



Draft Public Procurement Bill, 2020

Introduction and background

On 19 February 2020, the National Treasury released the Draft Public Procurement Bill (“Draft Bill”) for public comments until 31 May 2020¹. The Bill seeks to clarify the public procurement framework, rationalise public procurement processes and consolidate various existing public procurement Acts. In this way, the Draft Bill aims to revise the way organs of the state and state-owned entities procure, improve supply chain governance and ensure that public procurement contributes meaningfully towards South Africa’s socio-economic objectives.

While continuous changes to procurement rules, the Broad-Based Black Economic Empowerment (B-BBEE) codes and incentive procedures have sought to provide greater clarity, they have introduced uncertainty for potential exporters and investors, and a lack of coordination and enforcement across government entities has created opportunities for confusion and corruption. The South African Government recognises that several policies and guidelines determine procurement decisions, and there is a need to better ‘regulate’ the public procurement process. As such, the Draft Bill seeks to consolidate the numerous laws and supply chain instructions that inform public procurement into a ubiquitous piece of legislation, and to create new and stronger oversight mechanisms². In this way, the Draft Bill can be seen as part of the government’s response to “state capture”, and the associated high economic and social costs that have resulted from procurement irregularities.³

The Draft Bill provides for the complete repeal of the Preferential Procurement Policy Framework Act, 2000, which was last amended in April 2017 (“the Preferential Procurement Regulations, 2017”). The Preferential Procurement Regulations, 2017, provide the legislative framework through which procurement by all organs of the state is currently administered. This includes the preference point system (and the B-BBEE policy) that applies to all public procurement, and the local content regulations that provide the Department of Trade, Industry and Competition (“the DTIC”) with the ability to designate specific sectors or products (or a percentage thereof) for local supply. Representatives of the DTIC perceive the Draft Bill as a mechanism for implementing more ambitious local content requirements and for ensuring the standardised application of these requirements

¹ Before a Bill can pass as law, it must be considered by both houses of Parliament. Bills that affect the provinces must be introduced into the National Council of Provinces, while other Bills are tabled only at the National Assembly. The Bill is then debated at the relevant committee and amended as necessary. Thereafter, public hearings can be organised, and further amendments are made accordingly. The Bill can then be tabled for further debate and further changes can be made. Once all revisions are agreed, the Bill can then be referred to other houses for consideration. If the Bill passes through the National Assembly and/or the National Council of Provinces, it assents to the President. The Bill becomes an Act of Parliament and law once it has been signed by the President.

² <https://www.businesslive.co.za/bd/national/2019-07-04-draft-public-procurement-bill-before-cabinet/>

³ <https://www.businesslive.co.za/bd/national/2018-08-21-national-treasury-suggests-special-tribunal-on-procurement-transgression/>

across all levels of government.⁴ However, the absence of specific guidelines in these areas raises questions and concerns about the design and implementation of this legislation.

This flash report discusses the potential implications of repealing the Preferential Procurement Regulations, 2017, and incorporating them into the Draft Bill. The main changes are summarised in Table 1 at the end of this report. It also serves to highlight the potential implications of these changes for EU businesses (exporters and investors) and proposes areas for future engagement. This discussion is based only on a desktop review.

The key features of the Draft Public Procurement Bill

The overriding purpose of the Draft Bill is to introduce a single regulatory framework for local, provincial and national government and state-owned enterprises; and to create the necessary institutions to ensure the integrity of the procurement system and to address potential violations.

Most notably, the Bill proposes the establishment of a **Public Procurement Regulator**, led by the Head of the Regulator. This new regulator will have the powers to address any material breach by an institution, reconsider decisions by institutions, verify bidders and issue disbarments.

