THE FW DE KLERK FOUNDATION

Upholding South Africa's National Accord

To:	National Treasury
Per email:	DraftGeneralProcurementRegulations@treasury.gov.za
Re:	**FW de Klerk Foundation Submission on the Draft General Public Procurement Regulations, 2026**
Date:	Wednesday, 15 July 2026 **(Deadline for comments: Wednesday, 15 July 2026)**

INTRODUCTION

Dear National Treasury

1. We refer to the invitation by the National Treasury for written submissions on the Draft General Public Procurement Regulations 2026 for consultation into section 63(3) of Act ("the Regulations").

2. The FW de Klerk Foundation ("the Foundation") is a non-profit organisation dedicated to upholding the Constitution of the Republic of South Africa, 1996 ("the Constitution"). Our vision is to make our constitutional democracy a reality for all South Africans.

3. To this end, the Foundation seeks to promote the Constitution and monitors developments, including legislation and policy, that may affect the Constitution. The Foundation does so in the interest of everyone in South Africa.

4. As such, the Foundation's written submission will focus on those issues in the Regulations that may / could affect the Constitution.

5. The Foundation welcomes the opportunity to make this written submission and expresses to its willingness to engage with the National Treasury to discuss

129 Hatfield Street, Gardens, Cape Town 8001 South Africa
Tel: +27 21 930 3622 Email: info@fwdeklerk.org Website: www.fwdeklerk.org NPO 031-061// PBO 930004278

same, including its willingness to make an oral submission should such an opportunity arise.

EXECUTIVE SUMMARY

6. The Foundation's primary concerns relate to:

    6.1. Potential infringements on municipal autonomy through increased national and provincial oversight, as well as

    6.2. Procurement measures that may unduly limit competition, reduce cost-effectiveness and expose the regulations to legal challenge.

7. It recommends clarifying that certain oversight mechanisms are advisory rather than binding, preserving municipal discretion in matters falling within their constitutional functions, and ensuring that transformation measures are appropriately tailored, evidence-based and balanced against the constitutional requirements of fairness, competitiveness, transparency and value for money.

8. Overall, the Foundation urges targeted amendments to strengthen constitutional compliance, accountability and the long-term sustainability of South Africa's public procurement system.

LEGAL FRAMEWORK

The Constitution

9. **Fundamental values:**[1] The republic is expressly founded on *inter alia* the values of constitutional supremacy and the rule of law[2] and accountable, responsive and open government[3].

[1] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 26 Mokgoro J, writing for the majority, said "*all applicable laws must comply with the Constitution and be applied in conformity with its fundamental values*".
[2] Section 1(c) of the Constitution.
[3] Section 1(d) of the Constitution.

10. **Procurement**:

10.1. Section 217 of the Constitution is the supreme law governing procurement.[4] It requires all of state[5] to use a procurement system that is **fair, equitable, transparent, competitive and cost-effective**.[6] It also allows for preferential procurement policies, but such policies must be implemented within the framework prescribed by national law.[7] Importantly, procurement must comply with the Constitution, including, in general, its spirit, purport and objects and, specifically, section 217.[8]

10.2. Section 195 of the Constitution reinforces the above by requiring *inter alia* a high standard of professional ethics,[9] efficient, economic and effective resource use,[10] accountability[11] and transparency[12] across public administration. This includes local government.[13]

11. **Municipal autonomy:**

11.1. The principle of separation of powers applies among the national, provincial and local spheres of government.[14] Municipalities have **exclusive authority** over the powers assigned to them by the Constitution.[15] The national and/or provincial governments cannot take

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[4] Section 1(c) of the Constitution.
[5] Section 217(1) of the Constitution refers to: "organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation".
[6] Section 217(1) of the Constitution.
[7] Section 217(2) and (3) of the Constitution.
[8] Section 2 of the Constitution read with *Du Toit v Minister of Transport* at para 26.
[9] Section 195(1)(a) of the Constitution.
[10] Section 195(1)(b) of the Constitution
[11] Section 195(1)(f) of the Constitution.
[12] Section 195(1)(g) of the Constitution.
[13] Section 195(2)(a) of the Constitution states that section 195(1) applies to organs of state. Section 2(a) of the Municipal Systems Act 32 of 2000 ("the Municipal Systems Act") classifies municipalities as organs of state.
[14] *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) at para 171.
[15] *Merafong* at para 171.

