JOINT SUBMISSION TO NATIONAL TREASURY ON THE DRAFT PUBLIC PROCUREMENT BILL

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INTRODUCTION

The Budget Justice Coalition (BJC) and Imali Yethu Coalition for Open Budgets make this submission in response to the Finance Standing Committee's call to provide the National Treasury with comments on the draft Public Procurement Bill. To ground our analysis in what occurs in reality, we offer a case study of procurement in the water and sanitation sector and critique how the draft bill addresses typical infringements of existing procurement regulations. The submission then examines the chapters in the draft bill, systematically and offers recommendations.

Given the current fragmentation of laws governing procurement, the Budget Justice Coalition and Imali Yethu welcome that the draft Bill will create a single framework to regulate public procurement. The realisation of the principles of fairness, equitability, transparency, competitiveness and cost-effectiveness as envisaged in section 217(3) of the Constitution being practiced when organs of state contract for goods and services, requires that there is the will for a culture of clean governance to prevail. The introduction of this bill as a necessary legislative reform will support to instill clean governance. We simultaneously urge that this legislative reform must be accompanied with improved financial management and consequence management, as well as prosecutions of those who engage in criminal acts in transgression of procurement regulations.

The context in which this submission is made is one in which there has been a trend of worsening corruption and elites in both the public and private sector engage in state capture, diverting public sector spend to benefit private interests. South Africans have been repeatedly disappointed by accounts of corruption and state capture. Public money is being diverted from service delivery and human rights are being eroded, while those involved in malfeasance appear largely to get away with it on an ongoing basis.

The prolonged failure to effectively deal with the culture of institutionalized corruption that has become entrenched has led to a trend of civil society organisations approaching the courts for relief. However, lawfare is fatiguing the judiciary. Courts are reluctant to overreach, because they are being called upon to decide on things due to the failures of the executive. For too long, a range of institutions with oversight roles have allowed state capture and corruption to go largely unchecked. We therefore urge that at the same time as undertaking welcome legislative reform, oversight institutions including Parliament and National Treasury accompany this with a more decisive stand against those who continuously squander tax payer money. The accountability and regulatory weaknesses that have enabled this environment will not be addressed by improvements in legislation alone. Legislative reform in procurement must be accompanied by concerted strengthening of capacity in key public institutions such as the National Prosecuting Authority (NPA), the Special Investigations Unit (SIU) and the Directorate for Priority Crime Investigations which requires adequate resourcing within the fiscus.

This submission first examines the Giyani Water Project, which illustrates key issues in current procurement practice. The question that should be posed throughout the reading of the Bill is whether proposed legislation would still enable corrupt, inefficient and ineffective procurement as

illustrated in the Giyani Water Project. We submit that it would. To demonstrate this, the submission outlines a series of “red flags” in the Bill, which represent corruption risks throughout the procurement process from planning to implementation. It then sets out clauses in each chapter that represent significant risks to the efficiency and integrity of the procurement process, together with suggested amendments to reduce these risks. We find that, overall, the Bill is inconsistent, insofar as it has a stated mandate to promote transparency and public participation, but has clauses which promote secrecy and disable public participation. Greater consistency and attention to detail in developing this Bill are of the essence insofar as this Bill will have far-reaching implications for procurement and fiscal stability in South Africa.

OVERARCHING TRANSPARENCY AND PUBLIC PARTICIPATION CONSIDERATIONS

Ensuring that procurement can be effectively monitored by both duty-bearers and members of the public/civil society is vital. There are various international examples that illustrate the value of meaningful public participation in inclusion processes which include vast benefits in ‘value for money’ improvements.

We argue that civil society monitoring of public procurement is feasible - and valuable - through observation of the results of procurement and tracking of the process from beginning to end. Civil Society Organisations and affected communities can track and assess whether any irregularities have taken place. They can also assist with verifying the quality of the goods and services delivered. The International Budget Partnership (IBP) and Open Government (OGP) provide a range of useful guiding recommendations specific to South Africa here and in terms of general procurement practice here.

The principles of OGP present an important opportunity to strengthen transparency, access to information, asset disclosure, and citizen engagement. OGP envisions that civil society, government and business are equal stakeholders. In practice, however, this has not been the case and formal processes for civil society to engage in the planning and monitoring of procurement has been severely limited.

CASE STUDY: PROCUREMENT IN WATER AND SANITATION SECTOR

Access to adequate, safe water and sanitation is a fundamental right that is enshrined in Section 27 of the Bill of Rights. Water is essential to all life. The use of public resources in a transparent, fair and equitable manner to deliver against this right is therefore of paramount importance. Efficient procurement lies at the heart of delivering these services. In recent years, the Office of the Auditor General of South (AGSA) and the Special Investigations Unit (SIU) have exposed

numerous examples of activities aimed at subverting procurement and PFMA regulations by Water Boards and other entities under the Department of Water and Sanitation (DWS) at the expense of public resources.

We use one particular case to illustrate some of our concerns pertaining to recurring risks within current procurement processes and the often hidden social costs and trade-offs: the Giyani Bulk Water Infrastructure project. The Giyani case also illustrates how emergency procurement and use of emergency legislation can be used as mechanisms to circumvent tender procedures and avoid scrutiny or adequate oversight. This, and the incidents of irregularities emerging from current COVID-19 procurement, must serve as lessons to inform procurement reform in South Africa. The abuse of preferential procurement policy is also central to the failings of the project.

Initiated in 2009 initially as an emergency drought intervention by DWS - the project has been the subject of various court challenges, investigations and delays.[1] The impact of the years of delay are captured in a 2020 SABC television interview with Giyani pensioner, N'wa Ringani Shilenge[2], who laments that nearly 50% of her social grant income is spent on monthly purchases of water. Also profiled is the fact that this multi-million Rand project has still not delivered any clean, piped water to the 50 surrounding villages intended to benefit. By 2019 the project had cost R2.5-billion, projected to increase to more than R2.8-billion in the current fiscal year.

In 2012, a judge ordered that the initial contract for the water pipeline be cancelled following the revelation that the contracting company to whom the tender was awarded had not existed prior to its awarding.The decision was appealed and a 2014 Supreme Court of Appeal (SCA) then instructed DWS to ensure remedial work and to complete the construction of the pipeline and the other works as contemplated in the original contract.

However, the incoming Minister of DWS, Nomvula Mokonyane, in contravention of the SCA directives, instructed Lepelle Water to act as implementing agent and appoint consulting firm LTE. It later emerged that the Minister had direct connections to LTE who were appointed to oversee project completion. LTE reportedly severely inflated the cost of their work and overcharged the DWS. Tender processes were not followed, contrary to requirements for the remediation and completion of the work. In a Parliamentary report, however, the Minister stated that DWS was complying with the court order and tender requirements.

Despite non-delivery of piped water by the project (its core objective), DWS, Lepelle and LTE initiated a range of other smaller projects including the construction of 'emergency reservoirs' and new water treatment facilities. The majority of this occurred in the absence of proper technical planning, budgeting or compliance with procurement requirements.

