

11 April 2022

Mr. Dondo Mogajane

Director-General
National Treasury
40 Church Square
Old Reserve Bank Building, 2nd Floor
Pretoria
0002

Email: CommentDraftLegislation@treasury.gov.za

Dear Mr Mogajane

DRAFT PREFERENTIAL PROCUREMENT REGULATIONS, 2022 FOR PUBLIC COMMENT (DRAFT PPR)

The South African Institute of Chartered Accountants (SAICA) welcomes the opportunity to make submissions to National Treasury on the Draft PPR.

SAICA is South Africa's pre-eminent accountancy body which 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)] who hold positions as chief executive officers, managing directors, board members, business owners, chief financial officers, auditors, and leaders in their spheres of business operation.

Our work in the public sector goes beyond member support but also includes a significant focus on advocacy and capacity building to support and encourage an improvement in public finance management.

SAICA appreciates and supports that following the Constitutional Court ruling on the case, National Treasury had to abide by the court ruling and revise Regulations that conflicted with the Constitution. Furthermore, SAICA appreciates that organs of state must be given the opportunity to develop and implement their own procurement policies providing for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination in line with section 217(2) of the Constitution.

SAICA's comments to the Draft PPR and other pertinent issues for consideration by National Treasury are included annexures to this comment letter as follows:

- (a) **Annexure A:** Omitted and new provisions in the Draft Preferential Procurement Regulations, 2022



(b) **Annexure B:** National Treasury communication and risk management processes

We would appreciate the opportunity to engage further and to discuss the comments, if required. Please do not hesitate to contact Odwa Benxa (odwab@saica.co.za) in this regard.

Regards,

A handwritten signature in black ink that reads "Soopal".

Natasha Soopal

**Executive: Ethical Standards and Public
Sector at SAICA**

ANNEXURE A – Omitted and new provisions in the Draft Preferential Procurement Regulations, 2022

No.	Amendment	Comments	Recommendation
OMITTED PROVISIONS			
1.	Reference to the use of B-BBEE status as a specified goal to be used when allocating preferential points has been omitted .	<p>SAICA recognises that in terms of section 10(1) of the B-BBEE Act, all organs of state and public entities must apply any relevant Codes of Good Practice issued by the Minister of Trade, Industry and Competition in terms of section 9 of the B-BBEE Act in:</p> <ul style="list-style-type: none"> • Determining qualification criteria for the issuing of licenses, concessions or other authorisations in respect of economic activity in terms of any law; • Developing and implementing a preferential procurement policy; • Determining qualification criteria for the sale of state-owned enterprises; • Developing criteria for entering partnerships with the private sector; and • Determining criteria for the awarding of incentives, grants and investment schemes in support of broad-based black economic empowerment. <p>It is also noted that section 10(1) of the B-BBEE Act is therefore mandatory, and not optional for organs of state and public entities. This is in terms of the Trade and Industry Statement on the Supreme Court of</p>	<p>National Treasury plays a critical role in promoting procurement principles to organs of states and must use this power to support national government.</p> <p>National Treasury should consider developing a guideline in terms of the policy development by organs of state. The guideline must include the goals to be considered by organs of state and must be supported by available legislation to ensure the completeness and consistency in the policies being applied across the state.</p>



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		<p>Appeal ruling on validity of the PPPFA Regulations of 2017 issued on behalf of the B-BBEE Commission on 8 April 2021.</p> <p>However, the specific exclusion of B-BBEE as a goal in the Draft Regulations raises the risk that organs of state have the option to exclude B-BBEE as a specific goal in their policies which would have a detrimental effect on the transformative spirit of the Constitution and the Preferential Procurement Policy Framework Act.</p> <p>In addition, without a guide or framework within which the policies may be developed by the organs of state, there is a loophole created where organs of state may choose to exclude B-BBEE as a specific goal in their procurement policy.</p>	
2.	Regulation 8 of the 2017 Regulations providing for local production and content has been omitted .	Regulation 8 of the 2017 Preferential Procurement Policy Framework Act (PPPFA) regulations empowered the Department of Trade, Industry and Competition to designate industries, sectors and sub-sectors for local production at a specified level of local content. The industries that had been designated included textile, clothing, leather and footwear, furniture products (including school furniture), residential electricity meters, solar water heater components, steel products and component for construction, among others. It can further be inferred that the spirit of the local production and content provisions was to promote local manufacturing industries and thus employment opportunities for the previously disadvantaged groups of society.	<p>National Treasury should consider developing guidelines for implementing local production and content which can be used as a framework around which organs of state may operate.</p> <p>In addition, National Treasury should consider a Bill that will make local production and content a legal requirement for state organs.</p>