over these powers by passing laws that allow them to perform municipal functions.[16]

11.2. Section 151(2) of the Constitution vests executive and legislative authority in municipal councils. And section 156(1) of the Constitution stipulates that municipalities have executive authority over, and the right to administer, that which national legislation assigns to them and the areas listed in Part B of Schedules 4 and 5 to the Constitution.[17] Accordingly, municipalities procure goods and services to carry out the powers and functions assigned to them under the Constitution and national legislation.

11.3. Section 151(3) of the Constitution grants municipalities the right to govern, on its own initiative, **the local government affairs** of its community, but **expressly stipulates that this is subject to national and/or provincial laws**.

11.4. Section 151(4) of the Constitution states that neither national nor provincial governments may **compromise or impede** a municipality's ability or right to exercise its powers or perform its functions.

11.5. Municipalities are, therefore, not administrative extensions of national or provincial government, but its own sphere of government with original powers, and the national and/or provincial spheres of government may

[16] *Merafong* at para 171.

[17] Air pollution; Building regulations; Child care facilities; Electricity and gas reticulation; Firefighting services; Local tourism; Municipal airports; Municipal planning; Municipal health services; Municipal public transport; Beaches and amusement facilities; Billboards and the display of advertisements in public places; Cemeteries, funeral parlours and crematoria; Cleansing; Control of public nuisances; Control of undertakings that sell liquor to the public; Facilities for the accommodation, care and burial of animals; Fencing and fences; Licensing of dogs; Licensing and control of undertakings that sell food to the public; Local amenities; Local sport facilities; Markets; Municipal abattoirs; Municipal parks and recreation; Municipal roads; Noise pollution; Pounds; Public places; Refuse removal, refuse dumps and solid waste disposal; Street trading; Street lighting; Traffic and parking; Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law; Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto; Stormwater management systems in built-up areas; Trading regulations; Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems.

not compromise or impede its ability to exercise powers or perform functions[18].

11.6. Rather section 154 requires the national government and provincial spheres of governments to support and strengthen municipalities' capacity to manage their own affairs, to exercise their powers and to perform their functions.

11.7. Importantly, section 139 allows for the provincial sphere of government to intervene and a fulfil a local government's executive obligation(s), only when that municipality cannot, or does not, fulfil it.[19]

11.8. Therefore, neither the national nor provincial spheres of government are granted a "general licence" by the Constitution for ordinary procurement supervision to become a *de facto* take-over of local governments' procurement. Such take-over would be *ultra vires* and would be overreach into areas of municipalities' exclusive authority.

12. **The right to just administrative action and the rule of law:**

12.1. Section 33 of the Constitution's Bill of Rights enshrines the right to lawful, reasonable and procedurally fair administrative action,[20] which is given effect to[21] by the Promotion of Administrative Justice Act[22] ("PAJA"). PAJA allows for the judicial review of administrative action.

12.2. **Tender decisions:** The adjudication of, and the decision to award, tenders constitute administrative action.[23]

12.3. **Regulations:** Once a particular administrative process is prescribed by

[18] Section 151(4) of the Constitution.
[19] Section 139(1) of the Constitution.
[20] Section 33(1) of the Constitution.
[21] Section 33(3) of the Constitution.
[22] Act 3 of 2000.
[23] *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) at paras 4 and 21.

law, it is subject to norms of procedural fairness codified in PAJA.[24]

12.4. The making of regulations, in terms of an empowering provision such as section 63 the Public Procurement Act[25], may also constitute administrative action that is subject to review under PAJA if it:[26]

a) Is a decision of an administrative nature;

b) Is taken by an organ of state;

c) In its exercise of a public power, or its performance of a public function;

d) Is made in terms of a law or an empowering provision;[27]

e) Adversely affect rights;

f) Has a direct and external legal effect; and

g) Not fall under any of the listed exclusions.