[1] See record of sitting of Standing Committee on Public Accounts, 27 November 2018, **SIU investigations: progress report; Department of Water and Sanitation challenges: Treasury briefing, with DWS Minister** Available online via Parliamentary Monitoring Group (PMG): https://pmg.org.za/committee-meeting/27686/

[2] Interview online via SABC Television, 3 February 2020: https://www.youtube.com/watch?v=TW2VHGxbiuY

That the project's emergency inception was a response to a drought crisis and that there were ready funds in the form of water infrastructure grants contributed to the context of corrupt practice. The ability of corrupt officials to set up compromised appointment panels and systems of oversight in addition to engaging complicit contractors made for a heady mix. This made overcharging - and overpayment - incredibly easy.

AGSA's investigation revealed a litany of PFMA and tender irregularities. For instance - in addition to contractors being found to have been irregularly appointed; many of the contractors' claims turned out to be fabricated. Alarmingly - the work ground to a halt and AGSA revealed that the DWA had no funds to continue and no clear plan to rectify the situation. The majority of the irregular expenditure at the DWS arose because of deviations from supply chain management processes at implementing agents. According to a special AGSA water sector report (2018), total expenditure on the Giyani project of R2,2 billion for the 2016-17 financial year was disclosed as irregular expenditure owing to Lepelle Water's deviations from normal procurement process in response to a ministerial directive.[3]

The Giyani project also underscores the risks inherent in Accounting Officers and Ministers being afforded too much power and scope to influence procurement decisions - to the point of appointing implementing agents directly and ignoring court orders. In this case, the Minister of DWS not only misled Parliament but was able to escape accounting for her role in the irregular appointment of a consulting firm she had connections to. There must be clear consequences for maladministration.

The Giyani Bulk Water case is a multilayered one - but at the core lies weak/overturned procurement processes and abuse of power by the executive and other key roleplayers along the supply chain and monitoring cycle. A March 2020 report by Corruption Watch spells this risk out clearly:

> *"... political appointees, such as the minister and board members of public agencies, should not involve themselves in procurement appointment decisions and where they insist on doing so, it should be treated as a red flag for corruption. Ministerial and board involvement is clearly appropriate at the strategic stage of a large procurement – the decision to build a large dam or a power station, or purchase a fleet of airplanes. But they have no call to engage with the operational decision about to whom contracts should be awarded; if they do, the inference is that they are offering a supplier a political favour in exchange for a consideration."*
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> -Corruption Watch Report, page 72

3 Auditor-General of South Africa, 23 March 2018, **Report of the Auditor-General to the Joint Committee of Inquiry into the Functioning of the Department of Water and Sanitation Challenges Facing the Water and Sanitation Portfolio**. Available Online: http://pmg-assets.s3-website-eu-west-1.amazonaws.com/180327AGSA-Challenges_Water_Sanitation.pdf

Desperately-needed basic services have not been provided despite expenditure by government entities in the billions. In 2009 when the project began it was estimated that Giyani had an indigent population of approximately 90 000 whose lives have scarcely improved more than a decade later. South Africa can ill-afford to continue losing precious public resources with this level of impunity and little to no recourse.

In conclusion - the Giyani debacle underscores several key issues in current procurement practice. We are concerned that the current Bill does little to address these in order to ensure the degree of reform required to avoid similar deviations and maladministration in future.

ANALYSIS OF HOW DRAFT PUBLIC PROCUREMENT BILL WILL ADDRESS TYPICAL INFRINGEMENTS

The Global Investigative Journalism Network (GIJN) has produced a red flags methodology. These red flags represent corruption risks throughout the procurement process from planning to implementation. The red flags and what "datapoints" or specific details about a contract that journalists need to be able to analyse each red flag can be found at this link: **Red flags**

Journalists in South Africa have played a critical role in exposing corruption and state capture through their reporting. The Budget Justice Coalition has selected ten red flags (from GIJN's list of 150). We deem these to be of the greatest concern in the South African context and present an analysis of how the draft bill addresses or does not address these red flags.

Legend

🚩 Red flag and infringement scheme

🔵 Analysis of how bill addresses red flag

🔳 Recommendation

Planning phase infringements

🚩 **Red flag**: Manipulation of procurement thresholds resulting in unjustified single source procurement or corruption.

🔵 **Analysis**: Section 121 (1)(b) states that the Minister may make regulations regarding procurement thresholds.

🔳 **Recommendation**: The draft bill is arguably light on consequences, so it is not clear if there are any consequences for manipulation of procurement thresholds. Debarment is a potential consequence, however in practice, the blacklisted suppliers database currently does not contain many companies that have been found to have engaged in corruption. Certain acts or omissions, especially those that result in repeated financial losses, should entail criminal liability to ensure that they are no longer the norm.

🚩 **Red flag**: Key planning documents are not provided.

🔵 **Analysis**: In the DWS case study, for instance, the reporting Minister misled a committee of Parliament by claiming that court-ordered contracting requirements were being followed by her Department. Chapter 6, Part 1 Section 3(1)(c) says that a supply chain management system referred to in subsection (1) must provide for (b) demand management; and (c) procurement planning and budgeting. The requirement in Chapter 6 under the demand management section for approval of the procurement plan will ensure that the instances of emergency contracting is decreased. Chapter 7, part 3, Section 88 deals with feasibility studies for major capital projects. This is a welcome inclusion.

🔳 **Recommendation**: The PFMA already supports Treasury to investigate any system of financial management and internal control of any department, but an analysis of the quarterly deviations and expansions reports shows that the same departments and entities habitually request deviations and expansions with little apparent change in their poor financial management practices and failure to adequately plan their procurement activities. In practice, the Regulator should institute a more proactive approach than has been Treasury's norm. When departments do not furnish procurement plans to the requisite Treasury for approval, there needs to be an intervention at that juncture, rather than waiting for the Auditor General to highlight it in the audit report or for requests to deviate from accepted supply chain management regulations when a crisis has arisen due to failure to plan. There must be follow up by Treasuries, who are being remiss in their oversight duties. If indicated, departmental officials in contravention should be called to Parliament to furnish the required documents and account at a much earlier stage in the cycle.

Tender phase infringements

🚩 **Red flag**: Persistently high or increasing bid prices compared to cost estimates, price lists, previous prices for similar jobs or industry averages indicating collusion.

🔵 **Analysis**: Section 73.(1) requires that the accounting officer or accounting authority must ensure that the institution has and maintains an effective and efficient contract management system. Section 74 (2) (e) states that the logistics management system referred to in subsection (1) must be aimed at ensuring that a complete record is maintained in respect of all procurement transactions. Both of these measures will support the identification of collusive behaviour. For example, access to the complete record will support the Competition Commission and other oversight bodies to identify collusion earlier.

🔳 **Recommendation**: Transparency of the complete record at successive stages of the procurement cycle will enable systematic searches to be done for behaviours that indicate collusive behaviour. However, the draft bill, while encouraging transparency, has provisions

which are vague or ill-defined (such as confidential information not being defined) and which may in fact undermine transparency while paying lip service to it. Clear definitions must be included under the definitions section. This should include defining confidential information.

🚩 **Red flag**: Delivery failure: agents fail to deliver any work product, or deliver low quality products.

🔵 **Analysis**: Section 61 (2) provides that: “When evaluating a bid, the bid evaluation committee must verify— (a) the capacity of the bidder to deliver the goods, services or infrastructure being procured”. Section 72 (2) states that the contract management system must be aimed at ensuring that: (f) service complaints against or failures by suppliers to meet their contractual obligations are recorded; (g) performance in accordance with contracts is enforced; and (h) appropriate measures are taken in the case of non-performance or underperformance.