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		<p>As Regulation 8 was the legally bounding requirement to enforce local production and content in state procurement, it is unclear what the legal provision for promoting this need would be, following the implementation of the amended regulations.</p>	
3.	<p>Provisions for evaluation on functionality have been omitted.</p>	<p>SAICA believes that it is necessary to determine quality/functionality when procuring goods and services. This serves to ensure that the right calibre of service providers is invited to bid for procurement.</p> <p>Removing this requirement may result in some bidders winning solely based on price and quality concerns not being prevented timely based on the experience. Time and again the issue of value for money and quality is raised when it comes to government projects, and this will further add to those challenges.</p> <p>SAICA agrees with National Treasury's suggested alternative of prescribing the quality/functionality evaluation criteria through an Instruction in terms of section 76 of the Public Finance Management Act (PFMA), or by amending the Municipal Supply Chain Management Regulations under the MFMA, as this will ensure consistency in the application of the evaluation criteria.</p>	<p>Functionality should be prescribed through an Instruction in terms of section 76 of the Public Finance Management Act (PFMA), or by amending the Municipal Supply Chain Management Regulations under the MFMA, where required, or by adopting in the SCM policies of the municipalities, where permissible (i.e. the broader SCM prescripts).</p>
4.	<p>Regulations providing for subcontracting after the award of a tender have been omitted.</p>	<p>Most SMMEs and historically disadvantaged groups do not have the resources to compete against large international and national suppliers. Subcontracting allows SMMEs and historically disadvantaged groups with the opportunity of obtaining manageable contracts with government thereby boosting their sustainability.</p>	<p>Sub-contracting provisions should be prescribed through an Instruction in terms of section 76 of the Public Finance Management Act (PFMA) or by amending the Municipal Supply Chain Management Regulations under the MFMA. Leaving these</p>



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			provisions to the organs of state to determine may lead to inconsistencies and lost opportunity for growing SMMEs.
5.	Regulations providing for cancellation of tenders have been omitted .	<p>The tender cancellation regulations in the 2017 PPPFA Regulations stated the following:</p> <ul style="list-style-type: none">• 13(1) An organ of state may, before the award of a tender, cancel a tender invitation if-<ol style="list-style-type: none">(a) due to changed circumstances, there is no longer need for the goods or services(b) specified in the invitation;(c) funds are no longer available to cover the total envisaged expenditure;(d) no acceptable tender is received; or(e) there is a material irregularity in the tender process.• 13(2) The decision to cancel a tender invitation in terms of sub-regulation (1) must be published in the same way the original tender invitation was advertised.• 13(3) An organ of state may only with the prior approval of the relevant treasury cancel a tender invitation for the second time. <p>It can be seen from the above that the regulations provided clear reasons in terms of when tenders may be cancelled and the processes that should be followed when cancelling tenders. The tender cancellation regulation is envisaged to provide guidance and protect organs of states from possible litigations due to inappropriate cancellation processes.</p>	Tender cancellation provisions should be prescribed through an Instruction in terms of section 76 of the Public Finance Management Act (PFMA), or by amending the Municipal Supply Chain Management Regulations under the MFMA



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6.	Regulations providing for prequalification for preferential procurement have been omitted .	<p>Regulation 4 of the 2017 PPPFA Regulations provided an option for the organs of state to decide whether to apply a pre-qualification criteria. It further required state organs to indicate the pre-qualification criteria and the type of tenderers that may respond in the bid documents.</p> <p>From the reading of the regulation, it can be inferred that the regulation was meant to promote transformation by giving tender opportunities to SMMEs and historically disadvantaged individuals.</p>	<p>SAICA recommends that National Treasury considers prescribing the pre-qualification criteria through an Instruction in terms of section 76(4)(c) of the Public Finance Management Act, or by amending the Municipal Supply Chain Management Regulations under the MFMA.</p> <p>In addition, National Treasury should consider developing guidelines for determining pre-qualification criteria which can be used as a framework which organs of state may use and allow for consistent application by all organs of state.</p>
7.	Regulations providing for subcontracting as a condition of tender have been omitted .	<p>Regulation 4 of the 2017 PPPFA Regulations was meant to advance designated groups and therefore transformation. The absence of clear guidelines to apply sub-contracting conditions may lead to inconsistent application and may have the impact of reversing transformation to date and growing SMMEs.</p>	<p>SAICA recommends that National Treasury considers prescribing the pre-qualification criteria through an Instruction in terms of section 76 of the Public Finance Management Act, or by amending the Municipal Supply Chain Management Regulations under the MFMA.</p> <p>In addition, National Treasury should consider developing guidelines for determining pre-qualification criteria which can</p>