13. If the Regulations do not constitute administrative action, the rule of law[28] (specifically, the principle of legality) would still apply.[29]

14. The rule of law is enshrined as a <u>founding value</u> of South Africa in the Constitution[30] and requires, *inter alia*, that the government <u>must</u> operate within the powers conferred on it by law[31] (the principle of legality).

15. The principle of legality means that every sphere of the government, whether it be

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[24] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC) at para 40.
[25] Act 28 of 2024.
[26] *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae)* 2006 (2) SA 311 (CC) ("*New Clicks*") at paras 126, 436, 437, 438, 581, 582, 583, 585 and 586; *Minister of Defence* at para 33.
[27] Importantly, section 6(2)(a)(1) of PAJA specifically empowers courts to judicially review an administrative action if the administrator who took it was not authorised to do so by the empowering provision
[28] *Affordable Medicines Trust v Minister of Health and Others* 2006 (3) SA 247 (CC) at paras 48, 49, 50.
[29] *Fedsure* at para 59.
[30] Section 1(c) of the Constitution.
[31] *Fedsure* at para 58.

the legislative, executive or judicial branch, cannot wield powers or perform functions beyond those that have been legitimately conferred upon it by the law.[32]

16. Conduct, or decisions, inconsistent with the principle of legality, are inconsistent with the rule of law, making them unconstitutional and invalid.[33]

17. Should any branch of government exercise powers or perform functions beyond those lawfully conferred upon it, such actions would constitute an *ultra vires* exercise of authority and would be inconsistent with the principle of legality, making such actions unconstitutional and invalid.[34]

Subsidiary legislation

18. The Minister is empowered to make the regulations by section 63 the Public Procurement Act.[35] (The Act is yet to take effect.[36])

19. The Act's goal is to create a single framework that regulates procurement, including preferential procurement, across all spheres of government.[37]

20. The Act respects municipal authority by expressly preventing the Public Procurement Office it establishes[38] from issuing binding instructions on procurement matters to municipalities and their entities.[39] It prevents provincial treasuries from doing the same.[40]

21. Section 63 imposes several constraints on the Minister before s/he can make regulations in terms of the Act, namely:

[32] *Fedsure* at para 58.
[33] *Masetlha v President of the Republic of South Africa and another* 2008 (1) SA 566 (CC) at para 174.
[34] Section 2 of the Constitution.
[35] Act 28 of 2024.
[36] Section 69(1) of the Act.
[37] Preamble of the act.
[38] Section 4(1) of the Act.
[39] Section 5(2)(a) of the Act.
[40] Section 6(2)(a) of the Act.

21.1. The Minister **must consult with** ministers whose portfolios would be affected by a draft regulation and organised local government on a draft regulation affecting municipalities or their entities;[41] and

21.2. Publish the draft regulation for public comment together with statements explaining the need for, the intended operation of, and the expected impact of the regulation.[42]

Case law

22. **Restitutionary equality measures:**

22.1. Restitutionary equality measures under section 9(2) of the Constitution are presumed to be fair discrimination.[43] A proposed draft regulations will qualify as a remedial measure only if it satisfies the internal test in section 9(2).[44] Otherwise, it falls outside section 9(2)'s ambit and constitutes discrimination on a prohibited ground,[45] thereby triggering an inquiry in terms of section 14 of the Promotion of Equality and Prevention of Unfair Discrimination Act[46] ("PEPUDA").[47]

22.2. Section 9(2)'s internal test requires that for a measure to be qualify as a restitutionary equality measure it must:[48]

a) Target persons, or categories of persons, who have been disadvantaged by unfair discrimination;

b) Be designed[49] (i.e. it must be reasonably capable / likely of attaining the desired outcome) to protect or advance such persons, or categories of persons and not be merely arbitrary, capricious or

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41 Section 63(2) of the Act.
42 Section 63(3) of the Act.
43 *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) at para 32.
44 *Van Heerden* at paras 36 through 44.
45 *Van Heerden* at para 36.
46 Act 4 of 2000.
47 Section 5(2) of PEPUDA states it trumps any other law, besides the Constitution. Additionally, the principle of subsidiarity requires PEPUDA be consulted before resorting to section 36 of the Constitution.
48 *Van Heerden* at paras 36 through 44.
49 See also section 14(1) of PEPUDA.

displaying naked preference; **and**

c) It must promote the achievement of South Africa's vision of equality by *inter alia* not imposing such substantial and undue harm on those excluded from its benefits that South Africa's long-term constitutional goal (of a non-racial and non-sexist society) would be threatened.

