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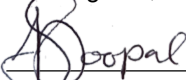
Hon. J. Maswanganyi, MP
Chairperson: Standing Committee on Finance (National Assembly)

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CALL FOR COMMENTS: PUBLIC PROCUREMENT BILL

1. The South African Institute of Chartered Accountants (SAICA) welcomes the opportunity to make submissions to the Standing Committee on Finance on the Public Procurement Bill (The Bill).
2. SAICA is South Africa's pre-eminent accountancy body and is widely recognised as one of the world's leading accounting institutes. The Institute provides a wide range of support services to more than 52 000 members who are chartered accountants [CAs(SA)] and associates [AGAs(SA) and ATs (SA)] who hold positions as chief executive officers, managing directors, board members, entrepreneurs, chief financial officers, auditors, and leaders in their spheres of business operation.
3. SAICA welcomes the create a single framework that regulates public procurement, including preferential procurement, by all organs of state as this will likely assist in ensuring a more streamlined and less complicated public procurement system. SAICA further notes and welcomes the intended promotion of the use of information technology as this may go a long way in improving the efficiency and effectiveness of the public procurement.
4. SAICA acknowledges the establishment of the Public Procurement Office (PPO) as this office will serve as a single point of entry with regards to the promotion, implementation monitoring and guidance with regards to procurement prescripts within the country and contribute towards the achievement of efficiencies in the procurement process.
5. Members have been consulted in responding to the Bill and therefore the comments reflected in the annexure consider the view of the membership. In addition, a task group of highly skilled professionals with experience and understanding in the public sector the institute in the preparation of this submission.
6. Specific comments to the Bill are included in Annexure A of this letter.
7. We would appreciate the opportunity to make a submission at the public hearings. Please contact Natasha Soopal (Natashias@saica.co.za) (Cell: 084 212 0233) or Odwa Benxa (OdwaB@saica.co.za) for the necessary public hearings arrangements.

Kind regards,



Natasha Soopal

Executive: Ethics Standards and Public Sector

ANNEXURE A: SPECIFIC COMMENTS

No.	Chapter and Section	Comment	Recommendation
1	Chapter 2, Section 5(1) Functions of Public Procurement Office (PPO)	<p>SAICA welcomes the inclusion of the functions of the PPO as this gives clarity to the roles and responsibilities of the PPO. However, the following concerns have been noted:</p> <p>(a) SAICA notes that section 5(1)(c)(ii) states that the PPO will guide and support officials and procuring institutions to ensure the professional development and training of officials involved in procurement. However, one of the challenges experienced by procuring institutions is the lack of adequate capacity in procurement units which leads to instances of non-compliance with procurement prescripts. It is therefore critically important that procurement units are adequately resourced to ensure that there is adequate capacity for the implementation of the prescripts. Therefore, prior to ensuring that there is professional development, there needs to be adequate staff available to be developed and this lack of capacity does not seem to be addressed in the Bill.</p> <p>Furthermore, officials appointed in the procurement units of procuring institutions should possess the necessary skills, experience and qualifications. The officials should further demonstrate the highest levels of ethics and be vetted prior to appointment as well as periodically during their tenure with the procuring institutions. However, the Bill is currently silent on these aspects.</p> <p>(b) Section 5(1)(e) states that the PPO must in accordance with this Act promote standardisation in procurement. The PPO should be responsible to promote and monitor the standardisation in procurement.</p> <p>(c) In terms of section 5(2)(b) the PPO may, in accordance with this Act, issue non-binding guidelines to assist procuring</p>	<p>(a) SAICA recommends that the Bill should include a section relating to the capacity and skills required within the procurement units at the procuring institutions.</p> <p>The Bill should further require that National Treasury implements regulations for minimum competencies for the head of procurement and procurement officials of procuring institutions to ensure that these individuals possess appropriate and adequate skills, experience, and qualifications, and demonstrate the highest levels of ethics.</p> <p>Other regulations to be implemented by National Treasury should include requirements for procurement officials to be vetted before being appointing and periodically (at least annually) during their tenure with the procuring institution.</p> <p>(b) SAICA recommends that Section 5(1)(e) be amended to “promote and monitor the standardisation in procurement.”</p> <p>(c) SAICA recommends that the use of the words ‘non-binding’ should be removed to promote a</p>