Alongside the Public Procurement Regulator, a **Public Procurement Tribunal** will be established to review the decisions made by the Regulator and provincial treasuries. In principle, this provides bidders with an ability to quickly resolve tender disputes, through a specialist structure, without having to resort to the costly and time-consuming court system. The administrative review process has been outlined in the Draft Bill as follows:

- A bidder can apply for a review within 10 days after becoming aware of the provincial treasury or the Regulator's decision.
- A bidder can still apply for review after the 10 days but before 20 days after the entry into force of the procurement on the grounds that the application raises *significant* public interest considerations.
- The Tribunal *must* issue a decision and the reasons for the decision to the bidder within 10 days from the date of receiving the request.

The Tribunal will consist of members appointed by the Minister, of which at least two members should possess suitable experience in law (e.g. retired judges) and two members should have experience or knowledge of procurement processes. From the members with law experience, the Minister can then appoint the chairperson and deputy chairperson. The roles and functions of the chairperson and deputy chairperson, along with the administrative and legal functions of the Tribunal, are included in the Bill. Importantly, the Draft Bill makes it clear that the Minister cannot appoint officers that do not possess the necessary skills, expertise, and knowledge. Tribunal members can be relieved of their duty for health reasons (accepted by the Minister), or if the member fails to discharge their responsibilities or acts in a manner that is inconsistent with the office's expectations.

The Draft Bill places a significant responsibility on the Minister of Finance not only to appoint the members of the Tribunal, but also – outside of the above institutions - to make any regulations required or permitted in the Act. Various processes and procedures in the Act, including procurement methods and thresholds, a preferential procurement framework, codes of conduct, the requirements for security vetting of officials employed in supply chain management units, can be stipulated by the Minister, within the confines of the Act. The Minister can also make regulations related to the

⁴ Discussions between the EU Delegation to South Africa and representatives from the DTIC.

procedures for bid submission, opening, evaluation, adjudication and awarding of bids and the cancellation of procurement processes.

Public officers that interfere with supply chain management processes could be liable for a fine, imprisonment or both. At the same time, suppliers in violation of the procurement regulatory framework can be disbarred from public procurement. Interference includes providing false or misleading information or evidence or interfering with or exerting undue influence on any official of an institution or member of the Public Procurement Tribunal. Officials that engage in collusive and anti-competitive, obstructive or negligent conduct that results in the loss of public assets or funds can also be liable for a fine, 10-year imprisonment or both.

Areas of potential interest and possible action

The impetus for the Draft Bill should be welcomed, as should the government's attempt to strengthen and streamline the national procurement system. The impact of these changes will however depend heavily on the political will of government in general, and the Minister of Finance in particular; the regulatory framework that follows; and on the independence and competency of the new institutions that are created. **Unfortunately, as it stands, the Draft Bill is silent on many of these features and provides widescale discretion to the Minister of Finance to appoint members of the Tribunal and to fill in many of the gaps that will emerge from the repeal of the current Act and regulations.** This may raise both concerns, and opportunities, for EU business.

Changes to the institutional framework

The establishment of a Public Procurement Regulator should provide bidders with a much-needed mechanism to identify procurement irregularities and resolve complaints. These changes will hopefully elevate the role of the Office of the Chief Procurement Officer from a departmental functionary to **an independent regulator with real powers** of oversight and enforcement. Similarly, the establishment of a separate Tribunal should alleviate bidders from seeking remedial action through the cumbersome judicial system.

The effectiveness of the Regulator as well as of the Tribunal will depend largely on the independence, capacity and ability with which it is given to implement and enforce their mandates. Unfortunately, the structure of the Regulator, and the composition and appointment of its members, is not described in the Bill. Previous publications by the National Treasury hint at the full establishment of the Office of the Chief Procurement Officer as the Public Procurement Regulator.⁵ All of this needs to be clarified before a realistic assessment of this new institution can be made; and ideally, the independence of this entity and its most senior staff should be fully protected in the law itself.

The Draft Bill allows dissatisfied parties to institute proceedings for judicial review in terms of the Promotion of Administrative Justice Act or any applicable law. While this provides an avenue for dissatisfied parties to appeal the decisions of the Tribunal, it is unclear whether the courts will only hear and address procedural issues or will be able to undertake substantial reviews of the decisions made by the Tribunal.