PROCEDURAL CONCERNS

23. It is unclear whether the Minister consulted with the minister and/or local government on these Regulations.

24. While the Regulations were published for public comment along with this notice explaining the need for the Regulations[50] and intended operation of the Regulations[51], the notice fails to cover the Regulations' impact.

SUBSTANTIVE COMMENTS ON REGULATIONS

Municipal Autonomy

Regulation 16:

25. Empowers relevant treasuries to initiate and/or conclude transversal term contracts (i.e. contracts arranged by the relevant treasury for procurement requirements of two (2) or more institutions[52]) for procurement for participating[53] institutions, with centralised auditing[54] and reporting[55].

[50] Government Gazette No 54528: Notice Draft General Public Procurement Regulations, 2026 at para 4.
[51] Notice Draft General Public Procurement Regulations, 2026 at para 5.
[52] Section1 of the Act.
[53] Regulation 16(3)(a) requires that the relevant treasury must invite procuring institutions to participate in a transversal term contract.
[54] Regulation 16(5)(b) requires that the relevant treasury must annually audit the performance of the contract.
[55] Regulation 16(6)(b) requires the Public Procurement Office to report to Parliament annually, at the end of the financial year, on the status and performance of all transversal contracts.

26. **Comment:** While *prima facie* and *de jure* voluntary, because the Regulation requires the relevant treasury to invite procuring institutions to participate in transversal contracts, there exists a risk that it could become a *de facto* compulsory, which would interfere with municipalities' autonomy.

27. **Recommendation:** Amend Regulation 16 to expressly state that municipalities' participation in transversal contracts is voluntary. Alternatively, amend Regulation 16 to allow for procuring institutions to opt-out, especially if they can show better value-for-money etc. reasons.

Regulations 41 and 42:

28. Institutes compulsory, independent gateway reviews during a project.[56] Should the project be a major and/or high-value and/or high-risk project, such gateway reviews must be done by a multidisciplinary team which may include Public Procurement Office or relevant provincial treasury representatives.[57]

29. At the inception phase of a project, this includes submitting a business case for gateway review.[58] Only after this[59] gateway review has verified various procurement aspects[60] of the project, **can the project proceed**.

30. **Comment:**
    30.1. It appears on the face of the draft regulations as if they create a compulsory authorisation regime for municipal infrastructure and capital asset procurement. This is because the compulsory, independent gateway review panel's prior permission is required **before** a procuring institution may commence *inter alia* procurement for the project.

    30.2. This is not the support or coordination envisioned by cooperative

[56] Regulation 41(1).
[57] Regulation 41(2).
[58] Regulation 42(2)(b).
[59] Regulation 42(3) contains a typo, referring to the "*gateway review contemplated in regulation 4141*", but for purposes of this submission it is assumed that Regulation 42(3) was meant to read the "*gateway review contemplated in regulation 42(2)".*
[60] Regulation 42(3)(a) through (c).

government, but centralisation and it would interfere with municipalities' autonomy. This is especially true for those projects that relate to municipalities constitutionally assigned functions.[61]

31. **Recommendation:** Regulations 41 and 42 should be amended to expressly state that:
    31.1. The compulsory, independent gateway review is an **advisory mechanism**; and

    31.2. That a municipality's departure from the review panel's advice and/or recommendation, requires that municipality to submit its written reasons for doing so to the relevant provincial treasury and the Public Procurement Office.

Regulation 38:

32. Makes it mandatory for procuring institutions to align their procurement strategies,[62] with national plans[63] and strategies.

33. **Comment:** While trying to ensure coordination amongst the different spheres of government, national (and provincial) plans should not become hierarchically binding instructions on **original municipal functions**. The fact that it is compulsory for municipalities to alight their procurement strategies with national plans, risks regulatory overreach into areas of exclusive municipal function.

