AFRICAN PROCUREMENT LAW UNIT
faculty of law ● stellenbosch university
private bag x1 ● matieland 7602 ● south africa
tel +27 (0)21 8083777 ● email aplu@sun.ac.za
www.africanprocurementlaw.org

30 June 2020

National Treasury

Per email: CommentDraftLegislation@treasury.gov.za

COMMENTS ON THE DRAFT PUBLIC PROCUREMENT BILL 2020

In response to General Notice No. 94 in *Government Gazette* 43030 of 19 February 2020, as amended by General Notice No. 220 in *Government Gazette* 43171 of 27 March 2020, we hereby wish to submit the comments contained in this document on the draft Public Procurement Bill, 2020.

About APLU

The African Procurement Law Unit (APLU) is a multi-institutional research unit focusing on the study of public procurement law within an African context. APLU is administered from the Faculty of Law at Stellenbosch University and the College of Law at the University of South Africa. Researchers from ten different universities across Africa and beyond as well as a number of researchers in other public and private institutions are currently actively affiliated with APLU. More details on APLU's objectives, projects and publications can be found at www.africanprocurementlaw.org.

Comments on the draft Public Procurement Bill, 2020

APLU welcomes the publication for public comment of the draft Public Procurement Bill, 2020. APLU is of the view that law reform in the field of public procurement is urgent in the South African context for a variety of reasons, including the incoherent state of procurement law in South Africa, the inefficiencies in the practice of public procurement, high levels of procurement corruption, but also the major role that public procurement can play in realising developmental goals in South Africa and in particular in support of the National Development Plan. We view law reform as an important enabler of the opportunities that public procurement holds and in many respects as a prerequisite for the realisation of those opportunities. It is in this spirit that we offer these comments on the current draft Bill in order to further refine the text towards an optimal procurement-law regime for South Africa.

As we have done in the past, we also gladly offer our assistance to National Treasury in furthering this important project.

Kind regards

Prof Geo Quinot
Prof Sope William-Elegbe
Dr Allison Anthony

COMMENTS ON THE DRAFT PUBLIC PROCUREMENT BILL, 2020[1]

General comments

Before proceeding to specific comment on particular parts of the Bill, it is apposite to note a few general comments on the Bill as a whole.

The deliberate attempt to consolidate public procurement law into a single regulatory regime is strongly supported. The fragmentation of public procurement law in South Africa and in particular the absence of a central, overarching, comprehensive public procurement statute is one of the main causes of an ineffective procurement regulatory regime in South Africa. We thus view this aspect of the Bill as very important and would argue that it should be strengthened in the following ways:

- We propose that the Bill deals explicitly with its relationship with the Construction Industry Development Board rules on public-sector construction procurement, issued under the Construction Industry Development Board Act 38 of 2000 ("CIDB Act"). Ideally, the Bill should make it plain that public-sector construction procurement is exclusively regulated under this Bill, i.e. not also under the CIDB Act.
- We strongly propose that no other form of subordinate legislation than regulations be mandated under the Bill. There can be little doubt that one of the main reasons for the extreme regulatory fragmentation in current South African public procurement law is due to the large range of subordinate legislation, in the form of instruction notes, standards, frameworks, etc., that are issued under the various statutes. If the Bill is to achieve its purpose of regulatory consolidation (and with it simplification), it is imperative that subordinate legislation should be restricted. It is thus proposed that the power granted to the proposed Regulator to issue binding legal instruments (such as directives and instructions under section 5(2) of the Bill) be removed from the Bill. The current power granted to the Minister to issue regulations (in section 121 of the Bill) should be retained as the sole form of subordinate legislation under the Bill.

We are concerned that the Bill is not wholly compatible with the paradigm of public finance management under the Public Finance Management Act 1 of 1999 ("PFMA") and the Local Government: Municipal Finance Management Act 56 of 2003 ("MFMA"). The paradigm of these foundational statutes in South African public finance management is that accounting officers/accounting authorities are responsible and thus accountable for the public finance management of their institutions. Put differently, the accountability of accounting officers/accounting authorities is premised on their powers to control spending within the entity. Public procurement is obviously an important dimension of public spending in these entities. When control over spending, such as through public procurement, is removed from accounting officers/accounting authorities, it is difficult to justify their accountability for such spending. We are concerned that the Bill removes in important ways the power of accounting officers/accounting authorities to control public procurement within their institutions, which is in tension with the paradigm of the PFMA and MFMA. We are in particular concerned that this may result in a lack of accountability when it comes to public spending via public procurement, since accounting officers/accounting authorities may legitimately claim that they are no longer primarily responsible for key public procurement decisions within their institutions under the Bill and thus cannot be held accountable for procurement outcomes. In our view, the Bill fails to introduce public procurement regulation that is institutionally aligned to the public finance management paradigm under the PFMA and MFMA. This is a serious defect in the Bill and requires close attention. We propose that the Bill be carefully scrutinised and revised to remove all provisions that undermine the primary responsibility and decision-making power of accounting officers/accounting authorities in relation to public procurement.