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		<p>institutions with the implementation of this Act or any other procurement related matter. SAICA cautions against the use of the words 'non-binding' in the legislation as this may create the impression that guidance provided by the PPO need not be taken seriously and subsequently implemented. It may be more appropriate to indicate whether the guidance is binding or not on the actual guidance that would be issued instead of the Bill to avoid the misconceptions that may be created by the words 'non-binding' being used in the Bill.</p> <p>(d) Section 5(1)(h) states that the PPO must intervene by taking appropriate steps to address a material breach of this Act by a procuring institution as may be prescribed. However, it is unclear what the envisaged intervention entails. For example, there have been instances where irregular expenditure has been identified and reported by procuring institutions for which a condonement has been applied for. It is unclear whether the intervention envisaged includes the approval of the condonement of irregular expenditure.</p>	<p>culture of implementation of guidance issued by the PPO.</p> <p>(d) SAICA recommends that guidance should also be developed to guide procuring institutions on interventions that can be taken where there is breach to the Act.</p> <p>(e) The functions of the PPO should be further clarified to ensure a common understanding by procuring institutions. This clarification can be in the form of regulations that accompany the Act once finalised.</p>
2.	<p>Chapter 2, Section 6(1)</p> <p>Functions of Public Procurement Office (PPO)</p>	<p>Provincial Treasuries play a critical role in supporting, monitoring and guiding procuring institutions within their provinces. SAICA therefore welcomes the inclusion of the functions of the provincial treasuries in relation to the Bill. However, SAICA believes that some of the listed functions may need further clarity or improvement as follows:</p> <p>(a) The Bill defines procuring institutions as meaning institutions referred to in section 3(1). Section 3(1) subsequently includes municipalities and municipal entities as procuring institutions.</p>	<p>(a) SAICA recommends that section 6(4) is deleted as it is a duplication of section 6(2)(d).</p>

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		<p>Section 6(2)(d) states that a provincial treasury may, if of the view that the procurement policy applied by a procuring institution does not comply with a provision of this Act, review such policy and advise on amendments.</p> <p>Section 6(4) states that “If a provincial treasury is of the view that the procurement policy applied by a procuring institution, which is a municipality or municipal entity in its province, does not comply with a provision of this Act, the provincial treasury may, after consultation with the Public Procurement Office, review such policy and advise the institution on amendments.”</p> <p>It therefore appears that section 6(4) is a duplication of section 6(2)(d) since section 6(2)(d) encompasses all procuring institutions which include municipalities and municipal entities.</p> <p>(b) Section 6(2)(b) states that a provincial treasury may issue non-binding guidelines to assist procuring institutions with the implementation of this Act or any other procurement related matter.</p> <p>SAICA cautions against the use of the words ‘non-binding’ in the legislation as this may create the impression that guidance provided by the PPO need not be taken seriously and subsequently implemented. It may be more appropriate to indicate whether the guidance is binding or not on the actual guidance that would have been issued instead of the Bill to avoid the misconceptions that may be created by the words ‘non-binding’ being used in the Bill.</p>	<p>(b) SAICA recommends that the words “non-binding” be removed in section 6(2)(b).</p>
3.	Chapter 2, Section 8(1)	SAICA notes and welcomes the inclusion of duties of procuring institutions in the Bill. However, the following has been noted:	<p>SAICA recommends:</p> <p>(a) The duties of procuring institutions must include a requirement for <u>consequence management</u></p>