34. **Recommendation**: Amend the regulations to expressly preserve municipal autonomy and discretion over municipalities assigned functions and expressly

[61] Section 156(1) of the Constitution stipulates that municipalities have executive authority over, and the right to administer, that which national legislation assigns to them and the areas listed in Part B of Schedules 4 and 5 to the Constitution.
[62] Regulation 38(1)
[63] Such as the National Development Plan and National Infrastructure Plan.

state that municipalities must "*take into account*" as opposed to "*align*".

Regulation 71:

35. Authorises the Public Procurement Office, or a provincial treasury, upon either identifying a material breach of the Act, or receiving an allegation of such a breach, to, *inter alia*:

    35.1. Investigate the breach if it is not satisfied with the procuring institution's response.[64]

    35.2. Outline remedial actions to stop or prevent the breach and address the responsible official in a report to the procuring institution.[65]

    35.3. **Escalate a procuring institution's refusal and/or failure to implement the remedial action to the relevant executive authority**.[66]

36. **Comment:** While the above is a wonderful suggestion to further the implementation of the Constitution's values of accountability and the rule of law in procurement matters, there is the risk that it may be ***ultra vires*** **insofar as it affects municipalities and/or their entities**:

    36.1. While the Act allows for the Public Procurement Office to step-in to address a material breach of the Act,[67] it **does not allow a provincial treasury to do so** when it is a municipality or a municipal entity[68].

    36.2. Furthermore, if a remedial action plan by the Public Procurement Office or a provincial treasury is effectively *de facto* binding (since non-compliance results in reporting to the executive authority) it undermines municipal autonomy and is inconsistent with the Act, which does not permit either **binding instructions** (by the Public Procurement Office or a provincial treasury) to municipalities or municipal entities[69].

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[64] Regulation 71(1)(d).
[65] Regulation 71(1)(e).
[66] Regulation 71(1)(g)
[67] Section 5(1)(h) of the Act.
[68] Section 6(1)(b) of the Act.
[69] Sections 5(2)(a) and 6(a)(i) of the Act.

37. **Recommendation:** Amend Regulation 71 to expressly exclude municipalities and municipal entities. Draft a Regulation expressly focussed on municipalities and municipal entities, where the remedial plan is issued as a non-binding circular.[70] This will then allow the remedial plan to become binding if adopted by a municipality's council or municipal entity's parent municipality's council[71].

Regulation 85(1)(d):

38. Obligates a procuring institution to obtain the Public Procurement Office's approval **before it is allowed** to *either* upgrade its Information and Communication Technology ("ICT") procurement system *or* implementing a new system.

39. **Comment**: Preventing municipalities and/or their entities from upgrading and/or implementing a new ICT procurement system without the Public Procurement Office's approval risks:

    39.1. Interfering with a municipality's right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions;[72] and

    39.2. Impeding a municipality's ability or right to exercise its powers or perform its functions[73], and/or its capacity to manage its own affairs, exercise its powers and perform its functions[74].

40. **Recommendation**: The reason for wanting to this are expressly stated in the Regulations.[75] Thus, instead of requiring municipalities to obtain **prior approval** from the Public Procurement Office, these reasons can be framed as the criteria

[70] Sections 5(2)(b) and 6(a)(i) of the Act.
[71] Sections 5(4) and 6(4) of the Act.
[72] Section 156(5) of the Constitution.
[73] Section 151(4) of the Constitution.
[74] Section 154(1) of the Constitution.
[75] Regulation 85(1)(d)(i) through (iii).

for issuing a **compliance certificate**, confirming that the upgrades or new ICT system meet the minimum national standards.

Equality, rationality and constitutional procurement values

41. The Foundation submits that the Regulations should avoid treating transformation measures as an end in themselves. Preference measures are constitutionally permitted,[76] because they advance substantive equality, but they remain part of a procurement system that must, overall, remain fair, equitable, transparent, competitive and cost-effective[77]. Compliance with the requirements of a valid tender process, issued under the constitutional and legislative procurement framework, is legally required.[78] Preferential and remedial measures permitted by sections 217(2) and (3) must, therefore, operate within a procurement system that satisfies section 217(1).