🔳 **Recommendation**: Appropriate measures in 72 (2) is a vague provision. The draft bill does not provide specificity when spelling out duties and responsibilities. This needs to be improved throughout the draft bill. The bill should include provision for transparency around the composition of, the minutes and deliberations of the Bid Evaluation and Bid Adjudication Committees.

Award phase infringements

🚩 **Red flag**: Supplier address is the same as project official's indicating possible collusion, a fictitious contractor or hidden interests.

🔵 **Analysis**: Improved contract management and logistics systems will support to systematically identify when project officials are doing business with the state. Section 18 deals with disclosure of interests. Chapter three on procurement integrity deals with the code of conduct of officials.

🔳 **Recommendation**: We recommend that just as there is a list of debarred suppliers, there should be a list of persons who during the course of being officials and board directors have been found guilty of corrupt, fraudulent, collusive or coercive practices and who should be barred from holding future positions with fiduciary duties. At the very least this list should be available to all department’s / institutions HR functions for checks to be performed prior to hiring an official. In around 2017, Treasury identified officials who were doing business with the state, and despite guidelines being issued and the Minister for Public Service and Administration saying action would be taken where public officials would be fired if they do not either relinquish their interests or resign from the public service, it is not clear that anything of that nature has happened. The Budget Justice Coalition notes that the current Minister of Public Service has recently again said action will be taken against officials doing business with the state. Even if action has been taken since 2017, but has not been communicated, this has been sending a message to officials doing

business with the state and to the public that there will be no consequences and Treasury and DPSA do not possess the will, support or positional power required to exercise their oversight roles. We recommend that SCM, Human Resources and Communications officials in sector departments / institutions and National and Provincial Treasury receive training on the new bill once adopted, as well as their roles in implementing it.

🚩 **Red flag**: Supplier is not on the approved supplier list.
🔵 **Analysis**: Section 117 states that: “If the Regulator creates a database in terms of section 5(1)(j) for specified goods or services, institutions may only procure goods or services through written price quotations from prospective suppliers listed in that database”.

🔳 **Recommendation**: Current practices are such that despite the fact that there is a Central Supplier Database, different organs of state continue to ignore the requirement to make use of the CSD and set up their own pre-authorised supplier databases which are infrequently refreshed. This circumvents open, competitive tendering. We therefore recommend that a provision that deals with enforcement in Part 1, section 5(1).

Contract phase infringements

🚩 **Red flag**: One or a few bidders win a disproportionate number of contracts of the same type (corruption; split purchases; unjustified sole source awards; favouring/excluding qualified bidders; bribes & kick-backs)

🔵 **Analysis**: With transparency across all departments and institutions and an IT system that consolidates the information and contains longitudinal data from different financial years, it will become clear when a few bidders are winning a disproportionate amount of contracts.

🔳 **Recommendation**: There needs to be consequences for repeated misuse of sole source contracting, split purchases to contract via a three quote system under the threshold, deviations, confinements and expansions of contracts that far exceed 15%. The quarterly reports Treasury publishes show that the same entities and departments are repeatedly engaging in these behaviours from quarter to quarter. Due to various sections of the draft bill being vague about duties and responsibilities, it is not clear that it will provide the legislative muscle for action to be taken that stops financial losses from being incurred particularly at State Owned Entities.

🚩 **Red flag**: Contract is not public (info withholding/release of bad info)

🔵 **Analysis**: In Chapter 3, section 17, says “Officials must … safeguard the confidentiality of information relating to procurement, including a bidders’ proprietary information”

🔳 **Recommendation**: This section legislates secrecy and creates a legal excuse for officials who want to hide corrupt contracts. We strongly recommend reconsidering it’s inclusion - we suggest omitting this provision or at the very least clearly defining proprietary information.

Implementation phase infringements

🚩 **Red flag**: Absent, inadequate or altered supporting documentation submitted by the contractor with its request for payment (corruption; failure to meet contract specs; product substitution; false statements or claims)

🔵 **Analysis**: The draft bill and current practices are light on real time monitoring arrangements and provisions to stop bad practices as they occur, rather than the trend of regressing financial management and dealing with issues years after illegal financial gains have been spent.

🔳 **Recommendation**: Provisions that deal with turnaround task teams and how to instill sound financial management in a department/entity that has become beset with institutionalized corruption should be added to the bill.

🚩 **Red flag**: Losing bidders are hired as subcontractors or suppliers (collusion).

🔵 **Analysis**: The section on debarment provides for a supplier to be debarred for an offence that involves obtaining or attempting to obtain a subcontract or colluding.

🔳 **Recommendation**: The procurement information published should include any subcontracting arrangements.

CHAPTER 1: DEFINITIONS, OBJECTS, APPLICATION AND ADMINISTRATION OF ACT

Chapter 1 omits a definition of what constitutes “confidential information”. This omission is consequential, insofar as appeals to “confidential information” are used in various sections of the Bill to legislate for secrecy. The Bill does not commit to the proactive disclosure of procurement information, requiring interested parties to utilise the Promotion of Access to Information Act 2 of 2000 (PAIA) in order to obtain the necessary documents. The confidentiality

of procurement information is frequently cited as a ground of refusal under PAIA, and challenging it often requires lengthy and costly court action.

Suggested insertion: The drafters of the Bill must provide a definition of confidential information, which balances the need to protect service provider's proprietary information, such as technical drawings and supply chain data, against the need for public scrutiny of the value of the contract and the contractual responsibilities of both the service provider and the institution.

CHAPTER 2: PUBLIC PROCUREMENT REGULATOR, PROVINCIAL TREASURIES AND PROCURING INSTITUTIONS

The establishment of a Public Procurement Regulator within the National Treasury is a facet of the draft bill which should strengthen oversight. It is not clear from reading the draft bill as to whether the Office of the Chief Procurement Officer within Treasury will continue to exist, but be named the Public Procurement Regulator going forward and what will then happen to the non-regulatory functions that the OCPO currently performs. The organisational form of the Public Procurement Regulator is not spelt out in the draft bill. It could therefore take a number of forms such as the form of a Chief Directorate within the National Treasury or a Government Component. While all organisational forms have pros and cons, there are considerations to take into account that could influence the ability to conduct the business of the regulator impartially. For example, if in a hypothetical future scenario which in no way is a reflection on the current office bearers, the Regulator is reliant on Treasury for shared services and Treasury officials were disgruntled about decisions by the Regulator that relate to Treasury requests, they could interfere with its functioning through specific human resources appointments, deprioritising shared services support or interfering with the funding of programmes and diluting the efficiency of specific functions of the Regulator's office. An independent chapter nine institution may therefore be a better organisational vehicle.

An aspect that is not contemplated is the governance arrangements whereby a Regulator which resides inside National Treasury will regulate National Treasury's procurement and contracting including transversal contracting in a manner that is impartial and where the powers are exercised without fear, favour or prejudice. State capture experiences indicate that measures to safeguard the Public Procurement Regulator from interference will be important to consider. Separation of duties is a general good governance practice.

Currently, a large amount of public procurement information is not transparent. Only a small percent of procurement and contracting information is available. For example, the request for proposals may be contained in the government gazette if an open tendering approach is utilised instead of a three quote approach. But the department may omit to publish who the bid was awarded to. Contracts are infrequently published. This makes it extremely challenging for any oversight body let alone civil society organisations wanting to understand the full procurement/contracting cycle for a specific tender. There is also no unique identifier such as a number used consistently from the RFP number through to the contract number. The information

which is published on e-procurement sites is not done in a uniform and consistent manner which undermines the ability to analyse aggregated data. The draft bill makes the right utterances with respect to transparency, but is vague in ways that are likely to undermine improved transparency. In the analysis below we recommend specific changes to address these issues.

