

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 103/25/2024

In the matter between:

PREMIER OF THE WESTERN CAPE GOVERNMENT Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY First Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL
OF PROVINCES** Second Respondent

MINISTER OF FINANCE Third Respondent

FILING NOTICE

DOCUMENTS FILED:

(1) Replying to affidavit: Deidre Baartman.

DATED at CAPE TOWN ON THIS 27th day of AUGUST 2025.



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Per _____

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Attorney for Applicant

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PREMIER OF THE WESTERN CAPE GOVERNMENT

Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY

First Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL OF
PROVINCES**

Second Respondent

MINISTER OF FINANCE

Third Respondent

REPLYING AFFIDAVIT

I, the undersigned,

DEIDRÉ BAARTMAN

do hereby make oath and say that:

Deidre Baartman

PART A INTRODUCTION

1. I am the Minister of Finance of the Western Cape Government. I deposed to the founding affidavit on behalf of the applicant.
2. The facts in this affidavit are within my personal knowledge, except where the context indicates otherwise, and they are to the best of my belief both true and correct. Where I make averments not directly within my knowledge, I do so based on information ascertained from documentation under the control of the applicant. Legal submissions are made on the advice of the applicant's legal representatives.
3. I have read the answering affidavit of Ms Angela Thokozile Didiza, the first respondent ("**the Speaker**"). I respond to her affidavit herein. I first deal with certain subject-matters traversed by the Speaker after which I respond to her answering affidavit paragraph-by-paragraph to the extent necessary.
4. Where I do not address or respond to a particular allegation which is inconsistent with my affidavits, my failure to do so must be construed as a denial of such allegation.

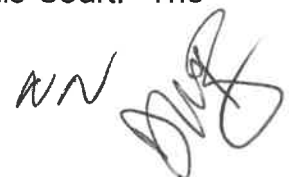
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**SPEAKER'S PRELIMINARY POINT - INTERGOVERNMENTAL RELATIONS
(AD PARAGRAPHS 7, 12 - 15 and 90-91)**

5. In these paragraphs the Speaker alleges that Chapter 3 of the Constitution of the Republic of South Africa, 1996 ('**the Constitution**') is applicable; there was an obligation on the applicant to comply therewith by first having to '*exhaust all other remedies before it approaches a court to resolve the dispute*'; and the applicant failed to do so thereby rendering the application fatally flawed.
6. The Speaker's objection holds no merit.
7. First, Chapter 3 of the Constitution is inapplicable in the present situation. Legal argument will be made on this issue in heads of argument and at the hearing. The applicant's legal representatives will elaborate on the following points –
 - 7.1. An intergovernmental dispute is a dispute between different governments concerning a matter arising from a statutory power or function assigned to any of the parties or an agreement between the parties regarding the implementation of a statutory power or function and which is justiciable in a court of law. In the present instance, the dispute falls outside the definition of an intergovernmental dispute, because it is not a dispute about the implementation of a statutory power or function. It is a dispute about the reasonableness of the NA's efforts to facilitate public participation in the exercise of its original law-making power.

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- 7.2. In any event, disagreement regarding the manner and form of making legislation and more particularly, the reasonableness of public consultation, does not give rise to the kind of 'intergovernmental dispute' which is capable of being resolved either before or after legislation is passed by the NA.
- 7.3. Before the Act was passed, the Premier of the Western Cape had no right to intervene in the national law-making process of the NA in order to declare a dispute about the sufficiency of public consultation. And the Speaker would not have had the power to speak or negotiate on the NA's behalf.
- 7.4. After the Act was passed, negotiations about the reasonableness of public consultation would have served no purpose, as the Act could not be undone.
- 7.5. In any event, the Intergovernmental Relations Framework Act, 2005 ('IRFA') specifically excludes Parliament and Provincial Legislatures from its ambit. The IRFA obligations would thus not apply.
- 7.6. There were also no other constitutional obligations or other formal "*other remedies*" to exhaust.
8. Second – and bearing in mind the lack of formal available avenues - the applicant indeed attempted to seek a resolution other than approaching this Court. The

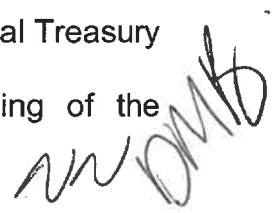


applicant did what it could to avoid litigation but its efforts were rebuffed by the President and the Minister of Finance. More particularly:

- 8.1. After the Bill was passed by the National Assembly ('NA') on 16 May 2024, the applicant addressed a letter on 27 May 2024 to the President highlighting the applicant's concerns with the constitutionality with both the substance of the Bill and the process followed by the NA. The applicant requested that the President refers the Bill back to the NA in terms of section 79 of the Constitution. I attach this letter as "RA1".
- 8.2. The President then, on 18 July 2024 signed the Bill into law.
- 8.3. On 25 July 2024 the applicant addressed a further letter to the President noting that he had signed the Bill into law. A request was made to the President that consultations be held urgently with the Provinces and municipalities given the serious concerns that had been raised. The letter then detailed the concerns and requested the President to delay putting the Procurement Act into operation pending the constitutional concerns being resolved. I attach this letter as 'RA2'.
- 8.4. On 23 August 2024 the President responded. He advised that he did not find any constitutional impediments to prevent the Bill from being assented to and signed into law. He further stated that he forwarded the letter to the Minister of Finance who was considering the letter and would revert to the applicant. I attach the President's letter as 'RA3'.

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- 8.5. On 10 September 2024 the applicant addressed a letter to the Minister of Finance and referred to the letters I detailed above. The applicant again expressed its concerns in respect of the constitutionality of the Procurement Act. Then, in paragraph 11 of the letter, the applicant called upon the Minister of Finance as follows - *“in the spirit of cooperative governance, we request that National Treasury along, with provinces and local government, meet as soon as possible to consult on the concerns, and that any processes relating to preparing [the regulations] under the Act be suspended until the concerns are resolved.”*
- 8.6. This letter, which I attach as ‘**RA4**’, was copied to the Director General: National Treasury, Mr Duncan Pieterse. I note that Mr Pieterse attested to a confirmatory affidavit filed in support of the Speaker’s affidavit.
- 8.7. The applicant then called upon the Minister to respond by 20 September 2024 *“failing which the [applicant] will be compelled to explore legal options to seek appropriate relief”*.
- 8.8. The Minister of Finance failed to respond at all.
- 8.9. On 23 September 2024 the Head: Provincial Treasury of the applicant (Ms Julinda Gantana) addressed a letter to Mr Duncan Pieterse, the Director General: National Treasury in the context of National Treasury commencing with a consultative process for the drafting of the

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regulations to be made under the Procurement Act. Ms Gantana referred to the applicant's letter of 10 September 2024 and noted that its call for consultations on the Procurement Act had not been responded to. I attach this letter as "RA5".