42. Every preference measure should, therefore, be demonstrably tailored to advance transformation while preserving adequate competition and value for money. Accordingly, the Foundation recommends that **before applying** stringent set-asides, ownership thresholds or subcontracting requirements, procuring institutions **should be required to conduct and record a market analysis** demonstrating that sufficient qualifying suppliers exist and that the restriction is unlikely materially to undermine competitiveness or value for money. (Although regulations 56(6), 59(4) and 62(4) provide for cancellation and re-advertisement where the initial process attracts no qualifying bids, those mechanisms should not substitute for an adequate *ex ante* assessment and may impose avoidable delay and cost.)

43. Additionally, the Regulations currently appear to rely on ownership demographics as the principal indicator of transformation. The Act, on the contrary, adopts a broader concept of transformation[79] that would include *inter alia,* socio-economic

[76] Section 217(1) of the Constitution.
[77] Section 217(2) of the Constitution.
[78] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC) at para 40.
[79] Section 1 of the Act defines "*transformation*" as the "*process of change that seeks to (a) redress the unfair discrimination of the past; (b) achieve representation of the economically active population of the Republic; and (c) achieve socio-economic objectives*.

advancement, enterprise development, labour absorption, local economic participation, innovation and broadening access to economic opportunity. **The Foundation submits that greater regulatory recognition should be given to these additional indicators of transformation**.

44. Regulations 56(1), 59(1) and 62(2) already require consideration of the relevant sector, industry, commodity or supply market and the availability of potential suppliers, while regulations 62 and 63 require an additional feasibility assessment for mandatory subcontracting. These are valuable safeguards. The Foundation nevertheless submits that the three-supplier or three-bidder minimum in regulations 56(2), 59(2) and 62(1) should not be treated as conclusive proof of effective competition. The assessment should also consider whether the identified suppliers are independent, willing, technically and financially capable of performing the contract; their geographic reach, where relevant; market concentration; and the likely effects of the restriction on price, delivery time and contract performance.

45. Considering the above, the Foundation recommends that the regulations should contain a requirement that the **impact** of ownership and subcontracting thresholds be reviewed at prescribed intervals and should include assessments of:
    45.1. Participation by targeted groups;
    45.2. Competition levels;
    45.3. Average number of bids received;
    45.4. Impact on procurement costs; **and**
    45.5. Impact on contract performance.

46. **Annexure 2 requires separate scrutiny. Section 17(2)(c) and (d) of the Act requires the Minister to take the applicable B-BBEE codes into account and periodically reconsider set-aside targets, while section 63(3)(b)**

requires publication of a statement explaining the expected impact of the Regulations. Annexure 2's summary notes cite broad ranges drawn from the codes, but do not explain why each selected percentage is suitable across materially different institutions, sectors and supplier markets, or whether targets for up to five identified categories overlap or accumulate. Treasury should publish the empirical basis and impact assessment, clarify the interaction between targets, and permit institution- or sector-specific adjustment on recorded reasons where a uniform target would impair section 217(1).

47. Finally, to protect against PAJA challenges, the Foundation recommends that where a procuring institution applies a set-aside, prequalification criterion or subcontracting condition, it should be required to **record written reasons** showing:

    47.1. The objective sought to be achieved;

    47.2. The availability of qualifying suppliers;

    47.3. The anticipated impact on competition;

    47.4. Why the measure is considered fair, competitive and cost-effective; and

    47.5. How the measure advances transformation.

Regulation 25(3):

48. Institutes a per-criterion threshold of 70% - i.e. a bidder must achieve 70% and above in each of the categories of: **Capability and capacity** to deliver; **Functionality and technical**, and **Preference**.

49. **Comments:**

    49.1. Regulation 25(3) risks being an unduly formulistic disqualification.

    49.2. Furthermore, it creates a universal qualification bar, which is likely to be challenged as not meeting the "designed" criteria under both PEPUDA and *van Heerden*.

    49.3. Additionally, as a universal qualification bar, it risks being challenged as being irrational and therefore, contrary to the right to just administrative action,[80] alternatively, the rule of law.

50. **Recommendation:**

50.1. Amend regulation 25(3) to treat preference as a **weighted criterion** as opposed to a universal qualification bar.