Section	Current formulation	Comment / suggested change
Part 1, Section 4(2)	(2) The Head of the Regulator must ensure that the business of the Regulator is conducted impartially and that powers are exercised without fear, favour or prejudice.	**Comment:** Organisational form of the Regulator to be considered carefully to ensure that the structural arrangements are set up to best enable the Regulator to function impartially and that powers are exercised without fear, favour or prejudice.
Section 5	General functions of Regulator	**Comment**: There is currently no clear provision guiding the disclosure of data and documents *at all stages* of the contracting process using centralised, interoperable e-platforms despite the need for improved whole-cycle monitoring and transparency. **Suggested change**: Add “ensure full provision of data and documents by officials and institutions at all stages of the procurement and contracting process using centralised, interoperable e-platforms”.
Part 1, section 5(1)	(d) develop and implement measures to ensure transparency in the procurement process and promote public involvement in the procurement policies of institutions;	**Comment:** Greater transparency will enable various oversight institutions and civil society to play an improved role in pushing for an efficient spend of public finances. This provision is therefore welcomed. However, there are few mechanisms to enable transparency and it is not clear whether later provisions effectively restrict public access to information.

		Suggested change: "involvement" is a vague term. It should be replaced with "public participation, monitoring and evaluation" **Suggested change**: Change 'in the procurement policies of institutions' to 'of the procurement policies and processes of institutions';
Part 1, section 5(1)	(i) establish and maintain registers for bidders and suppliers debarred in terms of section 22(1);	**Comment:** The blacklisted suppliers database has been in existence for some time, however for a number of years it contained a limited number of names. Currently, examining the blacklisted suppliers database, very obvious omissions are that the large consulting firms implicated in state capture, including firms where forensic investigations have found wrongdoing are not listed on the blacklisted suppliers database. The list largely contains small, relatively unknown firms and it would appear therefore that there are different standards when it comes to SMEs as opposed to multinational consulting firms. With large consulting firms it seems that Treasury and the Minister of Finance consider the effects on employment and the idea of 'too big to fail' pervades, however if the rules were applied uniformly, these firms should be blacklisted. **Comment:** There is no provision to make this database public, although the bill aims to "ensure transparency". Moreover, by mandating the creation of multiple databases, this bill makes accessing the data needlessly complex and difficult, thereby undercutting the objective of transparency. **Suggested change:** Establish and maintain a public register for all bidders and suppliers debarred in terms of section 22(1).

Part 1, section 5(1)	(j) create and maintain one or more databases as envisaged in this Act; (k) promote the use of technology in procurement;	**Comment:** The current blacklisted suppliers database is in PDF and fairly hard to find on Treasury's website which is not optimized for search engines, so if departments are meant to search it to check if a supplier is blacklisted before awarding tenders, they have to be very determined to do so. It would therefore be better for these registers to be electronically searchable. The use of technology is therefore welcomed. **Comment**: Current practices are such that despite the fact that there is a Central Supplier Database, different organs of state continue to ignore the requirement to make use of the CSD and set up their own pre-authorised supplier databases which are infrequently refreshed. This circumvents open, competitive tendering. **Comment:** There is no provision to make these databases public, despite the bill's objective to promote transparency. **Comment**: There is no provision for enforcement of the use of the databases. **Suggested change:** create and maintain one or more databases as envisaged in this Act; (k) promote the use of technology in procurement; (l) ensure that these databases are publicly accessible and optimised for search engines and text searches, (m) ensure that these databases are regularly maintained and updated, (n) enforce institution's use of these databases.
Part 1, section 5(1)	require institutions to— (i) publish information on their procurement proceedings; and	**Comment:** there is no provision to make this information publicly available in a timely and accessible

	(ii) allow the public to observe their adjudication processes for procurement above the prescribed threshold	manner, despite the bill's stated aim of ensuring transparency. Furthermore, only legislating to "allow" the public to observe adjudication procedures does not fulfil the spirit of "transparency". What is required is active promotion and support for public participation. **Suggested change:** require institutions to— (i) publish information on their procurement proceedings;(ii) make this information publicly available in a timely and accessible manner, and (iii) actively promote and support the public to observe their adjudication processes for procurement above the prescribed threshold,
Part 1, Section 5(1)	Protection of information 8. (1) No person may disclose confidential information held by or obtained from the Regulator except— (a) within the scope of that person's power or duty in terms of any legislation; (b) for the purpose of carrying out the provisions of this Act; (c) with the written permission of the Regulator; (d) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or (e) in terms of an order of court. (2) The Regulator must take appropriate measures in respect of personal information in its possession or under its control to prevent— (a) loss of, damage to or unauthorised destruction of the information; and (b) unlawful access to or processing of personal information, other than in accordance with this Act and the Protection of Personal Information Act, 2013 (Act No. 4 of 2013).	**Comment:** While the need to protect personal information is understood, organs of state where corruption is rife frequently hide this behind refusals to make procurement and contracting information transparent, often citing the reasons for rejecting Promotion of Access to Information Requests as 'commercially sensitive information contained in contracts'.
Part 1, Section 5(2)	(c) require institutions to— (i) publish information on their	**Comment**: It is not spelt out what a national security reason is, which

	procurement proceedings; and (ii) allow the public to observe their adjudication processes for procurement above the prescribed threshold, unless for a national security reason, the institution is permitted by the Regulator not to allow the public to observe in a specific matter;	means that this may lead to certain information being classified, where actually that action is concealing wrongdoing. **Comment**: There is a risk that organs of the state in the criminal justice system may be able to operate 'slush funds' without adequate scrutiny.
Part 1, section 7	Access to information held by Regulator 7. (1) Subject to any applicable law, the Regulator may make information in its possession available to— (a) an investigating authority in the Republic; (b) the National Prosecuting Authority; (c) an intelligence division in an organ of state; (d) the Public Protector; (e) the South African Revenue Service; (f) an investigating authority outside of the Republic subject to the approval of the Minister; (g) a person who is entitled to receive such information in terms of an order of court; or (h) a person who is entitled to receive such information in terms of other national legislation.	**Comment:** This section would seem to make it even harder for civil society to obtain procurement and contracting information, except with a court order, which will make it costly for civil society to play the crucial watchdog role that it currently plays. How will anti-corruption CSOs and journalists access information from the regulator? It effectively legislates against transparency and public oversight. The default should be that all information is publicly available, easily accessible and digitally searchable with the exception of narrowly defined intellectual property deemed essential as per the suggested definition of "confidential information" above. The Bill envisions that PAIA will be used to obtain procurement information, but the lengthy time-frames are ineffective in the procurement context which often requires speedy access to documents. We submit that the Bill should require proactive disclosure. **Suggested change:** "Access to confidential information held by the Regulator"
Part 2, section 9	Functions of Provincial Treasuries 9. (1) A provincial treasury must— (a) within its provincial administration— 16 (i) exercise control over the	**Comment:** There is no provision for mechanisms that would enable provincial treasuries to enforce these powers, nor to penalise institutions or persons for contravening the Act.