Whereas many other countries have established centralised procurement authorities or agencies that oversee government procurement (including some EU countries⁶); there are few examples of a

⁵ <http://www.treasury.gov.za/publications/other/SCM%20Review%20Update%202016.pdf>

⁶ For example, the Dutch Public Procurement Experts Committee (PPEC); Public Procurement Committees in Germany; the Finnish Competition and Consumer Authority; the Hungarian Public Procurement Authority; and the Swedish Competition Authority.

dedicated procurement regulator. **Moreover, the fact that the head of the regulator and the members of the Tribunal are all appointed (and removed) solely by the Minister of Finance, may weaken the independence of these institutions**⁷. The lessons from other countries in establishing and implementing effective procurement authorities, and the benefits of these different models, might prove useful to South Africa in the establishment of these new entities. In doing so, specific attention should be given to the mechanisms used to protect the independence of these institutions and their members, and the review and appeals processes in place.

Preferential procurement and local content

Key aspects of the existing Preferential Procurement Act and Regulations are effectively omitted from the Draft Bill; instead, **the Minister of Finance has been given the authority to develop regulations to prescribe how B-BBEEE and local content regulations will be incorporated into the new framework**. Both issues will be of critical interest to EU business in South Africa:

- Currently, the Preferential Procurement Regulations, 2017, awards tenders based on a **preference point system** that is adjusted depending on the value of the tender. All tenders that meet a minimum technical score, are subject to a second evaluation round. At this stage, tenders between R30 000 and R30 million are then adjudicated on an 80/20 basis (80 points for price and 20 points based on a company's B-BBEE score), while a 90/10 split is applied on tenders of above R30 million. The technical score is not even considered in this final evaluation. **The Draft Bill makes no mention of this system and allows the Minister to determine the preference point system depending on the objective of the procurement.**
- **Similarly, the Draft Bill is silent on whether the sectors designated, and the minimum thresholds determined for local production and local content, under the Preferential Procurement Regulations, 2017, will be retained or repealed.** This includes the complex and largely ineffective verification and exemption processes. To date, the DTIC has designated over 20 products and services that are largely restricted to local suppliers (or a high degree of local value-added).
- In addition, the Minister of Finance can now **set aside tenders for certain categories of persons**; this differs from the Preferential Procurement Regulations, 2017, in which only a proportion of a tender (30%) above R30 million could be set aside for sub-contracting to specific designated groups.

*The existing preferential point system and local content regulations intentionally discriminate against foreign businesses, in favour of local suppliers. The Draft Bill suggests that new regulations will be issued by the Minister of Finance in both areas. **This would potentially provide a further opportunity for the EU to raise its concerns with the current approach; and to put forward alternative suggestions to encourage domestic participation in government procurement.** In doing so, attention should also be given to the current two-stage adjudication system, which is out of line with international practice, in that it does not differentiate sufficiently between the quality of goods and services offered to government. **However, the absence of any policy guidance on these critical issues within the Bill does provide the Minister and Provincial Treasuries with an extraordinary amount of space to make and revise the procurement framework, and to possibly circumvent the full***

⁷ For some other regulators and tribunals in South Africa, the appointment (and termination) processes are more detailed, and in some cases involve the President, Parliament or the Judicial Services Commission.

parliamentary and law-making process in doing so. This opens up the Bill to future interpretation and manipulation and potential constitutional concerns.

Other potential risks

The **scope for cancelling tenders has been broadened** to include factors such as evidence of corrupt and anticompetitive behaviour, as well as matters of national security. While this should support additional discipline in tendering, it does also provide additional opportunities for arbitrary interference.

The Draft Bill also introduces a more extensive but centralised process for entering **public-private partnerships**.