9. Thus, even if the Chapter 3 principles of co-operative government and intergovernmental relations applied in the present situation, the applicant made reasonable efforts to settle the dispute but its efforts were not reciprocated.
10. For these reasons, it is submitted that the Speaker's preliminary point be dismissed.

**NEW CHAPTER 4 "FORESHADOWED" IN PREVIOUS SECTION 17
(AD PARAGRAPHS 9.1; 44; 69 – 74)**

11. In these paragraphs the Speaker states that the new Chapter 4, which was introduced by National Treasury to the NA Finance Committee at its meeting on 17 November 2023 "*did not contain any concepts or preferential procurement measures that had not already been foreshadowed*" and that the purpose of the revised chapter 4 was to "*unpack and elaborate upon the provisions that had initially been included in clause 17 of the Bill*".
12. However, this is incorrect.
13. I have already highlighted the fundamental change relating to the new Chapter 4 in my founding affidavit, and in particular paragraph 60 thereof. Set-asides,

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compulsory subcontracting and pre-qualification criteria were mentioned and contemplated in the B18-2023 Bill within a particular framework – one of permissiveness. However, the new Chapter 4 (which was not subjected to a public participation process by the NA) fundamentally changed that framework to a mandatory one.

14. It was not foreshadowed in the B18-2023 Bill that these “*concepts and preferential procurement measures*” would be obligatory. In terms of the B18-2023 Bill, they (set-asides, compulsory subcontracting and pre-qualification) merely needed to be included in the procurement policy of an organ of state – the details of which and the applicability of which in any given tender would be left to the discretion of the organ of state.
15. The Speaker has herself highlighted a further fundamental change between the Bill published for public comment and the Bill as adopted by the NA. This is set out in paragraph 24 of the answering affidavit. Here the Speaker explains that:
 - 15.1. The B18-2018 Bill did not determine in which circumstances any particular mechanism should be used.
 - 15.2. However, it is clear from section 16(4) of the Procurement Act that the mechanisms are to be implemented on a sliding-scale basis.
16. Such sliding-scale, or staggered manner was not ‘foreshadowed’ in the B18-2023 Bill. This adds a further element to the prescriptive nature of the new Chapter 4.

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It prescribes not only that it is mandatory for the preferential procurement mechanisms to be implemented, but also how organs of state are to implement them.

17. A further part of Chapter 4 which is new, is the entire section 20 which prescribes that the Minister may stipulate a threshold for local production and content – and when the Minister does so, organs of state must then specify in applicable tenders that only locally produced or manufactured goods meeting such threshold will be considered. This is an entirely new element – again not foreshadowed in the B18-2018 Bill.
18. I raise this particular element because the Speaker repeatedly states in her affidavit (paras 9.1, 44 and 69) that the *“revised draft of Chapter 4 did not contain any concepts or preferential procurement measures that had not already been foreshadowed”*. Patently, she is incorrect.
19. I note that the Speaker contends in paragraph 72 of her answering affidavit that the changes brought about by the new Chapter 4 on 17 November 2023 were not *“materially new subject matter”* and it is for this reason that the NA Finance Committee did not seek permission from the NA to extend the subject matter of the Bill as required by Rule 286(4)(b). However-
 - 19.1. The mere fact that the NA Finance Committee did not appreciate the significance of the changes; or did not seek permission to extend the subject matter, does not detract from the material nature of the changes.

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- 19.2. In fact, at the time it adopted the amended Chapter 4 for referral to the NCOP, the NA Finance Committee acknowledged that Chapter 4 had “*comprehensive revisions*” (para 47 of AA).

PPPFA REGULATIONS (2017) (AD PARAGAPHS 9.2 – 9.2.5, 34 1, 34.2, 34.5 & 74 – 76)

20. In these paragraphs the Speaker suggests that the regulations made in 2017 (“**the 2017 regulations**”) under the Preferential Procurement Policy Framework Act 5 of 2000 (“**PPPFA**”): (1) contain concepts which are “*fundamentally similar*” to those in the Procurement Act; and (2) were “*the product of an extensive research and consultation process*”.
21. The Speaker contends in paragraph 9.2.4. and 9.2.5 of her answering affidavit that the public participation process followed in making the PPPFA regulations (2017) should therefore be considered when determining the reasonableness of the process leading to the enactment of the Procurement Act.
22. The Speaker’s proposition is fundamentally flawed. The 2017 regulations were made by the Minister of Finance in terms of section 5(1) of the PPPFA. That section requires that draft regulations must be published for public comment. This the Minister must do – not Parliament. I attach as “**RA6**” the Media Statement of June 2016 by National Treasury calling for public comment on the draft 2017 regulations.

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23. The subject matter of this application relates to whether Parliament fulfilled its obligations to facilitate public participation in terms of the Constitution. It does not assist Parliament to state that – 8 years ago – a member of the Executive conducted a public participation process in respect of regulations under the PPPFA which happens to deal with similar concepts. Such process is irrelevant.
24. The Speaker's proposition is in any event factually flawed because the new Chapter 4 contains concepts that were not at all in the 2017 regulations. For instance -
- 24.1. Set asides did not feature at all in the 2017 PPPFA; and
- 24.2. There was no so-called staggered use (let alone the compulsory staggered use) of the various preferential procurement mechanisms as described in paragraph 24 of the Speaker's answering affidavit (referred to above).
25. Accordingly, the public participation process leading to the 2017 regulations falls to be disregarded.

FAILURE TO CONSIDER SUBMISSIONS (AD PARAGRAPHS 9.3 & 77 – 83)

26. The Speaker contends that all the submissions by the public were indeed considered but that they were not necessarily dealt with individually but categorised into themes and treated as such. In this regard, the Speaker relies

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on an extract from a report by National Treasury which is attached as "FA8" to my founding affidavit.