	implementation of the procurement function; and (ii) promote and enforce transparency and effective management in respect of the procurement function of institutions; (b) oversee institutions within its provincial administration in respect of the procurement function; (c) intervene by taking appropriate steps to address a material breach of this Act by an institution within its provincial administration; (d) provide any information required by the Regulator in terms of this Act; (e) perform other duties imposed by this Act; (f) perform other powers conferred by this Act. (2) A provincial treasury, within its provincial administration, may— (a) issue provincial instructions on procurement not inconsistent with an instruction issued by the Regulator; (b) assist institutions in building their capacity for efficient, effective and transparent procurement management; (c) investigate any procurement policy applied by an institution; (d) after consultation with the Regulator, investigate any procurement policy applied by an institution which is a municipality or municipal entity in its province. (3) A provincial treasury may issue different instructions in terms of subsection (2)(a) for— (a) different categories of institutions; (b) different categories of goods, services or infrastructure.	
Part 3, section 10	“Institutions must, in the execution of their duties, strive to achieve the highest standards of equity, taking into account— (a) equal opportunity for all bidders; (b) fair treatment of all parties;	**Comment:** The invocation of “open and effective competition” is undercut and contradicted by extensive legislation for secrecy in Chapter 2.

	(c) ethics; (d) open and effective competition;"	
Part 3, section 12	"An institution must …. (i) keep confidential the information that comes into its possession relating to procurement proceedings."	**Comment:** This legislates for secrecy. It is unacceptable and must be wholly removed.

CHAPTER 3: PROCUREMENT INTEGRITY

There is a breakdown in the intergovernmental handling of corruption. This can partly be attributed to an impact of state capture which is that capacity has been eroded in a large array of state institutions, including SAPS, the National Prosecuting Agency, SARS and National Treasury. A habitual practice of strict adherence to mandates to the detriment of ensuring adequate cooperation between officials across state institutions leaves many cracks in which criminality thrives. Intergovernmental cooperation and the political will to tackle corruption needs to be improved.

It is imperative that vacancies be filled with appropriately skilled officials who have integrity. Departments and entities should be required to report to the regulator when key posts that have bearing on procurement and financial management become vacant and are occupied by acting officials. A plan to deal with how to address the phenomenon that certain positions such as Chief Financial Officer or Director General positions in specific departments have become hot seats that no official of integrity wishes to fill should be implemented. This will support a culture of ethical professionalism being reinstituted in the public service.

The Budget Justice and Imali Yethu Coalitions would like to recommend that the National Treasury embark on implementing Open Contracting, which we believe will support greater integrity in the procurement cycle. The Open Contracting Partnership provides detail on this in addition to guidance on open data standards.

Section	Current formulation	Comment / suggested change
Section 17	"Officials must … safeguard the confidentiality of information relating to procurement, including a bidders' proprietary information"	**Comment:** This legislates for secrecy, and thereby contradicts the Bill's stated aim for transparency. **Suggested change:** "Officials must … actively promote access to all information relating to procurement,

		with the exception of confidential information as defined in Part 1".
Section 22	"The Regulator must issue a debarment order against a bidder or supplier, if the bidder or supplier … committed a corrupt, fraudulent, collusive or coercive practice, price fixing, a pattern of under-pricing or breach of confidentiality relating to procurement by an institution"	**Comment:** The confidentiality aspect is unacceptable due to a potentially unintended implication. If a bidder believes that another bidder has submitted fraudulent tender documents and attempts to make this public, then the bidder will be debarred. This legislates for secrecy by penalising whistle-blowing and thereby contradicts the Bill's stated purpose of fostering transparency. However, we understand that this clause is intended to protect against collusion, but this is already included under the language of "collusive practice", and the language of "breach of confidentiality" is therefore irrelevant. **Comment:** Many PAIA requests are turned down by departmental officials who wish to hide the information by citing confidentiality or commercial reasons. There needs to be greater clarity on what is indeed commercially sensitive and what stages of procurement specifically require absolute confidentiality by officials and bidders. **Suggested change:** "The Regulator must issue a debarment order against a bidder or supplier, if the bidder or supplier … committed a corrupt, fraudulent, collusive or coercive practice, price fixing, or a pattern of under-pricing."

CHAPTER 4: PREFERENTIAL PROCUREMENT

The Budget Justice and Imali Yethu Coalitions do not have any comments or suggested changes related to this chapter. We regard preferential procurement and the support of local economic development to be vital to ensure an inclusive economy. In our case study we highlight that preferential procurement should not be abused as a vehicle for irregular expenditure. This is undermining the broad-based economic empowerment that the preferential procurement provisions seek to support.

CHAPTER 5: PROCUREMENT METHODS AND BIDDING PROCESS

Section	Current formulation	Comment / suggested change
Part 2, Section 36	(4) "At the opening of bids session, the name of the bidder, the total amount of each bid, any discount or alternative offered, and the presence or absence of any bid security, if required, must be read out and recorded, and a copy of the record must be made available to any bidder on request"	**Comment:** There is no requirement for this to be made public, despite the Bill's stated aim of fostering transparency. **Suggested change:** "At the opening of bids session, the name of the bidder, the total amount of each bid, any discount or alternative offered, and the presence or absence of any bid security, if required, must be read out and recorded, and a copy of the record must be made promptly and publicly available."
Part 4, Section 42	"(5) An institution must promptly and in a manner determined by instruction, publish the results of a procurement process."	**Comment:** there is no provision to make this public, despite the Bill's stated aim of fostering transparency **Suggested change:** (5) An institution must promptly and in a manner determined by instruction, publish the results of a procurement process.
Part 4, Section 46	"To determine whether a proposed public-private partnership is in the best interest of the institution, the institution must undertake a feasibility study that— …. (c) in the case of a public-private partnership in respect of which the institution will incur financial commitments, demonstrates the affordability of the partnership"	**Comment:** The feasibility study does not compare the cost and risks of the PPP versus the cost and risks of public provision over both the short term and the life of the project. However, PPPs are often considerably more expensive than public provision in the long-term, where the state often bears a disproportionate share of the

		risk relative to the private partner. The feasibility study must conduct this cost and risk analysis and the results must be made public. The omission of a risk assessment is inconsistent with the draft bill's aims given the requirement to provide a risk assessment as stipulated in section 48(b). **Suggested change:** "To determine whether a proposed public-private partnership is in the best interest of the institution, the institution must undertake a feasibility study that— …. (c) calculates the costs and risks of the partnership relative to the costs and risks of public procurement over both the short term and the life of the project. It must demonstrate that the partnership is lower cost and less risky to the state than procurement from the public sector."
Part 4, Section 48	(1) After the procurement process has been concluded, but before the institution concludes a public-private partnership agreement with the preferred bidder, the accounting officer must submit the following documents to the relevant treasury for approval … (b) an explanatory memorandum on how the public-private partnership agreement meets the requirements of affordability, value for money and substantial technical, operational and financial risk transfer as approved in the feasibility study or revised feasibility study;	**Comment:** the feasibility study does not include any reference to a risk assessment.
Part 4, Section 48	(1) After the procurement process has been concluded, but before the institution concludes a public-private partnership agreement with the preferred bidder, the accounting officer must submit the following documents to the relevant treasury for approval: (a) The draft public-private partnership agreement;	**Comment:** these documents must be made publicly available given the Bill's stated intention to promote transparency. **Comment: "**decline to approve and provide reasons therefor": "therefor" is misspelt. **Suggested change:** (1) After the