We are concerned that the Bill does not adequate address the professionalisation of public procurement. We propose that specific provisions be added to the Bill to explicitly provide for professionalisation, such as provision for mandatory competency levels and training obligations.

[1] Hereafter referred to as "the Bill".

Section in the Bill	Comment
Title	The title of the Bill is misleading given that the Bill regulates a variety of issues that are not strictly speaking public procurement, including disposal and movable asset management. It is proposed that the Bill be renamed to reflect the true scope of its regulation, e.g. the Public Supply Chain Management Bill.
Section 1	There are a number of terms used in the Bill that are not defined and for which definitions should be provided. These include: • Frameworks • Previously Disadvantaged People • Small businesses • Transfer • Evaluated costs • Most Economically Advantageous Bid • Non-responsive
	The Bill is not consistent in the use of terminology, using different terms for what seems to be the same concepts. The Bill should be revised to be consistent in the use of terminology. Examples of inconsistent use of different terms include 'public procurement' vs 'supply chain management'.
	We welcome the inclusion of "infrastructure" in the definition of "procurement" as bringing clarity on procurement of infrastructure being subject to general procurement law in South Africa, as well as the inclusion of "renting, leasing or other means", which also brings greater clarity on the inclusion of alternative forms of acquisition forming part of procurement.
	The definition of "publish" creates uncertainty regarding whether publication in the *GG* is mandatory as well as the continuing use of e-tender solutions to public procurement such as the current e-tender portal. It is proposed that the definition clearly includes publication on a prescribed e-tender portal in order to support e-procurement.
	The definition of "transversal term contract" includes a reference to "goods or services that are required by one or more institutions". The inclusion of "one" in this definition is problematic, since a transversal term contract in South African law has been conceptualised as a contract under which more than one institution acquires goods or services. It is difficult to conceptualise the logic of a transversal term contract in the case of goods or services needed by only one institution. In such a case, the justification for departing from the paradigm of the PFMA that involves decentralised procurement, i.e. procurement at entity level, seems questionable. It is proposed that 'transversal term contract' be defined as a contract for goods or services required by more than one institution.
	The definition of "this Act" includes "codes of conduct and instructions". This inclusion is problematic since it suggests that these codes and instructions have the status of (subordinate) legislation, which it cannot have given the absence of appropriate promulgation rules for their creation under the Bill as is the case with regulations under section 121 of the Bill. It is proposed that the reference to "codes of conduct and instructions" be removed from the definition so that "this Act" only refers to the statute itself and regulations properly made under the statute.
Section 2	It is not clear why the Bill departs from the core principles of South African public procurement stated in section 217(1) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") in setting out its objects. It is proposed that the Bill rather explicitly uses the five principles contained in section 217(1) of the Constitution to frame its objects. That is, the Bill should flesh out in this section how it intends to give effect to the five principles states in section 217(1) of the Constitution.
Section 2(a)(i)	It is not clear why this provision departs from the wording of section 217(2) of the Constitution. It is proposed that the wording in this section be replaced with either a reference to section 217(2) or the wording of section 217(2).
Section 2(b)(v)	The object of promoting the use of technology in public procurement is of critical importance and we strongly support its inclusion in this provision. However, we are concerned that the Bill does not truly achieve this object in that there is very little in the rest of the Bill bearing out this object and quite a few provisions where a manual approach rather than an approach premised on digital