27. However, the extract from the report (quoted in paragraph 80 of the Speaker's answering affidavit) contradicts rather than supports the Speaker's argument. The extract makes it crystal clear. It states that '*comments that the review team were able to consider, were responded to on the comments matrix...*' The clear meaning of this is that not all comments were considered and not that all comments were considered under themes. And (only) of those that were considered, the review team either responded thereto, or where a response was not warranted, such comments were simply noted.
28. Further, I have already detailed in paragraphs 34 – 49 of my founding affidavit how the National Treasury had failed to consider and respond to the bulk of the public comments. Even the members of the NA Finance Committee raised this issue as a concern and did so repeatedly at the meetings (see para 36.1 and 37 of my Founding Affidavit). These members of the Committee also clearly understood what the report presented by the National Treasury officials meant. It meant that they had not considered (and were thus unable to respond to) all the comments. No claim was made that all the comments were dealt with thematically.
29. Accordingly, the Speaker's allegation in this regard is denied. National Treasury did not consider all the comments albeit under themes. And this is a fatal flaw because –

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- 29.1. the NA Finance Committee relied on National Treasury to summarise, consider and respond to the comments; and
- 29.2. there was no discussion in the NA Finance Committee on the remaining comments that National Treasury had failed to consider and respond.
30. It is necessary to deal briefly with the Speaker's claim in paragraph 83 of her answering affidavit that the applicant has not identified any particular issues which it raised in its comments to which "*National Treasury unlawfully failed to respond.*" This misses the point. It is not a case of each and every issue not being responded to – instead the challenge is that the applicant's submissions (and those of others) were not considered at all.
31. The Speaker's contention in paragraph 83 of her answering affidavit that '*the primary issues raised by stakeholders*' were all considered and addressed is not supported by the evidence – which I have already raised in my founding affidavit.
32. While I accept that a report which purported to summarise the comments in themes was presented by National Treasury at the meeting of the NA Finance Committee meeting of 17 November 2023, such summary did not include the consideration of all the comments. Only those that were considered were included in the thematic summary. Again, this effectively denuded the public participation process of legitimacy.

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33. As far as the presentation of the evidence is concerned, I need to apologize: the extracts of the comment-and-response matrix have not been printed and copied in a manner that illustrates my point clearly (i.e. that the vast majority of comments have not been considered by, and have been left with no response by, National Treasury). The extracts are not easily printable and unfortunately the relevant columns have been cut off from the printed versions. The applicant's attorneys will liaise with the Registrar to ensure that an electronic copy (in Excel format) is provided to the Court to be made available to the Judges.

SUBMISSIONS THAT B18-2013 BILL DID NOT GO FAR ENOUGH

(AD PARAGRAPHS 41, 69 and 82)

34. In these paragraphs the Speaker contends that the changes to Chapter 4 came about because of submissions that *"it was necessary in order to meaningfully advance the objectives of transformation and empowerment"*.
35. I accept that there were comments to the effect that clause 17 of the B18-2023 Bill failed to achieve the objective of sections 217(2) and 217(3) of the Constitution. SABTACO, for example, commented that Clause 17 provides only broad principles, leaving the design of preference point systems and thresholds to individual procuring institutions without providing much guidance. However, I make two points in response –

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35.1. There were also comments that favoured an even less prescriptive regime. This was, for instance, the position of the applicant and Transnet.

35.2. Just because some commentators argued for more prescriptive requirements does not detract from the material nature of the changes made to the Bill and the fact that such changes were not the subject of a further public participation process.

AD SERIATIM RESPONSES

AD PARAGRAPHS 1 - 4

36. The heading of the Speaker's affidavit (between the tramlines) states that the affidavit is that of both the first and second respondents. Further, the Speaker describes herself in paragraph 1 as 'the second respondent'. I have assumed these are clerical errors and that the answering affidavit is by and on behalf of solely the first respondent.

37. I deny the correctness of her affidavit where it conflicts with my affidavits.

AD PARAGRAPHS 5 and 6

38. The contents hereof are denied where they conflict with or do not accurately reflect the relief sought and the grounds therefore set out in my founding affidavit.

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AD PARAGRAPH 8

39. While it is unclear what the second alleged failure is, I in any event deny the contents hereof.

AD PARAGRAPHS 9.1 – 9.3

40. I have already responded to these paragraphs above. The contents hereof are denied.

AD PARAGRAPHS 10 – 10.8 (including introductory para)

41. The contents hereof are denied where they conflict with my affidavit.

AD PARAGRAPHS 17 - 27

42. In these paragraphs the Speaker seeks to set out the legislative and constitutional framework. To the extent that the relevant provisions of the Constitution and the Procurement Act are accurately reflected, these are admitted.

43. Further, I have already addressed the so-called staggered implementation of the various preferential procurement measures as explained by the Speaker in paragraph 24 of her answering affidavit. I point out though that, contrary to the

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contents of paragraph 24, it is not at all apparent from the wording of the Procurement Act that –

43.1. Section 17 is directed at assisting those disadvantaged by unfair discrimination to enter the economy and it will apply to “*lower-value contracts*” – an undefined concept;

43.2. Section 18 seeks to encourage previously advantaged and empowered bidders who are established in the market to sub-contract with certain identified groups and that it targets “*mid-level contracts*” – another undefined concept; and

43.3. Section 19 is applicable to “*complex and high-value tenders*”.

AD PARAGRAPHS 28 - 32

44. In these paragraphs the Speaker seeks to set out her legal representatives’ analysis of the Court’s powers to pronounce on the public participation process followed by Parliament.

45. These issues are matters for legal argument in the heads at the hearing. Therefore, I do not respond thereto.



AD PARAGRAPH 33

46. To the extent that it is implied, I deny that a failure to comply with a single material requirement does not render the legislation unconstitutional. If such failure renders the facilitation of public involvement as not being reasonable, it is fatal.

AD PARAGRAPHS 34.3 and 34.4

47. As I have already stated, the involvement of the public by the Executive (as opposed to Parliament) in the making of regulations under a different Act (i.e. the PPPFA) is irrelevant.

48. With regard paragraph 34.3 – while it is correct that the business of the NA lapses when its term ends, Bills do not lapse and they are to be taken up by the new Parliament. This much is clear from Rule 351 which states that “*all motions and all other business, other than Bills...*” lapse at the end of the day of the last sitting. Furthermore:

48.1. The Speaker’s assertions in paragraph 34.3 are puzzling. She appears to suggest that in this case it was better to rush through a Bill than to trouble the next NA and its members with an unfinished Bill, even one with “*a substantial impact on the state’s financial and other resources*”.

48.2. The Speaker’s approach is regrettable in that it appears to endorse a rushed legislative process where the majority of the public’s comments

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are not considered and where fundamental changes are made without seeking the public's comments thereon.

49. That a new NA will be saddled with a Bill left over by the previous NA is par for the course and it is explicitly permitted in the Rules. If there was insufficient time that was the preferable (and constitutionally valid) route to follow.
50. With regard to paragraph 34.4 – I have noted the reference to the confirmatory affidavit of Mr Pieterse. In his affidavit he does not explicitly confirm the contents of paragraph 34.4. However, I reiterate that the intention to conduct a rigorous process in the passing of the new regulations under the Procurement Act will not cure the lack of a reasonable process by Parliament when it had passed the Procurement Act. It is in any event impossible to predict, at this stage, what the consultation process regarding the new regulations will entail. And what makes matters worse, such future public participation is to be solicited by the Executive, not Parliament. Such actions are, and will be, completely irrelevant.