- The Draft Bill fleshes out all of the conditions and processes that will need to be met in the development of public-private partnerships, from project inception and feasibility through to procurement and the conclusion and management of the final agreement. This detail provides both government and the private sector with much stronger guidance on public-private partnerships, than was previously encapsulated in the Local Government Municipal Finance Management Act, 2003.
- Municipalities were previously given some autonomy in the conclusion of public-private partnerships (PPPs). The Draft Bill requires that all PPP concepts, feasibility studies, procurement documentation and agreements must be approved by the relevant treasury (National or Provincial). The relevant treasury must also approve all amendments and is involved in resolving disputes, monitoring implementation and measuring outputs. Whereas this may lead to greater clarity and conformity in the roll-out of PPPs in South Africa, in some Provinces, it will likely contribute to increased red-tape and delays.

The **provincial treasuries may issue different instructions** for (i) different categories of institutions and (ii) different categories of goods, services or infrastructure in so far as it supports public procurement objectives. In other words, the provincial treasuries may implement a different preferential point system and define different local content regulations to that of the national government, if this advances economic opportunities for certain categories of persons and promotes local production. This could lead to an even more complex and more discriminatory preferential procurement systems across different parts of the country.

The extent to which these provisions will favour EU business, or not, will depend largely on their interpretation and implementation. Further legal advice may be necessary in preparing a response on these (and many other aspects of the Draft Bill).

Table 1: Detailed description of major changes from the PPPFA

This table provides a detailed comparison of some of the main elements of the Preferential Procurement Regulations, 2017, and how they are now addressed in the Draft Bill.

Area	PPPFA (2017)	Chapter IV: Draft Public Procurement Bill
Custodian	Office of the Chief Procurement Officer	<p>Establish Public Procurement Regulator within the National Treasury to</p> <ul style="list-style-type: none"> - ensure that institutions comply with the Bill & engage in the prudent spending of public funds - reconsider decisions by institutions - continuously revise and guide the procurement and the procurement system - promote and ensure the integrity of the procurement system, - establish and maintain a register of debarred bidders <p>Establish a Public Procurement Tribunal to review decisions made by the Regulator or provincial treasuries. Parties not satisfied by the outcomes can review in terms of the Promotion of Just Administrative Justice Act</p>
Designated groups	B-BBEE codes of good practice	Not defined
Designated sectors	Designated under regulation 8(1)(a)	Not defined
Price	Includes all applicable taxes less all unconditional discounts	Not defined
Stipulated minimum threshold	the minimum threshold stipulated in terms of regulation 8(1)(b)	Not defined
The role of the organ of the state	<p>To determine: the preference point system, the applicability of the pre-qualification criteria, whether goods or services are designated, whether compulsory subcontracting is applicable as envisaged in regulation 9, whether the objective criteria are applicable as envisaged in regulation 11</p>	<p>Prepare an invitation to a bid, and can determine the qualification criteria considers appropriate to demonstrate if the bidder is capable Qualification criteria can include:</p> <ul style="list-style-type: none"> - professional or technical qualifications - financial resources - equipment & other physical resources - personnel and managerial capability - record of the past performance of similar contracts - registration of licensing with a professional body - any other criteria deemed necessary <p>The Bill requires the institution to:</p> <ul style="list-style-type: none"> - To develop, document maintain and implement an effective and efficient supply chain management system as per the Bill - Establish a procurement unit which is responsible for, among others, implementing functions & supply chain management and maintain the supply chain management system - Establish a committee system consisting of a bid specification committee, bid evaluation committee & bid adjudication committee - Develop an annual development plan <p>An institution must formally request the Regulator to verify the preferred bidder, before awarding the bid</p>