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			be used as a framework which organs of state may use and allow for consistent application by all organs of state.
8.	Regulations providing for the issuance of circulars and guidelines have been omitted since there is a requirement for organs of state to determine their own preferential procurement policy.	SAICA agrees with the omission of the regulations providing for circulars and guidelines since circulars and guidelines are not binding in nature and are merely issued to provide guidance to organs of state.	None.
NEW PROVISIONS			
1.	The draft Regulations provide for new provisions (not regulated in the 2017 Regulations) and propose to prescribe formulae to be used when allocating preferential points in tenders to generate income, dispose of or lease assets by an organ of state.	SAICA agrees with the additions of these provisions as supported by the Supreme Court of Appeal judgment (<i>Airports Company South Africa SOC Ltd v Imperial Group Ltd & Others</i>).	None.
1.1	80/20 preference points system for tenders to generate income or to dispose of or lease assets with Rand value equal to or above R30 000 and up to Rand value of R50 million 6.(1) The following formula must be used to calculate the points for price	SAICA agrees with the amendment.	None.



No.	Amendment	Comments	Recommendation
	<p>in respect of a tender to generate income or to dispose of or lease assets, with a Rand value equal to, or above R 30 000 and up to a Rand value of R50 million, inclusive of all applicable taxes:</p> $P_s = 80 \left[1 + \frac{P_t - P_{max}}{P_{max}} \right]$ <p>Where:</p> <p>P_s = Points scored for price of tender under consideration; P_t = Price of tender under consideration; and P_{max} = Price of highest acceptable tender.</p>		
	<p>6.(1) The following formula must be used to calculate the points for price in respect of a tender to generate income or to dispose of or lease assets, with a Rand value equal to, or above R 30 000 and up to a Rand value of R50 million, inclusive of all applicable taxes:</p>	SAICA agrees with the amendment.	None.
	<p>(2) A maximum of 20 points may be awarded to a tenderer for the specified goals envisaged in section 2(1)(d) and (e) of the Act. (3) The points scored must be rounded off to</p>	SAICA agrees with the amendment.	None.



No.	Amendment	Comments	Recommendation
	(3) The points scored must be rounded off to the nearest 2 decimal places.	SAICA agrees with the amendment.	None.
	4) Subject to regulation 9, the contract must be awarded to the tenderer scoring the highest points.	SAICA agrees with the amendment.	None.
1.2	<p>90/10 preference point system for tenders to generate income or to dispose of or lease assets with Rand value equal to or above R50 million</p> <p>7.(1) The following formula must be used to calculate the points for price in respect of a tender to generate income or to dispose of or lease assets, with a Rand value above R50 million, inclusive of all applicable taxes:</p> $P_s = 80 \left[1 + \frac{P_t - P_{max}}{P_{max}} \right]$ <p>Where:</p> <p>P_s = Points scored for price of tender under consideration; P_t = Price of tender under consideration; and</p>	SAICA agrees with the amendment.	None.



No.	Amendment	Comments	Recommendation
	Pmax = Price of highest acceptable tender.		
	(2) A maximum of 10 points may be awarded to a tenderer for the specified goals envisaged in section 2(1)(d) and (e) of the Act.	SAICA agrees with the amendment.	None.
	(3) The points scored must be rounded off	SAICA agrees with the amendment.	None.
	(4) Subject to regulation 9, the contract must be awarded to the tenderer scoring the highest points.	SAICA agrees with the amendment.	None.