AD PARAGRAPH 35

51. The contents hereof are denied.

AD PARAGRAPHS 36 - 40

52. The contents hereof are admitted.

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AD PARAGRAPHS 42 - 43

53. While I do not deny the contents of paragraph 43, I point out that the wholesale revision of clause 17, which became Chapter 4, happened virtually overnight. The only ones to be consulted on the new Chapter 4 were stakeholders who happened to be present at the meeting of 17 November 2023 (merely as a result of them having been present at the previous meeting in September 2023). Those present in any event complained of the short notice to comment on such a substantial amendment.
54. I reiterate what I have already stated in my founding affidavit, this new version was not made public for the general public to comment.

AD PARAGRAPHS 45 - 46

55. While I do not deny the contents hereof, I emphasise that at this meeting of the NA Finance Committee, the National Treasury did not respond to the remainder of the public comments that had been left unanswered. I also emphasise that there was no discussion on such comments by the committee members. Such comments had indeed slipped through the cracks and were effectively disregarded.



56. It is thus denied to the extent it is implied that the amendments to the Bill were *"informed by the submissions received from members of the public"* and that all such submissions were considered.

AD PARAGRAPHS 48 - 61

57. The contents hereof are admitted where they are consistent with my affidavits, failing which, they are denied.

AD PARAGRAPHS 68

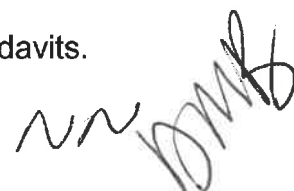
58. The opportunity afforded to comment on the new Chapter 4 at the NA Finance Committee of 17 November 2023 was limited to only those who attended. That was a closed list of stakeholders who attended the previous meetings in September 2023. Thus, this does not elevate the process involving such stakeholders to reasonable public involvement.

AD PARAGRAPHS 75-76

59. In light of the contents of my affidavits, the contents of paragraph 76 are denied.

AD PARAGRAPHS 84 - 85

60. The contents hereof are denied where they conflict with my affidavits.

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61. At no point have I contended that the duty to facilitate public involvement means that draft legislation must incorporate all public comments.

AD PARAGRAPH 98

62. The decision 'that further written submissions from stakeholders' would be accepted at the meeting of 17 November 2023 had limited reach. The invitation was limited to the closed list of stakeholders who were present at the meeting in September 2023.

63. A further call for public comment was indeed necessary once the new Chapter 4 had been introduced.

AD PARAGRAPHS 99 – 100

64. For reasons already traversed, the contents hereof are denied.

AD PARAGRAPHS 109 – 114

65. It is denied that the NA discharged its constitutional obligation as alleged.

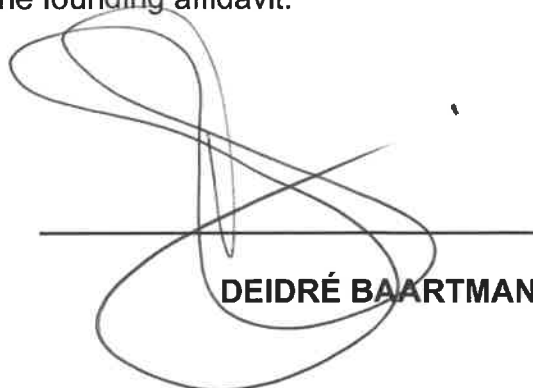
AD PARAGRAPHS 119 – 133

66. In these paragraphs the Speaker seeks condonation for the late filing of her affidavit.

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67. Condonation is not opposed. The late filing of the answering affidavit however meant that this affidavit could no longer be filed strictly in accordance with the directives of the Chief Justice. The applicant has utilised the allotted two weeks as contemplated in the Chief Justice's directive for the preparation and filing of this affidavit. To the extent necessary, condonation is sought for this affidavit not being filed by the deadline set in the directions.

ACCORDINGLY, the applicant persists in seeking the relief set out in the notice of motion, and costs as set out in paragraph 98 of the founding affidavit.



DEIDRÉ BAARTMAN

I certify that the above signature is the true signature of the deponent and that she has acknowledged that she knows and understands the contents of this affidavit which affidavit was signed and sworn to before me in my presence at **CAPE TOWN** on this 24th day of **AUGUST 2025**, in accordance with Government Notice No. R1258 dated 21 July 1972, as amended by Government Notice No. R1648 dated 19 August 1977, as further amended by Government Notice No. R1428 dated 11 July 1980, and by Government Notice No R774 of 23 April 1982.



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Kantoor van die Premier
Office of the Premier
I-ofisi ye Nkulumbuso



Reference : 3/2/9/5
Verwysing :
Isingqinisiso :

Date : 27 May 2024
Datum :
Umhla :

Mr MC Ramaphosa
President of the Republic of South Africa
Private Bag X1000
PRETORIA
0001

Per email: presidentrsa@presidency.gov.za / mike@presidency.gov.za

Dear President Ramaphosa

**RE: CONSTITUTIONAL ISSUES REGARDING THE PUBLIC PROCUREMENT BILL, 2023
[B18D-2023]**

1. We refer to the Public Procurement Bill, 2023 [B18D-2023] (the Bill), which was passed by the National Council of Provinces (NCOP) on 9 May 2024 and the National Assembly (NA) on 16 May 2024, and which has been, or is anticipated to be, submitted to you for assent in terms of section 79 of the Constitution of the Republic of South Africa, 1996 (the Constitution).
2. The aim of this letter is to advise you of multiple constitutional concerns regarding the content of the Bill and the processes followed in adopting it, and to request that you do not assent to the Bill, but instead refer it back to the NA for reconsideration, where those constitutional issues must be resolved.
3. The Western Cape Government (WCG) has, from the outset, repeatedly and consistently raised concerns regarding the constitutionality of the Bill. Despite this, most of those same constitutional flaws remain unaddressed, or are exacerbated, in the version which Parliament sent, or is anticipated to send, to you for assent.

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4. The National Treasury (NT) and Parliament, including its relevant committees, either did not apply their minds to the concerns or did not provide any rational reasons for dismissing them. This, on its own, is a constitutional flaw in each of the processes followed in adopting the Bill.
5. The concerns raised by the WCG in the past are detailed in our comments to the Western Cape Provincial Parliament, which were also sent to the NCOP's Select Committee on Finance (Select Committee). The comments are attached as Annexure "A" to this letter for your consideration, and include the following constitutional issues:

5.1. The NA and the NCOP failed to fulfil their constitutionally imposed duties, and the conduct of the NA and the NCOP, as well as the Bill, if passed, are inconsistent with the Constitution, for the following reasons among others:

5.1.1. The previous version of the Bill (Bill B18-B), which the NA passed and submitted to the NCOP, was substantially different from the version (Bill B18) that was published by the NA's Standing Committee on Finance (Standing Committee) for public comment. The NA failed to solicit public comment on the numerous material or fundamental changes, in contravention of its obligation under section 59 of the Constitution before passing Bill B18-B. For example, the complete substitution of chapter 4 (replacing one clause with no less than nine new clauses) fundamentally departs from how Bill B18 aimed to regulate preferential procurement, and significantly intrudes into the autonomy of organs of state to determine their own preferential procurement policies. The changes were not merely technical or semantic.