	(b) an explanatory memorandum on how the public-private partnership agreement meets the requirements of affordability, value for money and substantial technical, operational and financial risk transfer as approved in the feasibility study or revised feasibility study; (c) a management plan explaining the capacity of the institution, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the public-private partnership; and (d) a report demonstrating the satisfactory completion of a due diligence, including a legal due diligence in respect of the accounting officer and the proposed private party in relation to their respective competence and capacity to enter into the public-private partnership agreement. (2) A relevant treasury must consider the documentation referred to in subsection 48(1) and, in writing— (a) approve; or (b) decline to approve and provide reasons therefor. (3) The approval envisaged in subsection (2) is regarded as Treasury Approval III.	procurement process has been concluded, but before the institution concludes a public-private partnership agreement with the preferred bidder, the accounting officer must submit the following documents to the relevant treasury and make them publicly available … (2) A relevant treasury must consider the documentation referred to in subsection 48(1) and, provide a publicly available written response to …"

CHAPTER 6: SUPPLY CHAIN MANAGEMENT

Section	Current formulation	Comment / suggested change
Part 1, Section 54	"An institution must, within the supply chain management system, establish a committee system consisting of at least— (a) a bid specification committee; (b) a bid evaluation committee; and (c) a bid adjudication committee.	**Comment:** Establishment of committees is not subject to public oversight or participation. Members of the public are unable to sit in on committees, vet members of committees, or access minutes or recordings of meetings.

	(2) The committee system established in terms of subsection (1) must be applied for all competitive and restricted bids or any other procurement method envisaged in this Act which requires that a committee be a part of the procurement process. (3) If the accounting officer or accounting authority so directs, a committee may be established for the evaluation and adjudication of quotations. (4) An institution must ensure the segregation of duties in the composition of all bid committees. (5) In the exercise of its function, a bid committee must act without fear, favour or prejudice, and is not subject to the direction or control of any other person."	**Suggested change:** (6) Bid evaluation and adjudication committees must make provision for members of the public who are end-users to attend meetings as observers. (7) The names and CVs of all committee members must be made promptly and publicly available. (8) Minutes for each meeting must be recorded and made promptly and publicly available. (9) Any complaint against a committee member in terms of a conflict of interest or a breach of ethics must be made promptly and publicly available. (10) The institution must respond promptly, in writing, and the written response must be made promptly and publicly available.
Part 2, Section 55	(1) The accounting officer or accounting authority of an institution must, in writing, appoint the members of the respective committees and specify the duties of each member	**Comment:** This provides the accounting officer with undue powers, powers that are unmitigated by public oversight. The entire procurement process is effectively in the hands of the accounting officer, who controls the appointment of all committee members. It is simply too easy to subvert the procurement process by controlling the accounting officer through bribery, corruption or a conflict of interest.
Part 2, Section 60	"A bid evaluation committee must— (a) consist of at least three members of which- (i) the chairperson must be an official of the institution with requisite skills; (ii) other members must include a supply chain management practitioner and, where practical, an end user of the institution;"	**Comment:** The qualifier "where practical" is irrelevant, extremely vague and open to abuse. We cannot envisage a single situation where end users could not competently sit in on bid evaluation committees. It must be removed. **Suggested change:** "A bid evaluation committee must— (a) consist of at least three members of which- (i) the chairperson must be an official of the institution with requisite skills; (ii) other members must include a

		supply chain management practitioner and an end user of the institution;"
Part 2, Section 61	"(3) The bid evaluation committee must submit to the bid adjudication committee, a report and recommendation on the awarding of the bid or on any other related matter."	**Comment:** there is no provision to make this publicly available despite the Bill's stated aim of fostering transparency **Suggested change:** "(3) The bid evaluation committee must submit to the bid adjudication committee, a report and recommendation on the awarding of the bid or on any other related matter. This report must be made promptly and publicly available."
Part 2, Section 63	"(b) make a recommendation on the award to the accounting officer or accounting authority, together with reasons for the recommendation"	**Comment:** there is no provision to make this publicly available despite the Bill's stated aim of fostering transparency **Suggested change:** "(b) make a recommendation on the award to the accounting officer or accounting authority, together with reasons for the recommendation. This recommendation must be made promptly and publicly available."
Part 2, Section 65	"If the bid adjudication committee disagrees with the recommendation of the bid evaluation committee and recommends to the accounting officer or accounting authority, a bid other than the bid recommended by the bid evaluation committee, the bid adjudication committee's recommendation must include the reasons for the decision"	**Comment:** there is no provision to make this publicly available despite the Bill's stated aim of fostering transparency **Suggested change: ""**If the bid adjudication committee disagrees with the recommendation of the bid evaluation committee and recommends to the accounting officer or accounting authority, a bid other than the bid recommended by the bid evaluation committee, the bid adjudication committee's recommendation must include the reasons for the decision. This recommendation must be made promptly and publicly available."
Part 5, Section 73	"(1) The accounting officer or accounting authority must ensure that	**Comment:** there is no provision to make this publicly available despite

	the institution has and maintains an effective and efficient contract management system. (2) The contract management system referred to in subsection (1) must be aimed at ensuring that— (a) contracts for the procurement of goods, services or infrastructure are recorded in a contract register; (b) contracts are monitored and regularly reported on; (c) service level agreements are evaluated for compliance with the applicable transversal term contracts; (d) timelines in relation to the expiry of period contracts and specific clauses within a contract that are subject to timelines are monitored; (e) applications for price adjustments, cancellations, amendments, expansions, variations, extensions or transfer of contracts are considered; (f) service complaints against or failures by suppliers to meet their contractual obligations are recorded; (g) performance in accordance with contracts is enforced; and (h) appropriate measures are taken in the case of non-performance or underperformance.”	the Bill’s stated aim of fostering transparency. There is a need to make this whole system public and ensure that all records are uploaded on a central platform (such as Treasury’s eTender system) over and above any in-house arrangements in an institution, and that such information is uploaded in accordance with the open contracting data standard. **Suggested change:** (3) All records in the contract management system must be timeously uploaded onto a central, publicly available, search engine optimised government platform.
Part 5, Section 74	“(1) An accounting officer or accounting authority must ensure that the institution has and maintains an efficient and effective logistics management system”	**Comment:** there is no provision to make this publicly available despite the Bill’s stated aim of fostering transparency. Suggested change: “(1) An accounting officer or accounting authority must ensure that the institution has and maintains an efficient and effective logistics management system, where all records are up-to-date and timeously uploaded on a central, publicly available, search engine optimised government platform.”
Part 5, Section 74	“(d) the reliability of suppliers is monitored, at least in relation to - (i) compliance with delivery periods; (ii) quantity and quality of goods	**Comment:** there is no provision to make this publicly available despite the Bill’s stated aim of fostering transparency.