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	Duties of procuring institution	<p>(a) The duties in their current form do not refer to the need and requirement for procuring institutions to implement consequence management where non-compliance with the Act has been identified. While we note that section 8(1)(h) states that the procuring institution must take steps to prevent non-compliance with this Act, there is however no indication that <u>consequence management</u> must be implemented where non-compliance occurs.</p> <p>(b) The section does not clearly place responsibility on the procuring institutions to ensure that it appoints procurement officials with the required skills and that the procurement division is adequately resourced to implement the Act and compliance with other procurement regulations. This is critical due to the ongoing reporting by the Auditor General of South Africa on the lack of skills within the public sector.</p> <p>(c) The section fails to highlight the need of management of suppliers and the importance of ensuring the procuring institution must ensure that it receives quality services or goods that it procured.</p>	<p>to be implemented where non-compliance with the Act has been identified. This will ensure that consequence management is given prominence in the Bill for the appropriate attention to be given by procuring institutions.</p> <p>(b) Responsibilities should be included for the procuring institutions to ensure that the procurement officials have the required skills based on minimum competencies and that the procurement office is adequately staffed.</p> <p>(c) Responsibilities should be included for the procuring institutions to implement processes to manage suppliers in an effort to ensure that they receive quality services and goods. In instances where this does not occur the procuring institution has a responsibility to notify the provincial/national treasury and blacklist the supplier, preventing the service provider from doing business with government.</p>
4.	Chapter 3, Section 10 Conduct of persons involved in procurement	<p>SAICA notes and welcomes the inclusion of the code of conduct in the Bill as a right step in ensuring less corruption, fraud or any other misconduct in the procurement process. The following must however be considered:</p> <p>(a) Section 10(1) refers to an accounting officer or other official. Based on the way the section is currently written there may be</p>	<p>SAICA recommends:</p> <p>(a) The words accounting officer and official should be separated by a comma to avoid any</p>

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		<p>misinterpretation of the meaning of the words 'other official' as these words may be seen as referring to a person or official acting in the capacity of an accounting officer. It may therefore be more appropriate for the words 'accounting officer or other official' to be separated by a comma such that the section reads as 'accounting officer, or official' to ensure that the meaning of official is clearly ascribed to the definition of an official included in the Bill.</p> <p>(b) In certain instances, individuals within the procurement process are influenced or placed under pressure by individuals external to the procurement process to circumvent compliance with the Act through intimidation and threats. It is therefore important to highlight the importance of remaining ethical and implementing safeguards where there is a threat to integrity experienced by individuals involved in the procuring process. In addition, application guidance needs to be developed to support these individuals.</p> <p>(c) Section 10(d) states that an accounting officer or other official, or a member of an accounting authority, bid committee or the Tribunal, or any other person, involved in procurement in terms of this Act must avoid conflict of interest. However, the term 'conflict of interest' is not defined in the Bill which may lead to misinterpretation or misunderstanding.</p>	<p>misinterpretation of the meaning of the words 'other official' in Section 10(1) of the Bill.</p> <p>(b) This section should also highlight the importance of implementing safeguards in instances where there is a threat to integrity by an individual involved in the procurement process. In addition application guidance should be developed to assist procurement officials on how to identify threats to integrity and safeguards that can be implemented.</p> <p>(c) The term 'conflict of interest' should be defined in the Bill to avoid any misinterpretations or misunderstanding. Alternately, the term can be further unpacked in the regulations.</p>
5.	<p>Chapter 3, Section 11</p> <p>Due diligence and declaration of interest regarding persons involved in procurement</p>	<p>(a) Sections 11(1)(a) and 11(1)(b) state that a procuring institution must take steps in accordance with prescribed procedures to identify automatically excluded persons as envisaged in section 13 and their immediate family members; and related persons as envisaged in subsection (3), respectively. However, the currently available information technology system (Central Supplier Database) does not allow for the adequate identification of immediate family members as well as related persons of officials, suppliers and bidders.</p>	<p>SAICA recommends that:</p> <p>(a) Processes be implemented to facilitate the easy identification of conflict of interest through information technology system.</p>