5.1.2. The NA's failure to solicit comments on the abovementioned changes is a defect in the public participation process which the NCOP could not cure by way of its own public participation process, because among other things the purpose and function of the NCOP is different from the NA, and the NCOP is a different body. Similarly, the public participation processes followed by the Provincial Parliaments, as requested by, or agreed with, the NCOP, could not cure the defect.

5.1.3. Additionally, the comment periods provided by the Select Committee to comment on Bill B18-B, 2023, and the Standing Committee to comment on Bill B18, were too short. It was practically impossible for the WCG's relevant internal stakeholders to apply their minds adequately and meaningfully to the extensive contents of those Bills and engage with each other to submit all the adequate and meaningful comments at the relevant stages

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which it would have submitted if the period for comment had been appropriate.

5.1.4. In the NA less than a full month was provided to interested parties to consider this high-profile, complex, and very important Bill. On Bill B18-B, the call for comments by the Select Committee was less than two weeks, which on the 8 February was belatedly extended to 22 February, providing a disrupted comment period of less than a full month.

5.1.5. We are of the view that the Bill does not conform to the Constitution in terms of the way public participation has taken place by Parliament (NA and NCOP).

5.2. The Bill has the effect of interfering in the autonomy of the provinces and municipalities. The proposed establishment of a Public Procurement Office (PPO), based on our understanding of the institutional structure of the proposed PPO, as an independent entity, yet a part of the National Treasury, with the power to issue binding instructions on any procurement-related matter, has the effect of usurping the autonomy of provinces to make procurement decisions.

5.3. Procurement decision-making is separate and distinct from financial decision-making. Section 217(1) of the Constitution provides that an organ of state in the national, provincial or local sphere of government must contract for goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. This is subject only to limitations in the Constitution and to legislation consistent with the Constitution.

5.4. Section 217 of the Constitution obliges each procuring institution to only procure in terms of a system which is fair, equitable, transparent, competitive and cost-effective, and therefore each institution must take control of its procurement system to ensure that the system complies with those values. Any purport in the Bill to exempt procuring institutions from developing their procurement system in accordance with section 217 of the Constitution is unconstitutional.

5.5. Regarding preferential procurement, the prescripts proposed in the Bill do not meet the standard of what may be construed as a policy framework for preferential procurement within the meaning of section 217(2) and (3) of the Constitution. Characteristics of such a framework should include the principles and long-term goals that form the basis of the envisaged rules or regulations, the guidelines and overall vision for and direction of procurement system planning and development. The Bill instead usurps the preferential procurement policy decision-making powers of all organs of state in favour of the Bill's centralised, prescriptive, and paternalistic approach.

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5.6. The Bill repeats very similar, if not more onerous, preferential procurement policy prescriptions to those that were declared invalid in the Preferential Public Procurement Regulations, 2017. The implicit assertion is that Parliament (unlike the Minister) has the Constitutional authority to set preferential procurement policy for all organs of state. However, this is incorrect and unconstitutional, for the following reasons, among others:

5.6.1. the Constitutional Court in *Minister of Finance v Afribusines*¹ made it clear that section 217 of the Constitution empowers each organ of state to set its own preferential procurement policy;

5.6.2. if Parliament enacts legislation which compels other organs of state to adopt specific preferential procurement policies, this will unconstitutionally divest those organs of state of their Constitutionally envisaged autonomy to adopt their own preferential procurement policies; and

5.6.3. section 217(3) of the Constitution only empowers Parliament to enact legislation providing for a framework in which such a preferential procurement policy must be implemented. Section 217 does not empower Parliament to compel other organs of state to adopt specific preferential procurement policies. If such a drastic intrusion were intended, the wording of the section would have been explicit, and the word "framework" would not have been used.

5.7. The Bill also compels an organ of state to adopt a preferential procurement policy, however the Constitution envisages that organs of state have a discretion to decide whether to adopt a preferential procurement policy. A preferential procurement policy is one of many available policy options available to an organ of state to uplift historically disadvantaged individuals (HDIs). The Bill renders preferential procurement compulsory, which is not only unconstitutional, but will also undermine an organ of state's ability to select the most effective redress policies and programs for HDIs.

5.8. Furthermore, the Bill purports to empower the Minister to prescribe by regulation certain procurement policy prescripts for other organs of state, such as issuing "prequalification" requirements, targets for "set-aside", thresholds, categories, preference measures, contract preference measures and subcontracting requirements, all binding on those other organs of state. This repeats the same error which the Constitutional Court identified in *Afribusines*, as the Constitutional Court made clear that the procuring organs of state have the

¹ *Minister of Finance v Afribusines NPC (CCT 279/20) [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC) (16 February 2022).*

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Constitutional authority to determine for themselves these preferential procurement policy positions, not the Minister.

6. It is important to add that the unacceptably short time periods mentioned in paragraph 5.1.3 above were exacerbated by the fact that Parliament called for public comments on multiple other highly important and complex Bills, such as the National Health Insurance Bill, 2019, within the same period that it called for comments on the various versions of the Bill, which limited the time and resources available for stakeholders to meaningfully participate, an example being the WCG's Provincial Treasury which has direct, overlapping and material interests and concerns in the financial implications of these Bills.
7. There are new and further concerns regarding the constitutionality of the process followed by Parliament in adopting the Bill. We draw your attention to the following:
 - 7.1. During the NA's public participation process on Bill B18, NT admitted that it did not consider all public comments received when it reported on the comments to the Standing Committee. Neither the NT nor the Standing Committee appear to have properly applied their minds to all the comments received.
 - 7.2. It appears that the Standing Committee did not consider and respond to any of the public comments it received, but rather relied on NT to summarise and provide responses in Standing Committee hearings. The Standing Committee effectively abdicated its responsibilities in favour of the NT and did not apply its mind to the actual comments received.
 - 7.3. In particular, it does not appear that the Standing Committee or the NA ever considered the WCG's comments, and to the extent that NT provided a summary of the comments, it inadequately summarised them and did not address most of the issues raised, including some of the key constitutional issues. Furthermore, as mentioned above, the NT did not consider and report on all the comments received, allegedly due to time constraints which we assert Parliament imposed on itself without good reason.
 - 7.4. Despite failing to consult with the public on the fundamental changes made in Bill B18-B, the NA again failed to call for any comments from the public on these changes after the NCOP passed the current version of the Bill, which contained many of the same changes as those in B18-B.

