procurement Bill. The Report is submitted to the Standing Committee on Finance, the National Treasury, and the Minister of Employment and Labour in terms of Section 8 of the NEDLAC Act No 35 of 1994.

7.2. With due regard to the areas of concerns, agreements and disagreements in the Bill, the following further recommendations are made:

7.2.1. That further Nedlac processes are convened to (a) consider, after enactment of the Bill into law, sub-ordinate legislation which will be required to give effect to the legislation and (b) identify stronger consequence management steps to address procurement corruption. In respect of (b), the Nedlac process should include (at a minimum) the Department of Justice.

7.2.2. The social partners recognise that there may be a need to adjust the procurement framework in the near term in order to accommodate lessons or to flexibly adjust to new realities. They agreed on the principle of reconstituting the Nedlac Public Procurement Task Team in the near term for this purpose

7.2.3. The social partners will reconvene at a time to be determined by the Minister of Finance to reflect on the lessons learned.

ANNEXURE A

PPB TASK TEAM MEMBERS – 2022

BUSINESS	GOVERNMENT	LABOUR
C. Campbell (lead)	W. Mathebula (lead)	S. Eppel (Lead)
T. Sibanda	E. van Schoor	M. Parks
M. Lawrence	M. Nxumalo	T. Ehrenreich
V. Fele	A. Mulaudzi	A. Benjamin
K. Motlana	T. Makube	S. Phochana
L. Wyly	N. Guma	T. Tengela
T. Chibanguza	A. Hlatshwayo	
D. Mpafa	L. Pietersen	
	M. Fani	
	E. Setan	
	F. Adams	
	P. Mashabane	