50.2. Amen regulation 25(3) to confer a discretion[81] to waive or condone non-compliance with the 70% threshold, where such condonation is compatible with the public interest[82] and promotes the constitutional procurement values of fairness, competitiveness and cost-effectiveness[83].

Regulations 57:

51. Makes eligibility for preferential procurement set-asides conditional on a bidder being 100% ownership by members of specified categories[84]. Regulation 57 also applies to income generating contracts.[85]

52. **Comment**:

52.1. The 100% threshold functions as an absolute exclusionary criterion. As such, it risks being an unduly formulistic disqualification.[86]

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[80] Section 6(2)(f)(ii) of PAJA.
[81] As per para 30 of *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Smith* 2004 (1) SA 308 (SCA), unless the procurement framework expressly authorises a departure from that threshold, the decision-maker lacks the power to condone such non-compliance.
[82] As per paras 13 through 17 of *Millenium Waste* where the Supreme Court of Appeal held that a procurement authority that has been granted a discretion to condone non-compliance may not treat every **procedural defect** as automatically fatal. While *Millenium Waste* dealt with a procedural defect, our law permits condonation of non-compliance with **peremptory requirements** in cases where condonation is compatible with public interest **and** if such condonation is granted by the body in whose benefit the provision was enacted (See *SA Eagle Co Ltd v Bavuma* 1985 (3) SA 42 (A) at 49G – H). *Millenium Waste* held that it is in the public interest to promote competition and the constitutional principles of fairness, competitiveness and cost-effectiveness.
[83] Section 217 of the Constitution.
[84] Section 17(3) of the Act.
[85] Regulation 58(1).
[86] Contravening *Millenium Waste*, see footnote 80 above.

52.2. The blanket 100% ownership requirement opens itself up to being constitutionally challenged for being overbroad and/or disproportionate and/or insufficiently tailored. Thus, failing to meet the Constitution's procurement values, specifically, fairness, competitiveness and cost-effectiveness, because it would reduce the number of eligible bidders, decreasing competition and may undermine the constitutional objective of cost-effectiveness.[87]

52.3. Additionally, due to the above, it is open to being challenged for failing to meet the "design" criteria, but rather being arbitrary, capricious or displaying naked preference.

52.4. It risks being challenged as being irrational and therefore, contrary to the right to just administrative action,[88] alternatively, the rule of law.

52.5. Although *South African Police Service v Solidarity obo Barnard*[89] arose under the Employment Equity Act[90] and did not concern procurement, the Constitutional Court's observation - that the primary distinction between a numerical target and a quota lies in the flexibility of the standard - is instructive when assessing the rigidity of a remedial measure. Once regulation 57 applies, its 100% ownership threshold is absolute and regulation 57(4) requires the disqualification of every bid that does not meet it. While regulations 55 and 56 provide mechanisms for determining that a set-aside is not possible, and section 61 of the Act permits ministerial exemptions in specified circumstances, the Regulations do not provide a procurement-specific mechanism for calibrating the ownership threshold while retaining the set-aside. The Foundation therefore submits that Treasury should disclose the evidential basis for selecting 100%, explain its compatibility with section

[87] Section 217 of the Constitution.
[88] Section 6(2)(f)(ii) of PAJA.
[89] 2014 (6) SA 123 (CC) at para 54.
[90] Act 55 of 1998.

217(1) across different supplier markets, and consider a narrowly framed pre-advertisement adjustment mechanism based on recorded reasons.

53. **Recommendation**:

53.1. Instead of a 100% ownership requirement, or any percentage ownership requirement which would need to show why it is not simply an arbitrary or capricious percentage, amend regulation 57 to confer a discretion[91] to waive or condone non-compliance with the 100% ownership requirement, where such condonation **is compatible with the public interest**[92] and promotes the constitutional procurement values of fairness, competitiveness and cost-effectiveness[93].

53.2. Finally, regulation 57 should be amended to expressly require procuring institutions to show how fairness, competitiveness and cost-effectiveness were weighted in each application, to ensure section 217's values are taken into consideration.