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- 7.5. Furthermore, neither the NCOP nor the NA called for comments on any of the changes made by the NCOP in the current version of the Bill, and the public therefore did not get any opportunity (whether in the NA or the NCOP) to comment on those changes.
- 7.6. Neither the NA nor the NCOP adequately assessed the financial implications of the Bill on national, provincial and local government, nor did they provide the public with information on these financial implications when conducting public participation processes, which undermined the rationality of the process and the ability of the public stakeholders to submit meaningful comments on the Bill in this regard.
- 7.7. Neither the NA nor the NCOP considered whether policy options other than preferential procurement which a province or local government may pursue would be more effective, in the context of that organ of state, in achieving empowerment, rather than implementing mandatory national preferential procurement, nor did Parliament consider the constitutionality of effectively prohibiting those organs of state from evaluating those policy options in their own context.
8. We submit that the Bill cannot be assented to at this stage and must be referred back to the NA, in terms of section 79 of the Constitution, for reconsideration.
9. We request that, as soon as possible, you confirm that you intend to refer the Bill back to the NA. If you decide not to do so, we request that you provide us with full and detailed reasons as to why that decision was taken.
10. The WCG reserves all its rights and remedies, including, but not limited to, approaching a court or any other appropriate forum to challenge any substance, processes and decisions relating to the Bill.

Yours faithfully,



MR A R WINDE
PREMIER: WESTERN CAPE



MS M WENGER
PROVINCIAL MINISTER OF FINANCE
AND ECONOMIC OPPORTUNITIES:
WESTERN CAPE



RA2

Kantoor van die Premier
Office of the Premier
I-ofisi ye Nkulumbuso



Reference : PM 3/2/9/5
Verwysing :
Isingqiniso :

Date : 25 July 2024
Datum :
Umhla :

Mr MC Ramaphosa
President of the Republic of South Africa
Private Bag X1000
PRETORIA
0001

Per email: PresidentRSA@presidency.gov.za and mike@presidency.gov.za

Dear President Ramaphosa

**RE: CONSTITUTIONAL ISSUES REGARDING THE PUBLIC PROCUREMENT ACT, 2024
(ACT 28 OF 2024)**

1. We refer to the Western Cape Government's (WCG) letter of 27 May 2024, attached for ease of reference, marked Annexure "A", to which the WCG did not receive a response.
2. On 23 July 2024, the WCG became aware that the Presidency published a statement that day on its website indicating that the Bill had been signed into law. We understand that the law is numbered Act 28 of 2024 (the Act).
3. Given the direct and material impact that many of the constitutional concerns raised in our abovementioned letter have on the provinces and local government, a response to our letter, in the WCG's view, would have been consistent with the spirit of cooperative governance envisioned in the Constitution.
4. The WCG requests that consultations be held with provinces and municipalities, on an urgent basis, regarding constitutional and other concerns with the Act, and that the Act not be brought into operation until these concerns have been resolved. In the WCG's view, the impact of the

Private Bag X9043, Cape Town, 8000
Tel: 021 483 4630 | Premier.winde@westerncape.gov.za

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constitutional and other shortcomings in the Act on provinces and municipalities warrants this request. For ease of reference, we repeat some of the key concerns below:

4.1. Based on the information available to us, and as we did not receive responses to our concerns setting out rational reasons dismissing them, the WCG is of the view that National Treasury (NT) and Parliament, including its relevant committees, did not adequately apply their minds to the concerns raised by the WCG.

4.2. The WCG is of the view that the National Assembly (NA) and National Council of Provinces (NCOP) did not comply with their constitutionally imposed duties. These omissions are described in our abovementioned letter, some of which are repeated below:

4.2.1. The comment periods provided by the Standing Committee to comment on Bill B18, 2023, and the Select Committee to comment on Bill B18-B, were too short. It was practically impossible for interested parties and the WCG's relevant internal stakeholders to apply their minds adequately to the extensive contents of those Bills, and for those internal stakeholders to engage in order to submit meaningful comments at the relevant stages which it would have submitted had the period for comment been reasonable.

4.2.2. Based on the information available to us, it appears that the Standing Committee effectively abdicated its responsibilities in favour of NT, and it seems therefore that the Standing Committee did not apply its mind to the actual comments received.

4.2.3. During the NA's public participation process on Bill B18, NT admitted that it did not consider all public comments received when it reported on the comments to the Standing Committee. Therefore, neither the NT nor the Standing Committee appear to have properly applied their minds to all the comments received.

4.2.4. It does not appear that the Standing Committee or the NA considered the WCG's comments, and to the extent that NT provided a summary of the comments, it appears that they inadequately summarised them and did not address most of the issues raised, including some of the key constitutional issues. Furthermore, as mentioned above, NT did not consider and report on all the comments received, allegedly due to time constraints which, we submit, Parliament imposed on itself without good reason.

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- 4.2.5. Bill B18-B, which the NA passed and submitted to the NCOP, was substantially different from Bill B18 that was published by the NA's Standing Committee for public comment. The NA failed to solicit public comment on the numerous material or fundamental changes, before passing Bill B18-B. We are of the view that this contravened the NA's public participation obligations under section 59 of the Constitution. The public participation processes followed by the NCOP and Provincial Parliaments at the NCOP's behest could not cure that defect.
- 4.2.6. The NA did not call for any comments from the public on these changes after the NCOP passed the latest version of the Bill, which contained many of the same changes as those in B18-B.
- 4.2.7. Neither the NCOP nor the NA called for comments on any of the changes made by the NCOP in the latest version of the Bill, and the public therefore did not get any opportunity (whether in the NA or the NCOP) to comment on those changes.
- 4.2.8. It appears that neither the NA nor the NCOP adequately assessed the financial implications of the Bill on national, provincial and local government, nor did they provide the public with information on these financial implications when conducting public participation, which undermined the rationality of the process and the ability of the public stakeholders to submit meaningful comments on the Bill in this regard. The WCG raised this point in its comments to the NA and NCOP but was not provided with the financial implications.
- 4.2.9. It also appears that neither the NA nor the NCOP considered whether policy options other than preferential procurement which a province or local government may pursue would be more effective, in the context of that organ of state, in achieving transformation, rather than implementing mandatory national preferential procurement, nor did Parliament consider the constitutionality of effectively prohibiting those organs of state from evaluating those policy options in their own context.
- 4.3. The Act interferes in the autonomy of the provinces and municipalities. The proposed establishment of a Public Procurement Office (PPO), based on the WCG's understanding of its institutional structure, as an independent entity, yet a part of NT, with the power to issue binding instructions on any procurement-related matter, has the effect of usurping the autonomy of provinces and municipalities to make procurement decisions, which is inconsistent with the Constitution.