	solutions is favoured (see e.g. sections 36 and 41). We propose that the Bill be carefully scrutinised through the lens of this object to ensure that this object is pursued in every provision of the Bill.
Section 3	The comprehensive scope of application of the Bill is welcomed. This is an important dimension of consolidating procurement law. However, while the Bill includes local government in its application, it is not clear that much attention has been given to the particular context of procurement at local government level. There are a considerable number of provisions in the Bill that does not seem to adequately cater for local government (such as the dispute resolution mechanisms discussed below). We propose that the Bill be carefully scrutinised to ensure that all provisions adequately take account of local government contexts.
Section 4	While the creation of a Public Procurement Regulator ("the Regulator") at national level with jurisdiction across all levels and spheres of government is supported, the positioning of the Regulator within National Treasury is not supported. We propose that this positioning be seriously reconsidered since it will, in our view, greatly undermine the potential effectiveness of the Regulator. Section 4(2) obliges the Head of the Regulator to ensure that the Regulator exercises its mandate "impartially" and "without fear, favour or prejudice". There are, however, no further mechanisms in the Bill that would effectively enable the Regulator to act in this independent manner. In fact, the Bill provides virtually no further guidance on the institutional functioning of the Regulator. For example, the Bill says nothing about the appointment or dismissal of the Head of Regulator or to whom this person is accountable. In the absence of any such provisions, one must assume that the Regulator will function as a unit of National Treasury alongside all other divisions and will thus be subject to the same oversight and control mechanisms within the Department. This institutional arrangement will hardly result in any form of independence for the Regulator. Simply put, the Regulator will not be independent from national government. To be effective as a true regulator, it is in our view imperative that the Regulator operate at arms-length, if not wholly independently, from national government. Its current placement within National Treasury will make this impossible and the Regulator will in all likelihood be viewed as judge and jury in matters involving public procurement, which is unlikely to generate much trust in either the public or private sectors in the regulatory functions of the Regulator. This lack of independence will greatly undermine the potential effectiveness of the Regulator in fulfilling its oversight function. It will exist within the same departmental relationships as all other divisions of National Treasury, which means that it will not enjoy any particular enhanced standing to ensure that procurement across all organs of state is aligned to a single regulatory vision. The cross-cutting role of procurement across different departmental mandates will be lost within this institutional arrangement. That is, the role that procurement plays in delivering on policy mandates across all government departments, either directly as in the industrial development, wealth redistribution or SMME support roles of procurement in South Africa or indirectly, in facilitating public programmes such as infrastructure development or a national health insurance scheme, will not be optimally served by this institutional arrangement. With this arrangement, procurement remains wholly conceptualised as exclusively within the public finance domain to the detriment of these other important conceptualisations and more broadly, the realisation of the National Development Plan. The lack of effective independence will also put the dispute resolution function of the Regulator at risk. Without proper independence, it is questionable whether aggrieved suppliers will be satisfied with the orders issued by the Regulator when a matter is appealed to it. If suppliers regard the Regulator as too close to government, in effect as part of government, it is to be expected that they will still proceed to courts to resolve procurement disputes, which would undermine the purpose of the new dispute resolution mechanisms created in the Bill.
Section 5(2)(e)	This is an example of inappropriate powers granted to the Regulator to the detriment of public finance management control by accounting officers/accounting authorities. It is not clear why the

	Regulator should have the power to prescribe particular institutional arrangements to institutions. In our view, this is a function that is appropriately located within the general public finance management powers of accounting officers/accounting authorities under the PFMA/MFMA and should not be interfered with here.
Section 5(2)(g)	As noted in the general comments above, this provision will greatly undermine the object of the Bill to consolidate procurement laws and address fragmentation. This power will simply replicate the current fragmentation. It is furthermore highly incongruous that the power of the Minister to make regulations is subjected to extensive procedural safeguards in section 121, but the power of the (unelected) Regulator to issue instructions, which seems to carry the same legal force than regulations, can ostensibly be exercised without any procedural prescripts. We propose that this provision be completely omitted.
Section 6	It is not clear what the effect of a declaration of undesirable practice will be. Importantly, will it result in decisions taken under such declared practice to be unlawful and potentially open to review?
Section 9	The duplication of much of the functions of the Regulator by provincial treasuries should be reconsidered. This arrangement is unlikely to result in an efficient public contract system and the duplication will undoubtedly come at considerable cost. If a truly independent national regulator is created, there is much less need for provincial treasuries to fulfil the same functions as the Regulator.
	It is not clear what the ambit of the powers stated in section 9(1)(a)(i) and 9(1)(c) are. Does this power imply that a provincial treasury may override decisions taken by accounting officers of provincial departments as a means of exercising control over implementation or intervention? If so, there is a tension here with the paradigm of the PFMA that places the decision-making power in respect of public finance management generally within the hands of the accounting officer. There is also no equivalent power at national or local government level under the Bill, which raises questions about why provincial level is differentiated in this way.
	It is not clear whether the powers granted to provincial treasuries extend to local government within the particular province. The use of the term "within its provincial administration" suggests that provincial treasuries do not have power to exercise these functions in respect of local government, but that implies that local government is only subject to oversight by the Regulator. We propose that clarity be provided on the applicability of these powers to local government.
Section 10	It is not clear why the Bill departs from the principles of public procurement as stated in section 217(1) of the Constitution when imposing general obligations on institutions in this section. We propose that this section refers to all the principles contained in section 217(1) as part of the general requirements that institutions must meet when procuring. The way in which this section is currently formulated results in conceptual confusion when compared to section 217(1). Under the Constitution, fairness, competition and equity are distinct principles of public procurement, whereas under this section competition and fairness are stated as factors to be taken into account in achieving equity. This is conceptually confused and should be corrected.
Section 11	While this section states that the accounting officer/accounting authority is responsible for decisions taken under the Bill and hence by implication for the procurement function, it takes considerable parts of that power away in other parts of the Bill (e.g. in the extensive binding powers granted to the Regulator, National Treasury and the Tribunal), which raises serious questions about whether such responsibility can legitimately be imposed.
Section 13	It is not entirely clear what this section is meant to achieve and the current wording of the section is likely to create significant legal problems. Most significantly, it is not clear what the effect for the validity of the relevant decision will be when the decision is taken despite objection from the relevant person, in terms of section 13(2). Is the implication of this subsection that the action is then authorised regardless of the interference. How viable is it that all such objections should be reported to the Minister?
Section 14	This section is unworkable for a number of reasons. It is too vaguely formulated to be effective. For example, what does a "transfer of funds" mean or when will a person "implement a project on behalf of the institution"?