Annexure B – National Treasury communication and risk management processes

National Treasury communication

1. Following the handing down of the Constitutional Court judgement in Minister of Finance v Afribusines NPC [2022] ZACC on 16 February 2022, in the application for leave to appeal against a judgment and order of the Supreme Court of Appeal (SCA), the Director-General of the National Treasury, issued a letter on 25 February 2022 informing organs of state about the court judgement and the steps taken by National Treasury in that regard as well advice to organs of state as follows:
 - a. tenders advertised before 16 February 2022 be finalised in terms of the 2017 Regulations;
 - b. tenders advertised on or after 16 February 2022 be held in abeyance; and
 - c. no new tenders be advertised.
2. The 25 February 2022 was followed by another letter issued on 03 March 2022 in which National Treasury clarified that the 25 February 2022 letter was an advisory note and that until the new procurement regulations take effect or the Constitutional Court's clarity on the suspension of the invalidity of the 2017 Regulations is provided, whichever occurs first, an organ of state may, in terms of section 3(c) of the Act, request an exemption from the provisions of the Act for a specific procurement or category of procurement requirements.
3. The communication issued by National Treasury on 16 February and 25 February caused chaos and confusion within organs of states as clear guidance was not provided by National Treasury on the steps that had to be taken to ensure that organs of states would be complying.
4. While it is appreciated that the communication was meant to be advice in response to the numerous requests for guidance regarding how to deal with the implications of the Constitutional Court judgment, it is common cause that matters communicated as advice instead of instructions or directives have the potential to cause confusion due to inconsistent application. This is demonstrated by the fact that the Western Cape Government issued [Treasury Circular No. 07 of 2022 - PPPFR 2017 Interim arrangements](#) giving guidance to the Western Cape provincial organs of state on the approach following the court case judgement and the National Treasury issued letters. However, no such communication is evident from the other provincial governments which will lead to inconsistent application by various organs of state.
5. In addition, the National Treasury issued letters may have had certain implications, including:
 - a. Negative impact on service delivery as some organs of state had stopped procuring following the advice given and the fear of negative findings from Auditor - General South Africa;



- b. Grants are not being used which has devastating effect on service delivery and the economy. In addition, future allocations will be impacted as unspent grants will be required to be paid back into the fiscus at year-end.
 - c. Possible litigation on state organs for tenders that were already advertised, even when there is exemption, as there will be bidders that would not have submitted bids when they didn't meet certain criteria which is subsequently waived by the exemption.
 - d. The limit of R30 000 provided in the advisory note is potentially too low and opens a risk for possible splitting of quotations.
6. In addition, the lack of guidance provided by National Treasury could have potentially threatened the control environments allowing for an increase in irregular expenditure and an increased risk in fraud.
7. SAICA recommend that National Treasury should provide clarification to organs of states on the following matters:
 - a. The potential impact on all procurement that was made and the expenditure that was incurred in terms of the now declared invalid 2017 Regulations prior and post its invalidity. For example, National Treasury should clarify whether such expenditure would be irregular expenditure.
 - b. The potential impact of procurement made and expenditure incurred by those organs of state who continued to procure after the advisory note being issued. For example, National Treasury should clarify whether the expenditure would be irregular expenditure.
 - c. The treatment of expenditure incurred on investigations conducted by organs of state in relation to expenditure arising from non-compliance with the 2017 Regulations.

The clarification above will also assist in the consistent treatment of the procurement and subsequent expenditure during the 2021/22 audit process to be undertaken by the Auditor - General South Africa.

Risk Management

1. Section 38(1)(a)(i) of the PFMA requires "the accounting officer for a department, trading entity or constitutional institution to ensure that the department, trading entity or constitutional institution has and maintains effective, efficient and transparent systems of financial and risk management and internal control."
2. Risk management is a process designed to identify potential events that may affect the government and to protect and minimize risks to the government's property, services, and employees. Effective risk management ensures the continuity of government operations. The importance of risk management has been growing steadily over the last several years for a variety of reasons including legal, political, and medical liability, increased use of technology, and higher litigation costs.



3. Risk management is geared to achieving a government's objectives through strategic decisions that flow through high-level goals, effective use of resources, reliability of reporting, and compliance with applicable laws and regulations.
4. Based on the outcomes of the Constitutional Court ruling and subsequent advisory notes issued by National Treasury raises questions on risk management within SAICA to adequately support organs of state based on the uncertainty that existed on the state of procurement. This left organ of states in a vulnerable position.
5. It is common cause that the case had been in the courts for several years and therefore a plan to respond to the outcome of the court case should have been developed by National Treasury to avoid any confusion that may have arisen due to the court case outcome going against National Treasury.
6. Proper planning and risk management of potential court outcomes would have assisted with timely and concise communication which would give clear guidance to the organs of state to ensure consistent application by all organs of state.
7. Mitigation actions should have been implemented to ensure that the approval of exemptions applications by organs of state is timely.
8. Timely and concise guidance should have been given to organs of state in relation to the treatment of irregular expenditure incurred based on the 2017 Regulations, the impact of expenditure incurred after the court case outcome was issued and the impact of the court case on the audit process.
9. SAICA recommends that National Treasury reviews its risk management process to ensure that it is strengthened to support national government and organs of states, as well as to prevent the reoccurrence of the incident as experienced on 22 February.