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- 4.4. Through uniformity and centralisation, the Act purports to exempt procuring institutions from developing their own procurement systems in accordance with section 217 of the Constitution, which is equally inconsistent with the Constitution.
- 4.5. Regarding preferential procurement, the prescripts in the Act do not meet the standard of what may be construed as a policy framework for preferential procurement within the meaning of section 217(2) and (3) of the Constitution. The Act usurps the preferential procurement policy decision-making powers of all organs of state in favour of the Act's centralised, prescriptive, and paternalistic approach. The unconstitutionality of the Act in this regard is obvious.
- 4.6. Contrary to the Constitution the Act compels an organ of state to adopt a preferential procurement policy. The Constitution envisages that organs of state have a discretion to decide whether to adopt a preferential procurement policy.
- 4.7. The Act repeats very similar, if not more onerous, preferential procurement policy prescriptions to those that were declared invalid in the Preferential Public Procurement Regulations, 2017. The Constitutional Court in *Minister of Finance v Afribusines*¹ made it clear that section 217 of the Constitution empowers each organ of state to set its own preferential procurement policy. The Act divests organs of state of their constitutionally envisaged autonomy to adopt their own preferential procurement policies, because it compels them to adopt specific preferential procurement policies. Section 217(3) of the Constitution only empowers Parliament to enact legislation providing for a framework in which a preferential procurement policy must be implemented.
- 4.8. The Act purports to empower the Minister to prescribe by regulation certain procurement policy prescripts for other organs of state. This repeats the same error which the Constitutional Court identified in *Afribusines*, since the Constitutional Court made clear that the procuring organs of state have the Constitutional authority to determine for themselves these preferential procurement policy positions, not the Minister.
5. We trust you will appreciate that, bringing the Act into operation, despite the unduly hurried and procedurally unfair process that resulted in its enactment, and whilst the Act's inconsistencies with the Constitution remain unresolved, would be counter-productive. In our submission, doing so would not only infringe the constitutional rights and interests of provinces and municipalities, but also detract from service delivery, and prompt the institution of legal proceedings to have the relevant provisions of the Act declared unconstitutional, exposing the state to unnecessary and wasteful costs.

¹ *Minister of Finance v Afribusines NPC (CCT 279/20) [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC) (16 February 2022)*.

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6. In the circumstances we request that you advise, as a matter of urgency, whether you are amenable to delay bringing the Act into operation until such time as provinces and municipalities have been properly and meaningfully consulted and their concerns regarding the constitutionality of the Act resolved.

Yours faithfully,

**Alan
Winde**
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by Alan Winde
Date:
2024.07.25
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**MR ALAN WINDE
PREMIER: WESTERN CAPE**



Digitally signed by
Deidre Baartman
Date: 2024.07.25
19:18:01 +02'00'

**MS DEIDRÉ BAARTMAN
PROVINCIAL MINISTER OF FINANCE:
WESTERN CAPE**

COPY TO:

Mr Enoch Godongwana
Minister of Finance
Per email: minreg@treasury.gov.za



RA3



23 August 2024

Dear Premier Winde,

**CONSTITUTIONAL ISSUES REGARDING THE PUBLIC
PROCUREMENT ACT, 2024 (ACT 28 OF 2024)**

Your correspondence dated 25 July and 14 August 2024, on the above matter, refers.

Please note that I did not find any constitutional impediments to prevent the Bill from being assented to and signed into law.

Your letter was also brought to the attention of the Minister of Finance for further attention as he is responsible for making recommendations to me on the readiness to bring the Act in operation. I understand that the Minister of Finance is still considering your letter and will revert to you in due course.

Yours Sincerely,

A handwritten signature in black ink, which appears to be Cyril Ramaphosa's signature.

**Mr Matamela Cyril Ramaphosa
President of the Republic of South Africa**

Mr A Winde
Premier: Western Cape
Provincial Government
CAPE TOWN

cc: Mr E Godongwana, Minister of Finance

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RA4

Kantoor van die Premier
Office of the Premier
I-ofisi ye Nkulumbuso



Reference : PM 3/2/9/5
Verwysing :
Isingqinisiso :

Date : 10 September 2024
Datum :
Umhla :

Mr Enoch Godongwana
Minister of Finance
40 Church Square
Pretoria
0001

Per email: minreg@treasury.gov.za

Dear Minister Godongwana

**RE: CONSTITUTIONAL ISSUES REGARDING THE PUBLIC PROCUREMENT ACT,
2024 (ACT 28 OF 2024)**

1. We refer to the Western Cape Government's (WCG) letters to President Ramaphosa dated 27 May 2024 and 25 July 2024, and to the President's response dated 23 August 2024.
2. In his response, the President indicated that the WCG's letters were forwarded to you for a response.
3. Despite the fact that the WCG requested urgent responses to its requests in the letters, and despite two weeks having passed since the President's undertaking, the WCG has not received your response.
4. We note the press statement from the National Treasury dated 13 August 2024 which states that certain sections of the Public Procurement Act 28 of 2024 (the Act) will not be brought into operation until the associated

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subordinate legislation is in place. However, the statement does not fully specify which sections of the Act will be affected.

5. The WCG remains steadfast in its view that the constitutional concerns raised in our letters must be resolved as a matter of urgency, in consultation with provincial and local government.
6. Should the Act be brought into operation without resolving the constitutional concerns, it would severely impair the WCG's and local government's abilities to design and implement procurement systems and preferential procurement policies that are tailored to their unique circumstances.
7. Additionally, the Act would place undue strain on the financial positions of procuring institutions, a factor that neither Parliament nor National Treasury has fully assessed nor addressed any socio-economic assessment. This could exacerbate the already precarious financial positions of many provinces and local governments, particularly in the current economic climate.
8. It is important to highlight that the concerns raised by the WCG are shared by several respected senior legal professors and academics, and experts in Constitutional law, governance and supply chain management – some of whom voiced these concerns during Parliament's public participation processes.
9. Despite these issues having been raised in various forums, including in Parliament and with the President, to our knowledge National Treasury has not yet formally addressed these concerns or discussed them with stakeholders. Doing so would advance meaningful participatory democracy and cooperative governance, as envisaged in the Constitution and emphasised in numerous Constitutional Court judgments.
10. We believe that it is premature to proceed with the drafting of subordinate legislation or to initiate related participation processes at this stage. The Act is the principal legislation from which the subordinate legislation would derive its status as law, so the constitutional concerns raised regarding the Act must first be resolved, as these cannot be remedied through subordinate legislation, nor be resolved in consultations over such legislation.

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11. In the spirit of cooperative governance, we request that National Treasury, along with provinces and local government, meet as soon as possible to consult on the concerns, and that any processes relating to preparing subordinate legislation under the Act be suspended until the concerns are resolved.

12. We request your response by no later than **20 September 2024**, failing which the WCG will be compelled to explore legal options to seek appropriate relief. Should you decide not to accede to the request, we kindly ask that you provide full reasons for your decision, including National Treasury's comprehensive responses to the concerns raised in the WCG's previous letters.