	In its current overbroad formulation, this section may include all suppliers of services to organs of state with the implication that all such suppliers will have to apply public procurement rules to their own procurements, which is not viable. It is for example not clear if general construction contractors should be subjected to this provision when they contract with an organ of state to build a road and then enter into contracts with its own suppliers to provide the materials or hire equipment for such construction works. Are these latter contracts to be subjected to procurement rules under this Bill? This is surely not a realistic approach, but may very well be the effect of the section as currently formulated. We propose that this section either be completely omitted or significantly narrowed down by more precise formulations, including appropriate definitions of the terms used.
Section 15	The formulation in this section is worryingly narrow. As such, it fails to achieve the object of the Bill stated in section 2(b)(v) in our view. It is, for example, not clear why this obligation is restricted to "procurement methods"? Why not all aspects of procurement? As currently formulated, it is not even clear that this section will include an obligation to use the Central Supplier Database.
Section 22	We welcome the adoption of the internationally-recognised term 'debarment' for purposes of restricting suppliers under the Bill. However, we have a number of concerns relating to the proposed debarment regime in the Bill. The Bill centralises the current largely decentralised debarment system in South Africa. That is, under the Bill, debarment will be done exclusively by the Regulator. This may create delays and blocks in the system. As at June 2020, there were 200 active cases of firms and individuals who have been debarred by organs of state across the country. It is not clear how the regulator will be set up to timeously deal with the volume of debarment cases, given that a debarment procedure necessarily entails some degree of investigation or knowledge about the offences and a form of hearing before a debarment may be imposed. While centralized debarment systems are not unknown and are for instance utilized in the multilateral development banks, these systems often operate as a two-tier system, with the second tier acting as either a de novo review or appeal of the first-tier decision. Section 22 (2) states provides that an "institution must inform the Regulator in writing of any bidder or supplier who commits any of the acts listed in subsection (1) for possible debarment." From the brevity of this provision, it is not clear how the fair hearing requirements for a debarment decision will be met. Two scenarios are possible. The first is that the debarment procedure will be conducted by the organ of state who will meet the requirements for a fair hearing and will submit a recommendation for debarment to the Regulator who will then decide whether the record warrants a debarment. A second scenario is that the Regulator obtains the evidence of the commission of the offence from an organ of state, conducts the debarment hearing and imposes the decision to debar the bidder, in which case, the due process requirements are the responsibility of the Regulator. Both scenarios are problematic. Whilst the second scenario may lead to delays that may stagnate the debarment system, it is the first scenario that raises the most questions. If in the first scenario, the debarment procedure is conducted by an organ of state (which is contrary to a literal reading of the Bill), then it is not clear where an affected contractor or bidder may seek a review of this decision. Under section 7(2) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), a person must exhaust internal remedies prior to approaching the courts for a review of administrative action. Will an organ of state provide an avenue (a superior official to the debarring official) to conduct a review of the decision before it submits its recommendation to the Regulator, or will the practice be that any review of the recommendation to debar is conducted by the Regulator, which will not serve as an "internal remedy" for the purposes of section 7 PAJA. The Bill further confuses the issue as it provides that the "Regulator may, on application by a bidder or supplier subject to a debarment order—(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." This can lead to a third additional scenario to the two outlined above:

	Scenario 1: the debarment procedure is conducted by organs of state and a recommendation sent to the Regulator which includes the proposed length of debarment and the Regulator may then impose the debarment on those terms, refuse to impose the debarment, or impose the debarment on different terms in accordance with section 22(7). Scenario 2: the debarment is conducted de novo by the Regulator on receipt of information and evidence from the organs of state; and subject to appeal by the Public Procurement Tribunal created by section 99 of the Bill. Scenario 3: the debarment is conducted by one office/unit within the Regulator de novo as in scenario 2, but that the Regulator may also provide an avenue (another unit within the Regulator) to hear appeals from affected contractors over debarment decisions.
	Another challenge with the debarment provisions relates to the kinds of offences that could lead to debarment. Whilst the section covers the expected offences such as fraud, corruption and anti-competitive practices, it also unusually makes a bidder liable to debarment where they "refused to sign a contract or furnished a performance security in accordance with the terms of the invitation document bid if required to do so". Although in some cases the refusal to sign a contract might be considered distasteful and a waste of the public sector's time, it is not the kind of conduct that could or should lead to debarment in any jurisdiction. Similarly, where a contractor is unable or refuses to furnish a security, then there should be other less drastic options available to the organ of state. The rationale for imposing debarment for this type of conduct is unclear and does not accord with international best practices on debarment.
	The wording, "Regulator must issue a debarment order…", suggests that the proposed debarment regime is a mandatory one, and once there is evidence that a bidder has committed the offences listed in the section, the bidder must be debarred. This is problematic for three reasons: first because of the "non-offences" such as failure to furnish a security and failure to sign a public contract included in the list of offences. Most debarment systems utilise a mix of mandatory and discretionary debarments depending on the nature and egregiousness of the offence in question, as does the current regime in South Africa. Second, the proposed mandatory regime makes it all the more important that the debarment process meets all the requirements of administrative justice (under PAJA), as it will lead to more challenges by contractors. Third, the proposed regime does not make exceptions, and in particular, does not provide for rehabilitation or "self-cleaning", which in debarment systems like the EU and the USA, permit contractors to escape debarment where the contractor can prove that it has in the meantime eliminated the causes for debarment.
	In section 22(7), it is unclear whether the qualifier "if the order was made in error of fact or law" applies to both subsections (a) and (b) or only (b). Furthermore, it should be noted that the general standard for review of administrative actions in South African law on the basis of error is materiality, i.e. only *material* errors of fact or law will justify interference as opposed to all errors. We propose that this standard also be adopted in his section by inserting the word "material" before "error" in the section.
Section 23	The arrangement of sections 22 and 23 is strange, given that section 23 deals with provisional debarment, which may precede final debarment under section 22. It would be much better if these sections are reversed in order.
	It appears as though a temporary debarment is not a necessary precursor to a mandatory debarment under section 22. It is then also not clear in what situations a temporary debarment is imposed by the Regulator and in what cases it proceeds straight to a mandatory debarment under section 22. In other jurisdictions, a suspension is imposed as means of immediately protecting the government from an errant contractor, pending the completion of investigations and the imposition of a final debarment sanction. Under the Bill, however, the temporary debarment seems divorced from the mandatory debarments in section 22 and it is not clear how both sections will co-exist in practice.
Section 25	This section is not aligned to section 22, where it seems to be contemplated that the Regulator will do the actual debarment. Clarity must be provided on which entity will take the debarment decision.