	supplied or services rendered or infrastructure; and (iii) actions taken against non-performing or underperforming suppliers;"	**Suggested change:** ""(d) the reliability of suppliers is monitored and information on this is made timeously available on a central, publicly available, search engine optimised government platform, at least in relation to - (i) compliance with delivery periods; (ii) quantity and quality of goods supplied or services rendered or infrastructure; and (iii) actions taken against non-performing or underperforming suppliers;"
Part 5, Section 74	"(e) a complete record is maintained in respect of all procurement transactions."	**Comment:** there is no provision to make this publicly available despite the Bill's stated aim of fostering transparency. **Suggested change:** "(e) a complete record is maintained in respect of all procurement transactions, where this is made timeously available on a central, publicly available, search engine optimised government platform and such information is uploaded in accordance with the open contracting data standard."
Part 5, Section 76	"(1) Institutional instructions on inventory management issued in terms of section 75(g) must at least cover"	**Comment:** there is no provision to make this publicly available despite the Bill's stated aim of fostering transparency. **Suggested change:** "(3) All records for inventory management must be made timeously available on a central, publicly available, search engine optimised government platform which is uploaded in accordance with the open contracting data standard."
Part 5, Section 76	"An accounting officer or accounting authority must ensure that— (a) the institution has and maintains a comprehensive movable asset register that complies with the relevant reporting framework	**Comment:** there is no provision to make this publicly available despite the Bill's stated aim of fostering transparency. **Suggested change:** "(c) The up-to-

	applicable to the institution; and (b) a register is updated each month within 20 days after the end of the previous month."	date register must be available on a central, publicly available, search engine optimised government platform"
Part 5, Section 80	"(1) An accounting officer or accounting authority must annually report on matters relating to movable asset management in a format as may be determined by instruction."	**Comment:** there is no provision to make this publicly available despite the Bill's stated aim of fostering transparency. **Suggested change:** ""(1) An accounting officer or accounting authority must annually report on matters relating to movable asset management in a format as may be determined by instruction. This report must be made promptly and publicly available."

CHAPTER 7: INFRASTRUCTURE DELIVERY MANAGEMENT

Section	Current formulation	Comment / suggested change
Part 2, Section 85	"(3) (a) A school governing body, established in terms of section 16 of the South African Schools Act, 1996 (Act No. 84 of 1996), and which makes a substantial financial contribution towards a project at that particular school, may be delegated to act as an implementing agent for projects at that particular school subject to the approval of the provincial education department. (b) If a school governing body is appointed to act as an implementing agent, the provincial education department must enter into a service delivery agreement with that particular school."	**Comment:** This clause strengthens the powers of school governing bodies considerably over and above that stipulated by the Schools Act; its legality and constitutionality is far from clear, given that it effectively positions school governing bodies as private sector actors and fundamentally undermines the state's commitment to public education. **Comment:** This clause considerably increases the information asymmetry between the national state and implementing institutions. The Department of Basic Education has struggled to oversee provincial implementation of infrastructure delivery. This clause increases the problem from nine provinces to potentially thousands of school

		governing bodies. Yet the Bill explicitly states that it aims to "create a single regulatory framework for public procurement to eliminate fragmented procurement prescripts". As such, this clause is contradictory. **Comment:** By fragmenting and multiplying the number of infrastructure providers to potentially every single school governing body in South Africa (approximately 23,000 of them), it multiplies information asymmetries and thereby undermines the Bill's stated commitment to fostering transparency. **Comment:** singling out school governing bodies as infrastructure providers is arbitrary and unjustified. **Suggested change:** this entire clause must be removed. It is contradictory and arbitrary.
Par 2, Section 88	"Before procuring any major capital project, the accounting authority of an institution listed in Schedule 2, 3B or 3D to the Public Finance Management Act must conduct a feasibility assessment of the project. (2) A feasibility study referred to in subsection (1) must at least include the following: (a) Preparatory work covering— (i) a needs and demand analysis with output specifications; and (ii) an options analysis; (b) a viability evaluation covering— (i) a financial analysis; and (ii) an economic analysis, if necessary; (c) a risk assessment and sensitivity analysis; (d) a professional analysis covering— (i) a technology options assessment; (ii) an environmental impact assessment; and (iii) a regulatory due diligence; and (e) implementation readiness covering— (i) institutional capacity; and	**Comment:** The feasibility must examine the capacity, cost and risks involved in procuring from the private sector vis-a-vis the public sector, and where it chooses to procure from the private sector it must provide evidence that it is cheaper, less risky and in the interests of public institution building. Government institutions have typically sought to circumvent problems within the Department of Water and Sanitation and the Department of Public Works by outsourcing infrastructure provision to the private sector. This has resulted in unsustainable and rising costs, and has considerably weakened the state. **Suggested change:** (3) The feasibility study must conduct the above analysis with regard to both private and public procurement options, and must demonstrate with evidence which option is most cost-effective, low risk and contributes to building state institutional capacity. This study must

	(ii) a procurement plan.”	be made promptly and publicly available.

CHAPTER 8: DISPOSAL OF ASSETS

Section	Current formulation	Comment / suggested change
Section 92	(92) An accounting officer or accounting authority must ensure that the institution has and maintains an effective and efficient disposal management system that is fair, equitable, transparent, competitive and cost effective.	**Comment:** there is no provision to make this publicly available despite the Bill’s stated aim of fostering transparency. **Comment:** The secrecy around asset disposal will allow the state to sell off all its critical assets at rock-bottom prices to politically connected individuals under austerity, as has occurred in the past in a number of countries, from South Africa, to the Soviet Union to Zambia and India. **Suggested change:** (92) An accounting officer or accounting authority must ensure that the institution has and maintains an effective and efficient disposal management system that is fair, equitable, transparent, competitive and cost effective. The up-to-date records from the disposal management system must be timeously available on a central, publicly available, search engine optimised government platform”

CHAPTER 9: DISPUTE RESOLUTION

We do not have any comments or suggested changes related to this chapter.

CHAPTER 10: GENERAL PROVISIONS

Section	Current formulation	Comment / suggested change
Chapter 10, section 114 (1)	114. (1) (a) The Minister may— (i) delegate to the Director-General: National Treasury any power conferred on the Minister by this Act, except the power to make regulations; or (ii) authorise that Director-General to perform any duty imposed on the Minister by this Act. (b) The Director-General: National Treasury may— (i) delegate to any official of the National Treasury any power delegated to him or her in terms of paragraph (a); or (ii) authorise that official to perform any duty he or she is authorised to perform in terms of paragraph (a).	**Comment:** This could lead to political interference where the Minister has delegated the power but still regards the power as something they need to micromanage and once that mode of interfacing is established, may start directing the DG and officials in a similar manner when it comes to other duties that are not delegated duties.
Chapter 10, section 114 (2)	(2) The accounting officer or accounting authority of an institution may— (a) delegate to any official of the institution any power conferred on that accounting officer by this Act; or (b) authorise that official to perform any duty imposed on that accounting officer or accounting authority by this Act.	**Comment:** What does this imply for accountability? If an action in the department has resulted in a financial loss, a bad debt can be raised against the accounting authority that fails to take actions to rectify the situation. If the official who has been delegated the power fails to act, who does the liability fall to?
Chapter 10, section 114 (4)	(4) Any person to whom a power has been delegated or who has been authorised to perform a duty under this section must exercise that power or perform that duty subject to the conditions the person who made the delegation or granted the authorisation considers appropriate.	**Comment:** This is a vague provision: “conditions the person who made the delegation or granted the authorisation considers appropriate”. What pushback can the official being delegated the powers provide in an unequal power dynamic where they do not agree with the conditions? For example, what if the DG considers a condition by a Minister to amount to political interference?