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		<p>Therefore, in line with the intension of the Bill to promote the use of technology for efficiency and effectiveness, improvements in available information technology systems will be required to enable procuring institutions to easily identify the relationships referred to above.</p>	
6.	<p>Chapter 3, Section 13</p> <p>Automatic exclusion from procurement</p>	<p>(a) In Section 13(1), the word 'may' is used instead of the word 'must' or "shall". The word 'may' sometimes indicate a choice and/or recommendation instead of a legal obligation.</p> <p>(b) In terms of section 13(1) of the Bill, the following persons may not submit a bid:</p> <ul style="list-style-type: none"> ▪ Subsection (g) any entity in which a person mentioned in paragraphs (a) to (f) is a director or has a controlling or other substantial interest. ▪ Subsection (i) an entity in which a bidder or supplier debarred in terms of section 16— <ul style="list-style-type: none"> ○ (i) has a controlling interest; or ○ (ii) is a director or a member; and <p>However, control has not been defined in the Bill which may subject the requirements of sections 13(1)(g) and 13(1)(i) to misinterpretation.</p> <p>(c) Section 13(1) does not appear to list employees of departments even though employees of other procuring institutions as defined are specifically listed.</p>	<p>SAICA recommends:</p> <p>(a) The word "may" in Section 13(1) be replaced with the words "must" or "shall".</p> <p>(b) There are pieces of legislation that define control, most notably being the Companies Act, 2008 in sections 2 and 3 of that Act. It may therefore be appropriate to define control with reference to other pieces of legislation such as the Companies Act, 2008.</p> <p>(c) The list of excluded persons should include employees of all procuring institutions as defined, including departments. This will ensure the consistent application of the requirements of the Bill across all procuring institutions (that is, departments, constitutional institutions, municipalities, municipal entities and Public Finance Management Act schedules 2 and 3 public entities).</p>

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7.	<p>Chapter 3, Section 14</p> <p>Directions inconsistent with Act</p>	<p>SAICA welcomes the inclusion section 14 as this section provides recourse to affected persons that may be receiving unlawful instructions from persons with authority over them. However, SAICA believes that the following must be considered:</p> <p>(a) The section only refers to instructions that are in contravention of the Act but does not refer to instructions that are in contravention of the procurement policies of the procuring institution even though policies would typically provide more detail in terms of the implementation of the Act by the procuring institutions. Furthermore, the section does not refer to instructions that are in contravention of the regulations relating to the Act.</p> <p>(b) It is unclear on how the affected person is protected after reporting to the PPO other than protection from disciplinary measures being taken against them. Reporting may often lead to risk to life for which there is no indication of protection being provided.</p> <p>The Bill is unclear about the process that should be followed by the affected person when reporting. For example, the Bill does not indicate whether the reporting must be done anonymously or not and does not indicate the steps that follow after the reporting is done to the PPO.</p> <p>(c) Section 14 does not refer to actions that must be taken with regards to the procurement transaction which the affected person would have reported on. It is unclear whether the procurement transaction would be halted until the PPO has processed the affected person's reporting. This is because there may be instances where the unlawful instruction would</p>	<p>SAICA recommends:</p> <p>(a) Reference to instructions that are in contravention of the regulations and procurement policies should also be included in section 14 of the Bill.</p> <p>(b) The Bill should make reference to protection that is provided to the affected person after reporting, especially as it relates to risk to the affected person's life. It is recommended that the procuring institution, provincial treasury or national treasury have the responsibility of implementing fraud hotline/whistleblowing processes to improve strong internal controls over the procurement process and protection of those who report non-compliance with the Act. This will strengthen the ethical environment of the public sector a reduce procurement fraud.</p> <p>(c) The Bill should include measures to be taken in relation to the procurement transaction on which the affected person would have reported on to ensure that the unlawful act does not continue on that procurement transaction until</p>