Section 26	In our view, this provision is in conflict with section 217(3) of the Constitution, which explicitly requires national legislation to provide the framework for the implementation of policies of preference in public procurement in terms of section 217(2) of the Constitution. It follows that the power to prescribe such a framework cannot be delegated to the Minister. The Bill itself will have to include the framework.
	We propose that this entire provision be replaced with an appropriate framework in terms of which preferential procurement policies can be implemented. We propose that such a framework should be closely aligned to the Broad-Based Black Economic Empowerment Act 53 of 2003 in order to ensure the maximum coherence in policy regarding black economic empowerment. In addition, we propose that principles of sustainable development, in line with the Sustainable Development Goals, as well as attention to human rights abuses in supply chains be explicitly incorporated into the framework in order to enhance sustainable public procurement practices in South Africa.
Section 27	In our view it is insufficient for the Bill to leave it wholly to the Minister to prescribe the procurement methods to be used. We propose that the Bill must set out the basic principles regarding the different types of procurement procedures to be used in the South African procurement system. While the details of the procedures could be set out in regulations made by the Minister, it is imperative for regulatory certainty that the basic framework of procurement procedures be set out in the Bill. Such an approach will be in line with international best practice. We propose that the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement be used as a basis from which to develop this part of the Bill. This will not only ensure that South African public procurement law is in line with international consensus on procurement law, but indeed closely aligned to public procurement regulation in our region, where the COMESA public procurement regulations have been closely aligned to the UNCITRAL Model Law with the result that most COMESA member states' procurement laws follow the Model Law. In this way, greater integration of regional public procurement and eventually African public procurement can be facilitated.
Section 32	The potentially adverse effect of bid security on participation in public procurement by SMMEs should be carefully taken into account. We propose that the use of bid security should be restricted in this section to instances where it is absolutely necessary to reduce risk in public procurement and there is no alternative strategy to reduce such risk.
Section 33	Since the term "bid" includes a quotation, the minimum deadline of 4 weeks for submission of all bids in this section is problematic. This seems to be an unreasonably long time for quotations or more informal forms of procurement. We propose that this section be restricted to open bidding procedures and not apply to all forms of procurement.
Section 35	The 180-day timeframe for bid validity period is too rigid. This may be too long for smaller procurements where SMME participation is an important objective and too short for complex procurements that involve highly technical and involved evaluation processes with multiple stages. We propose that a more flexible approach to bid validity periods be adopted.
	It is not clear what the effect will be if a bidder refuses to agree to an extension of a bid validity period. In its current wording, the power of the accounting officer to extend the bid validity period is restricted to agreement with the bidder. Does this imply that the bid validity period for the entire procurement cannot be extended (and the process thus lapse) if one bidder refuses to extend? What is the effect if one bidder decides not to extend, but all the other bidders decide to extend? Could a procurement continue in such a case with the bidders that extended? We propose that clarity be provided on these questions in the section.
Section 36	The provisions on bid opening seem to contemplate a manual procurement process as the norm, rather than encouraging e-procurement practices. As such the section runs contrary to one of the objects of the Bill, as stated in section 2(b)(v) and section 15. We propose that this section be redrafted to encourage the adoption of e-procurement, where bid opening will take a completely different form.
Sections 37, 38	The Bill provides no clarity on what the adjudication method is that should or may be used to evaluate bids and to identify the winning bid. Such uncertainty creates scope for significant legal challenges and for abuse of the procurement system. The Bill refers to different concepts in evaluating bids without aligning them or providing an overarching indication of methodology. The