Yours faithfully,



ALAN WINDE
PREMIER: WESTERN CAPE



DEIDRÉ BAARTMAN
MEC: FINANCE, WESTERN CAPE

COPY TO:

Mr Duncan Pieterse

Director-General: National Treasury

Per email: DGRegistry@treasury.gov.za / Lindiwe.Mnisi@Treasury.gov.za





Western Cape
Government

Provincial Treasury
Julinda Gantana
Office of the Head Official
Julinda.Gantana@westerncape.gov.za | Tel: 021 483 3749/6204/3604

Reference number: PTR/1/3/1/1/1

Mr Duncan Pieterse
Director-General: National Treasury
40 Church Square
Pretoria
0002

Per Email: DGRegistry@treasury.gov.za; Lindiwe.Mnisi@Treasury.gov.za

Dear Director-General Pieterse,

CONSTITUTIONAL ISSUES REGARDING THE PUBLIC PROCUREMENT ACT, 2024 (ACT 28 OF 2024)

1. We refer to the Western Cape Government's (WCG) letter to the Minister of Finance dated 10 September 2024, attached marked **Annexure A**.
2. We note that, despite the WCG's requests in its letter, the National Treasury has begun to consult with other spheres of government to prepare draft regulations under the Public Procurement Act 28 of 2024 (the Act) through various seminars and/ webinars, with the Western Cape engagement being scheduled for 25 September 2024.
3. The WCG remains of the view that the participation process is premature because the constitutional concerns mentioned in the WCG's letter have not been resolved in consultation with the provinces and local government.
4. It is however in the WCG's and the public's interest that we participate in the process. Failure to participate may have severe adverse effects for the WCG. Furthermore, some aspects of the draft regulations may not relate to the constitutional concerns, yet the WCG may not be provided with another opportunity to participate in that regard.
5. For the reason alluded to in the previous paragraph, the WCG will therefore participate in the process that National Treasury has started, without prejudice to its positions, comments and requests in its letter and its previous engagements with National Government.
6. The WCG's participation must not be construed as a waiver or concession regarding any of its previously mentioned positions, comments and requests relating to the Act, including in its abovementioned letter.
7. All of the WCG's rights and remedies are reserved.

Yours sincerely,

Julinda
Gantana

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Gantana
Date: 2024.09.23 17:11:30
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JULINDA GANTANA
HEAD OFFICIAL: PROVINCIAL TREASURY

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Provincial Treasury | Office of the Head Official





national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

MEDIA STATEMENT

PROPOSED NEW PREFERENTIAL PROCUREMENT REGULATIONS, 2016

The Office of the Chief Procurement Officer (OCPO) has published the proposed new Preferential Procurement Regulations in terms of section 5(2) of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000) (PPPFA), to afford the public an opportunity to provide comments.

The revision of the Preferential Procurement Regulations of 2011 was influenced, to a large extent, by the need to provide for a mechanism that will assist in targeting certain categories of persons, including looking at how government can procure at least 30 per cent from SMMEs, co-operatives, township and rural enterprises, and other targeted groups.

The main changes contained in the proposed new Preferential Procurement Regulations are the following:

- **80/20 preference points system**

In the current 80/20 preference point system, 80 points are allocated for the lowest price and a maximum of 20 points count towards the level of broad-based black economic empowerment (BB-BEE) status of the supplier. This applies to tenders of the rand value equal to or above R30 000 to a maximum of R1 million.

The points for price (80) and the B-BBEE level (20) are combined or calculated to a total of 100. Only a tender with the highest number of points scored may be selected on the highest points scored.

The draft regulations propose that this threshold for the application of the 80/20 system be increased to R100 million to further stimulate the development of small enterprises.

- **90/10 preference points system**

Similarly, in the current 90/10 preference point system, 90 points are allocated for price and a maximum of 10 points for B-BBEE status level. The 90/10 applies to tenders that are above R 1 million, with all applicable taxes included.

The proposal in the draft regulations is for the 90/10 rule to apply to tenders above R100 million.



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- **30 per cent sub contracting**

The current regulations do not make sub-contracting compulsory, however with the draft regulations it will be compulsory to sub-contract a minimum of 30 per cent of the value of the contract for all contracts above R30 million to further develop emerging suppliers.

The tenderer must sub-contract a minimum of 30 per cent of the value of the contract to-

- (a) one or more black female-owned Exempted Micro Enterprises (EMEs); or
- (b) one or more black youth-owned EMEs; or
- (c) one or more black-owned EMEs; or
- (d) one or more Qualifying Small Business Enterprises (QSE); or
- (e) one or more small business, as defined in the National Small Business Act, 1996 (Act No. 102 of 1996).

- **Pre-qualification criteria**

The current regulations do not provide for pre-qualification; however the option to use pre-qualification criteria based on B-BBEE levels of contribution is introduced in the draft regulations as a means to further support small and emerging enterprises. Examples of such pre-qualification criteria, although not exhaustive, are:

- (a) The tenderer must have a stipulated minimum B-BBEE status level of contribution;
- (b) The tenderer must sub-contract at a minimum of 30 per cent of the value of the contract to one or more-
 - (i) black female owned EMEs;
 - (ii) black youth owned EMEs;
 - (iii) black owned EMEs.

A tender that fails to meet the pre-qualification criteria will not be accepted

- **Objective criteria**

The current regulations are silent on the use of objective criteria as envisaged in section 2(1)(f) of the Act. The draft Regulations introduce objective criteria in terms of section 2(1)(f) of the Act, to be taken into account after price and preference have been evaluated. The organs of state who intend using the objective criteria on evaluation of tenders will be required to indicate in the advertisement of such tenders that the tender will be subject to further evaluation in terms of objective criteria over and above the 80/20 or 90/10 preference point system.



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The criteria must be objective and may include, but not limited to-

(a) A tenderer sub-contracting a minimum of 30 per cent of the value of the resulting contract to one or more-

- (i) black female owned EMEs;
- (ii) black youth-owned EMEs;
- (iii) black owned EMEs;
- (iv) co-operatives conducting business in the municipal area or province where the goods or services are required;
- (v) enterprises conducting business in a township or rural area in the municipal area or the province where the goods or services are required;
- (vi) Small Medium and Micro Enterprises (SMMEs)

The draft regulations aim to allow for the development of certain targeted groups, including SMMEs, Co-operative, Township and Rural enterprises.

The draft Regulations are available on www.treasury.gov.za, please send your emailed comments to pppfainputs@treasury.gov.za using the word template accompanying the Draft Regulations. Further enquiries can directed to Leanda Kleinbooi at (012) 315 5715.

The closing date for public comments is 15 July 2016.

Issued on behalf of National Treasury

Date: 15 June 2016



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