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<p>Tenders to be evaluated on functionality</p>	<p>Tender documents must include: evaluation criteria, points for each criterion, the minimum qualifying score</p>	
<p>Preference point system</p>	<p>Tenders valued between R30,000 and R50m are awarded in terms of the 80/20 preference points system, where 80 points are awarded for price and 20 points for preferences based on the bidder's broad-based BEE (BBBEE) scorecard. Tenders valued at more than R50m are awarded based on the 90/10 preference points system, in terms of which 90 points are awarded for price and 10 points for preferences based on the bidder's BBBEE scorecard.</p>	<p>The Minister of Finance must prescribe a framework that must consider:</p> <ul style="list-style-type: none"> - B-BBEE provisions - A preference point system - Measures to advance a category or categories of persons previously disadvantaged by unfair discrimination, in procurement i.e. women, youth and disabled - Measures to advance a category or categories of businesses or a sector. - Measures for preference to set aside the allocation of contracts - Measures regarding the participation of a manufacturer of goods in the bid to supply the goods to its manufacturers - Measures aimed at advancing industrial development - Measures aimed at advancing small medium and micro enterprises in high-value procurement <p>The Minister must consult with the ministers responsible for women, youth, people with disabilities, small businesses, trade, industry, competition or infrastructure before making a regulation.</p>
<p>Pre-qualification criteria</p>	<p>The organ of the state can decide its application to advance specific designated groups</p>	
<p>Local content and production</p>	<p>The Department of Trade and Industry may, in consultation with the National Treasury: designate a sector, sub-sector or industry, stipulate the minimum threshold for local production and content National Treasury must inform organs of the state through a circular Tenders that fail to meet the minimum stipulated threshold for local production and content is unacceptable</p>	
<p>Subcontracting as a condition for tender</p>	<p>Applies to tenders above R30 million, to subcontract a minimum of 30% An organ of state can subcontract to advance specific designated groups</p>	<p>The Minister could set aside certain government tenders so that historically disadvantaged persons can submit bids.</p>
<p>Criteria for a breaking deadlock</p>	<p>The B-BBEE score breaks the deadlock If the tender is based on functionality, the winner can be determined by the highest functionality score If points are equal, the winner can be decided by drawing lots</p>	
<p>Cancellation of tenders</p>	<p>Reasons for cancellation:</p> <ul style="list-style-type: none"> - No longer a need for the goods and services, - Funds are no longer available - No acceptable tenders received - Material irregularity in the tender process <p>Cancellation must be published in the same way the original tender was advertised Cancellation requires prior approval from the relevant treasury</p>	<p>Reasons for cancellation:</p> <ul style="list-style-type: none"> - Goods, services or infrastructure no longer needed - Insufficient funding is available - Not economically viable - A significant change in the required technical specs, bidding conditions, conditions of a contract, etc. - No responsive bids are received - Irregularities in the procurement process - Evidence of corruption, fraud, anti-competitive behaviour - Considered to be a in the interest of national security
<p>Remedies</p>	<p>Apply to false information regarding: B-BBEE status, local production & content, or any matter, the organ of state must: inform the tenderer give the tenderer time to respond within 14 days</p>	<p>Debarment: The Regulator can issue a debarment order against a bidder or supplier if:</p> <ul style="list-style-type: none"> - false information is provided - connived to interfere with participation of other bidders



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	<p>Repercussions for false information: Written submissions and presentations as to why the tenderer should be restricted from conducting business with state Maintain and publish on official website of restricted suppliers</p>	<ul style="list-style-type: none"> - commit corrupt, fraudulent, or anti-competitive behaviour - the Regulator can confirm the final debarment order or remove provision debarment <p>Automatic exclusion from procurement processes Persons with an interest or membership in an entity supplying or rendering goods or services</p> <p>Publication of debarred bidders or suppliers</p>
Circulars and guidelines	<p>National Treasury may issue circulars to inform organs of state of matters in the Regulations & guidelines to assist state organs with implementation</p>	
Bid documents	<p>The standard bidding documents (SBD 6.2 or MBD 6.2) must be completed in line with the requirements of the SABS approved technical specification number SATS 1286:2011 and the Guidance Document for the Calculation of Local Content together with the Local Content Declaration Templates</p> <p>Annexure C: Local Content Declaration - Summary Schedule Annexure D: Imported Content Declaration Supporting Schedule to Annexure C and Annexure E: Local Content Declaration - Supporting Schedule to Annexure C.</p>	<p>Standard bid document to be developed</p>

Source: Desktop review carried out by the EU-funded project 'EU-South Africa Partners for Growth'