	Bill thus refers to "evaluated cost of each bid", "most economically advantageous bid", "lowest evaluated price", "applicable cost estimate" all of which could denote different analyses of bids. In section 42, reference is made to "scoring" in bid evaluation, which introduces yet another notion of adjudication. In our view it is imperative that the Bill provides clarity on how bids are to be evaluated, that is, what the parameters are in terms of which criteria for adjudication are to be formulated and applied, so as to create a clear legal framework for evaluation and adjudication of bids.
Section 39	The Bill should provide clarity on whether these are the only grounds upon which a procurement process may be cancelled in order to avoid the legal uncertainty that has emerged on this point under the Preferential Procurement Regulations issued under the Preferential Procurement Policy Framework Act 5 of 2000 in court cases such as *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC); *City of Tshwane v Nambiti Technologies (Pty) Ltd* [2016] 1 All SA 332 (SCA); *SAAB Grintek Defence (Pty) Ltd v South African Police Service and Others* [2016] ZASCA 104 (5 July 2016); *Head of Department, Mpumalanga Department of Education v Valozone 268 CC* [2017] ZASCA 30 (29 March 2017). We propose that the word "only" be inserted in the first sentence of section 39(1), so that the sentence reads: "(1) An institution may cancel the procurement process only if – …" Such formulation will provide much-needed certainty and avoid further unnecessary litigation regarding cancellation of procurement processes.
	Clarity must be provided on the meaning of "economically viable" in section 39(1)(c), i.e. when will it not be "economically viable" to proceed.
	Clarity must be provided on the meaning of "insufficient bids" in section 39(1)(f). Does this section imply that if only one bid is received, the procurement process should be cancelled, i.e. that it will never be possible to proceed if there is only a single responsive bid?
	The relationship between cancellation and bid validity periods (section 35) must be spelt out in the Bill. Since the procurement process will come to an end if the bid validity period lapses without extension, an institution can avoid the requirements on cancellation contained in this section by simply sitting out the bid validity period. This should not be possible and we propose that this section explicitly deals with such a scenario.
Section 41	It is not clear why a manual process of bidder verification is prescribed in this section while this process is already done electronically via publication on the National Treasury website as well as the Central Supplier Database. This is another section where the Bill's object of promoting the use of ICTs in public procurement (section 2(b)(v)) as well as the injunction in section 15 to use e-procurement methods, is greatly undermined. We propose that this section be replaced with a section that simply obliges institutions to verify this information, which could then be done electronically.
Section 42	As stated in our comment on section 37 above, the Bill is not sufficiently clear on the prescribed or authorised adjudication methods to use in determining the winning bid. This section refers to "highest score", which suggests that a scoring system is to be used, but no further information is provided on what this scoring system entails.
	The section is not clear on whether there is to be a standstill period following the identification of the winning bidder and award of the tender. Section 41(1) may be read as implying that there should be a 10-day standstill period during which the contract may not be awarded to allow challenges to be brought against the award decision, but the section is not clearly formulated, leaving significant doubt about whether this is indeed the case. Clarity on a standstill period is essential in order to avoid legal challenges. We propose that the section explicitly states whether there must be a standstill period and for what length of time.
Section 43(5)(a)	We question the advisability of making participation in transversal contracting mandatory across all organs of state. Again, this is an example of public finance decision-making being removed from accounting officers/accounting authorities that stands in tension with the paradigm of the PFMA/MFMA. It is difficult to see on what basis accounting officers/accounting authorities can be held responsible for public finance in their organisations if they have no control over their

	procurement, because they are forced to procure via transversal contracts. We propose that the current voluntary participation in transversal contracts be maintained.
Section 52(2)(d)	We propose that the continued parallel regulation of construction or infrastructure procurement under the CIDB Act and this statute is inappropriate and leads to unnecessary duplication and legal complexity. We propose that infrastructure procurement be solely regulated under this legal regime.
Section 54(4)	The prescript that there must be "separation of duties in the composition" of bid committees suggests that there may not be overlap in membership between committees. Whereas this is a sensible approach in respect of the Bid Adjudication Committee, there is in our view no logic in applying this prescript to the Bid Evaluation Committee and Bid Specification Committee. In our view, it is desirable to have membership overlap between these two committees to ensure that the appropriate technical competence is available to both these committees and to ensure consistent application of technical specifications.
Section 64	The same issue as noted in respect of section 42 regarding standstill period arises here. It is not clear whether there is a mandatory 10-day standstill period before award. This should be explicitly stated.
	We propose that the power granted in section 64(b) be explicitly subjected to the requirements in section 39.
Sections 77 - 80	We question whether movable asset management is appropriately located within a public procurement statute. In our view, this is a topic that should not form part of this legal regime, but should rather be dealt with separately.
Section 91	The formulation of subsections (1) and (2) seems to be at odds. In subsection (1), the Minister is granted a discretion ("may prescribe"), but in subsection (2), the Minister is obliged to include certain methods ("must include at least"). This seems incongruous. Why force the Minister to include certain methods under subsection (2) if the Minister is not even under a duty to prescribe any method under subsection (1).
	Subsection (2) also seems at odds with section 93, where discretion is granted to institutions about what methods for disposal to adopt in their disposal management system.
Chapter 9	We welcome the attention to a new dispute resolution regime introduced in the Bill. We are of the view that the creation of effective remedies in procurement disputes at an administrative level, i.e. outside of litigation is an important step in the right direction regarding procurement dispute resolution.
	We are concerned that the dispute resolution regime introduced in this chapter is too onerous and will have a severely negative impact on efficiency of the procurement system. We thus propose that the basic principles of the proposed system be maintained, but that it be reduced. In particular, we propose that two levels of reconsideration, one at entity level and another at Regulator/Provincial Treasury level, are unnecessary. We propose that one level of reconsideration is adequate.
	We are concerned that the position of local government procurement is not adequately dealt with in this chapter. It is not apparent how disputes at local government level will be addressed. Ostensibly, such disputes will be subject to reconsideration by the institution in terms of section 96. However, it is not clear what the subsequent mechanisms are. Section 97(1) allows provincial treasuries to reconsider a decision by an institution "in the provincial sphere of government". Section 98(1) allows the Regulator to reconsider a decision by an institution "in the national sphere of government". There is no equivalent provision for institutions in the local sphere of government. The Tribunal, in turn, may only review decisions taken by a provincial treasury in terms of section 97 or the Regulator in terms of section 98, which will thus exclude decisions relating to local government procurement. It thus seems that, for local government procurement, there is only reconsideration by the institution, where after an aggrieved party should proceed to judicial review. This seems anomalous in light of the dispute resolution regime implemented in this chapter in relation to the two other spheres of government. Furthermore, we are concerned that no mention is made of section 62 of the Local Government: Municipal Systems Act 32 of 2000 in respect of procurement disputes at local government level. The applicability of section 62 in the context of public procurement has created significant legal uncertainty. It is imperative that the Bill clarify the role of section 62 in public procurement. We propose that the Bill explicitly states that section 62