Chapter 10, section 114 (4)	(5) Any delegation of a power or authorisation to perform a duty in terms of this section— (a) must be in writing; (b) does not prevent the person who made the delegation or granted the authorisation from exercising that power or performing that duty himself or herself; and (c) may at any time be withdrawn in writing by that person.	**Comment:** When the duty is delegated and performed by the person who delegated it, it may result in contradictory actions or strain the working interface. Therefore, this potentially sets up political principals and appointed public servants for conflict.
Chapter 10, section 114 (4)	115. A person who exercises a power or performs a function or duty in terms of this Act is not liable for, or in respect of, any loss or damage suffered or incurred by any person arising from a decision taken or action performed in good faith in the exercise of a function, power or duty in terms of this Act.	**Comment:** What does this imply for accountability? It appears to be limiting liability of both the delegator and delegatee. If an action in the department has resulted in a financial loss in terms of the material irregularity category, the Auditor General's new powers allow that a bad debt can be raised against the accounting authority that fails to take actions to rectify the situation. Is this limiting the liability for damages?
Chapter 10, section 117	117. If the Regulator creates a database in terms of section 5(1)(j) for specified goods or services, institutions may only procure goods or services through written price quotations from prospective suppliers listed in that database.	**Comment:** Current practice is for departments to establish panels of pre-authorized service providers and not to refresh these regularly, which limits new entrants to the market from an opportunity to bid for work. Any supplier should be able to apply to be on the database on an ongoing basis. **Comment:** there is no provision to make this publicly available despite the Bill's stated aim of fostering transparency. **Suggested change:** "117. If the Regulator creates a database in terms of section 5(1)(j) for specified goods or services, this database must be up-to-date and publicly available, and institutions may only procure goods or services through written price quotations from prospective suppliers listed in that database".

Chapter 10, Section 118	**Offences**	**Comment:** there is no provision to make the list of persons who commit offences publicly available despite the Bill's stated aim of fostering transparency. **Suggested change: "**(4) The Regulator will establish and maintain an up-to-date database of individuals who have been found to commit and offence. The records from this database must be made timeously available on a central, publicly available, search engine optimised government platform"
Memorandum on Objects of Public Procurement Bill, 2020	"3. The Bill aims to create a single regulatory framework for public procurement and eliminate fragmentation in laws which deal with procurement in the public sector by, among others— (a) determining general procurement requirements; (b) providing for an enabling framework for preferential procurement; (c) establishing a Public Procurement Regulator within the National Treasury and defining its functions; (d) defining the functions of provincial treasuries; (e) defining the functions of institutions; (f) providing for measures to ensure the integrity of the procurement process; (g) providing for the power to prescribe different methods of procurement and bidding process; (h) setting out a framework for supply chain management; (i) providing for infrastructure delivery management; (j) providing for a framework on the disposal of assets; (k) providing for dispute resolution mechanisms; and (l) providing for the repeal and amendment of certain laws."	**Comment:** Despite the Bill stating that "procurement must occur in accordance with a system which is fair, equitable, transparent, competitive and cost-effective", the Memorandum does not explicitly state that its objective is to ensure that public procurement is transparent. **Suggested change:** "3. The Bill aims to create a single regulatory framework for public procurement, promote transparency and eliminate fragmentation in laws which deal with procurement in the public sector by, among others— (a) determining general procurement requirements; (b) providing for an enabling framework for preferential procurement; (c) establishing a Public Procurement Regulator within the National Treasury and defining its functions; (d) defining the functions of provincial treasuries; (e) defining the functions of institutions; (f) providing for measures to ensure the integrity of the procurement process; (g) providing for the power to prescribe different methods of procurement and bidding process;

		(h) setting out a framework for supply chain management; (i) providing for infrastructure delivery management; (j) providing for a framework on the disposal of assets; (k) providing for dispute resolution mechanisms; and (l) providing for the repeal and amendment of certain laws.”

In examining the quarterly reports that deal with deviations and expansions, BJC has determined that among these deviations are instances where state institutions working with other state institutions to support them with their delivery is regarded as a deviation. While we understand that departments need to approach the National Treasury for authorisation to be compliant with Supply Chain Management rules, we regard these requests as an indication of intergovernmental cooperation rather than deviant behaviour. We would therefore like to propose that in the interests of improved intergovernmental cooperation, regulations or guidelines are issued that deal with how state institutions can contract with other state institutions and that this outlines when it is permissible that this entails financial exchange, what arrangements are required in that instance and how payment will be effected. For example, if a state research institution is well placed to perform research that a government department requires, there needs to be a mechanism to assess if it is already part of their funded mandate to do so, or if it is acceptable for the requesting department to pay for the work to be done or fund a research programme. Particularly with research, there is a risk of power asymmetry when a requesting department is paying for research, where the requesting department may want certain conclusions to be drawn. This has an implication for research ethics and so it is important that these relationships are better regulated for. Research is not the only type of service where state institutions may be well-placed to perform the work as opposed to tendering it out. Maintenance of buildings and provision of IT services are other areas where organs of state interact with each other and where the state or the private sector could potentially provide the service. While there has been a trend of dysfunctional financial management and poor delivery of services by some of the departments involved in such provision, it does not imply that this should be accepted as the status quo and codified into legislation. Arrangements are required that enable services to be delivered in a manner that is efficient and cost effective.

CONCLUSION

The Budget Justice and Imali Yethu Coalitions seek to promote stringent measures to ensure that the state avoids misuse of public funds. A culture of sound financial management must be instituted across all departments and entities. This must include private entities engaged in business with the state. We acknowledge, however, that regulatory environments that are overly complex and/or complicated have the counterproductive impact of creating confusion and

promoting illicit/shadow processes. It is our hope that the contributions included in this submission will inform a balanced procurement regulatory space.

We are also acutely aware that legislation that is 'blind' to social injustice risks deepening inequality and perverse power dynamics. It is for this reason that we have placed significant emphasis on processes that are both transparent and inclusive as well as on mechanisms to avoid the abuse of potentially progressive provisions such as those pertaining to preferential procurement.

SUBMISSION ENDORSEMENTS

The following organisations endorse this submission:

1. Corruption Watch
2. Public Affairs Research Institute
3. Public Service Accountability Monitor
4. Women and Democracy Initiative, Dullah Omar Institute

ABOUT THE BUDGET JUSTICE COALITION

Civil society organisations who are part of the Budget Justice Coalition include: the Alternative Information and Development Centre (AIDC), the Children's Institute at UCT (CI), Corruption Watch (CW), the Dullah Omar Institute at UWC (DOI), Equal Education (EE), Equal Education Law Centre (EELC), the Institute for Economic Justice (IEJ), OxfamSA, Pietermaritzburg Economic Justice and Dignity Group (PMEJD), the Public Service Accountability Monitor (PSAM), the Rural Health Advocacy Project (RHAP), SECTION27, and the Treatment Action Campaign (TAC).

The purpose of the Budget Justice Coalition is to collaboratively build people's understanding of and participation in South Africa's planning and budgeting processes – placing power in the hands of the people to ensure that the state advances social, economic and environmental justice, to meet people's needs and wellbeing in a developmental, equitable and redistributive way in accordance with the Constitution.

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ABOUT IMALI YETHU

Imali Yethu is a coalition of civil society organisations working with the South African National Treasury to make budget information more accessible, user-friendly and empowering. We are committed to exploring co-creation to achieve open, accountable governance. Our work is inspired by the standards of co-creation and participation envisioned by the Open Government Partnership (OGP).