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		<p>be given to officials that would simply follow it without reporting even though the affected person would have reported it.</p>	<p>the PPO processes the affected person's reporting.</p>
8.	<p>Chapter 3, Section 16</p> <p>Debarment</p>	<p>SAICA welcomes the inclusion of debarment in the Bill as this will assist in ensuring that bidders and suppliers, together with their directors, members, trustees or partners, who contravene the Act face consequence management. However, the following areas appear to be unclear from the Bill:</p> <p>(a) Section 16(2)(b) indicates the period over which the bidder should provide reasons why they must not be debarred (that is, 10 days) while section 16(4)(b) indicates the period over which the PPO must inform the affected person of the decision from the date of the decision (that is, 5 days). It is however unclear from the Bill what the period the PPO will take to make the decision on whether to debar a supplier or bidder is.</p> <p>(b) Section 16(3)(d) states that a supplier or bidder may be debarred if they have committed any offence involving corruption, fraud, collusion or coercion, price fixing, a pattern of under-pricing or breach of confidentiality relating to procurement by a procuring institution. It is however unclear how under-pricing would be assessed and confirmed as prices are often determined by market values and consider efficiencies that the supplier or bidder might be able to realise in comparison to their competitors. In addition, this section does not refer to cases of scope creeps that may lead to unnecessary variation orders.</p> <p>(c) There appears to be no indication of the period of debarment. Section 16(6) merely states that a debarment order may not exceed the prescribed period and different periods may be prescribed for debarment in terms of subsection (3). It is</p>	<p>SAICA recommends the following:</p> <p>Further details on the period that the PPO will take to make a decision whether to debar the supplier or bidder as well as the period of such debarments should be included in the Bill to ensure transparency and to avoid potential abuse and preferential treatment in the debarment process.</p> <ul style="list-style-type: none"> • Reference to underpricing should be reconsidered for removal. Alternatively, a definition of what constitutes underpricing should be included in the Bill to avoid the ambiguity that the term may lead to. In addition, the section must be reconsidered to include reference to instances of scope creeps which often lead to unnecessary expenditure being incurred by the procuring institutions. • The Bill should include a process to be followed by suppliers, bidders and other affected persons to appeal a debarment decision. This will assist in ensuring fairness in the debarment process considering the ripple effect that a debarment may have on the suppliers, their employees and the resultant impact on unemployment and the economy at large where the staff have to be retrenched. Furthermore, consideration should be given to including a dispute resolution process or mediation between the supplier or bidder and the

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		<p>however unclear what the prescribed period is and how it will be determined.</p> <p>(d) The Bill appears to be silent on whether suppliers and bidders and other affected persons can appeal a debarment decision and the process to be followed with regards to that appeal process.</p> <p>(e) The Bill appears to be silent on the period within which the procuring institution must inform the PPO of a bidder or supplier alleged to have committed any of the acts listed in subsection (3) for possible debarment.</p>	<p>procuring entity to ensure that issues being raised by the procuring institution are assessed objectively prior to the reporting of the supplier or bidder for debarment.</p> <ul style="list-style-type: none"> • A time period must be indicated in relation to period within which the procuring institution must inform the PPO of a bidder or supplier alleged to have committed any of the acts listed in subsection (3) for possible debarment.
9.	<p>Chapter 7, Section 55</p> <p>Offences</p>	<p>SAICA notes the inclusion of section 55 and the intension to ensure the implementation of consequence management where transgressions have been identified.</p> <p>Section 55(3) states that an accounting officer or accounting authority who fails to take reasonable steps to implement the procurement system of the procuring institution in accordance with this Act commits an offence and is liable on conviction to a fine or to imprisonment for a term not exceeding three years or both. SAICA believes that this section may be too broad since it refers to the entire procurement system which the accounting officer would be responsible for. It may be more appropriate to further break down the offences to align to the seniority of the accounting officer with the procuring institution.</p> <p>In addition, SAICA believes that the implementation of section 55 should be balanced against attracting the right calibre of individuals in the public sector, closely linked to government's ambition of professionalising the sector.</p>	<p>SAICA recommends that the implementation of section 55 should be balanced against attracting the right calibre of individuals in the public sector, closely linked to government's ambition of professionalising the sector.</p>