	does not apply to decisions taken under this Bill, so that only the dispute resolution mechanisms created in this Bill apply to procurement disputes.
Section 95(1)	This section is not clear on whether there is mandatory 10-day standstill period during which challenges can be brought. The section qualifies the restriction on awarding the contract with the words "if a procurement process is subject to a reconsideration", which may suggest that the award can proceed if there is no such reconsideration, even within the 10 day period. We propose that the section explicitly states that there may be no award for a 10-day period, during which an application for reconsideration may be brought.
Section 96(1)	The scope for challenge is extremely broad as stated in this section, i.e. "a decision made in terms of this Act". This means that any decision made under the Bill may be challenged, e.g. a decision on procurement planning (under section 12), on what qualification criteria to use (under section 30), a decision on clarification (under section 37), a decision to constitute a bid committee (under sections 54, 55, 56) etc. This seems far too broad. We propose that the scope of reconsideration be limited to only certain types of decisions, which could either be described generally (as is done under PAJA for example) or specifically with reference to particular decisions taken under the Bill (e.g. by listing the relevant sections).
Section 96(4)	The timeframe for resolution of disputes is too rigid. We propose that a more flexible approach to timeframe be incorporated in order to allow institutions more time where it is necessary, e.g. because of the size of the organisation or the complexity of the matter. We propose the following alternative wording for section 96(4)(b) "issue a written decision, within a reasonable time, but no later than 30 days after the submission of the application."
Section 96(7)	While reconsideration by the institution necessitates the power stated in this section in order to avoid the effect of the *functus officio* doctrine, we are concerned that this provision is too broadly stated. In its current wording, an institution is empower to revisit any of its decisions at any point in time. This may suggest that no procurement decision will ever be final. We propose that a limit be placed on this power, in line with the reconsideration power granted in this section, i.e. an institution should be granted the power to reconsider its decision only in terms of this section.
Section 97	We propose that the second layer of reconsideration by provincial treasuries is unnecessary and should be removed. We seriously question whether provincial treasuries will have the capacity to effectively deal with all such applications for reconsideration, which could quite likely be extremely voluminous.
Section 98	We propose that the second layer of reconsideration by the Regulator is unnecessary and should be removed. We seriously question whether the Regulator will have the capacity to effectively deal with all such applications for reconsideration, which could quite likely be extremely voluminous.
Chapter 9 Part 5	We welcome the creation of the Tribunal and its proposed role in procurement dispute resolution. We think this can be a very effective mechanism in streamlining dispute resolution in the context of public procurement.
Sections 115, 118	The indemnity against civil liability ostensibly granted in section 115 seems incongruous with the criminal liability imposed in section 118 and particularly relating to losses in section 118(1)(e). It is not clear what the difference in the standard of care is when comparing these two provisions. Further, it is not clear whether section 115 would be a defence against potential liability under section 118 to pay compensation to a complainant in respect of losses incurred. We propose that the relationship between these two provisions be clarified.
Section 119	The power of exemption is in our view too narrowly stated. We propose that the Minister be granted broader powers to exempt upon application and good cause shown.
Section 120	We question the advisability of granting the power to approve deviations by all organs of state to the Regulator. We question whether the Regulator will have the capacity to deal with all applications for deviations, especially given that one ground for deviation is urgency in emergency situations. Again, this is an example of public finance decision-making being removed from accounting officers/accounting authorities that stands in tension with the paradigm of the PFMA/MFMA. We propose that the current regime, where accounting officers/accounting authorities carry both the responsibility and accountability for deviations be retained.