Regulation 60(2):

54. Makes a bidder's eligibility for pre-qualification for preferential procurement contingent upon subcontracting at least 30% of the work to an entity that is 100% owned by members of specified categories[94]. Regulation 6(2) also applies to

[91] As per para 30 of *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Smith* 2004 (1) SA 308 (SCA), unless the procurement framework expressly authorises a departure from that threshold, the decision-maker lacks the power to condone such non-compliance.
[92] As per paras 13 through 17 of *Millenium Waste* where the Supreme Court of Appeal held that a procurement authority that has been granted a discretion to condone non-compliance may not treat every **procedural defect** as automatically fatal. While *Millenium Waste* dealt with a procedural defect, our law permits condonation of non-compliance with **peremptory requirements** in cases where condonation is compatible with public interest **and** if such condonation is granted by the body in whose benefit the provision was enacted (See *SA Eagle Co Ltd v Bavuma* 1985 (3) SA 42 (A) at 49G – H). *Millenium Waste* held that it is in the public interest to promote competition and the constitutional principles of fairness, competitiveness and cost-effectiveness.
[93] Section 217 of the Constitution.
[94] Section 18(1) of the Act.

129 Hatfield Street, Gardens, Cape Town 8001 South Africa
Tel: +27 21 930 3622 Email: info@fwdeklerk.org Website: www.fwdeklerk.org NPO 031-061// PBO 930004278

income generating contracts.[95]

55. **Comment**: See paragraph 52 above.

56. **Recommendation:**

    56.1. As with regulation 57 above, amend regulation 60(2) to confer a discretion[96] to waive or condone non-compliance with the requirement (that the bidder subcontracting at least 30% of the work to an entity that is 100% owned by members of specified categories), where such condonation is compatible with the public interest[97] and promotes the constitutional procurement values of fairness, competitiveness and cost-effectiveness[98].

    56.2. Additionally, it should be amended to expressly require procuring institutions to show how fairness, competitiveness and cost-effectiveness were weighted in each application.

Regulation 64:

57. Makes a bidder's eligibility for a procurement contract where subcontracting is a condition of a bid, contingent upon subcontracting with an enterprise that is 100% owned by members of specified categories[99].

58. **Comments:** The Act empowers the Minister to prescribe *inter alia* "targets for set-aside"[100] and ownership percentages for categories of persons[101]. Thus, while

[95] Section 18(7) of the Act.
[96] As per para 30 of *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Smith* 2004 (1) SA 308 (SCA), unless the procurement framework expressly authorises a departure from that threshold, the decision-maker lacks the power to condone such non-compliance.
[97] As per paras 13 through 17 of *Millenium Waste* where the Supreme Court of Appeal held that a procurement authority that has been granted a discretion to condone non-compliance may not treat every **procedural defect** as automatically fatal. While *Millenium Waste* dealt with a procedural defect, our law permits condonation of non-compliance with **peremptory requirements** in cases where condonation is compatible with public interest **and** if such condonation is granted by the body in whose benefit the provision was enacted (See *SA Eagle Co Ltd v Bavuma* 1985 (3) SA 42 (A) at 49G – H). *Millenium Waste* held that it is in the public interest to promote competition and the constitutional principles of fairness, competitiveness and cost-effectiveness.
[98] Section 217 of the Constitution.
[99] Section 19(2)(a) through (g) of the Act.
[100] Section 17(2)(a) of the Act.
[101] Section 17(4)(a) of the Act.

preference measures are permitted by both the Constitution[102] and the Act, these must be tailored to the Constitution's values – especially fairness, equitableness, competitiveness and cost-effectiveness.[103] A percentage of 100% risks being seen as overbroad and a rigid quota. Importantly, it could be argued that the measure is insufficiently **designed** and rather arbitrary, capricious or display naked preference.[104]

59. **Recommendations:**

59.1. Amend regulation 64 to confer a discretion[105] to waive or condone non-compliance with the requirement (that the organisation must subcontract with an enterprise that is 100% owned by members of specified categories), where such condonation is compatible with the public interest[106] and promotes the constitutional procurement values of fairness, competitiveness and cost-effectiveness[107].

59.2. Amended regulation 64 to expressly require procuring institutions to show how fairness, competitiveness and cost-effectiveness were

[102] Section 217(2) of the Constitution.
[103] Section 217(1) of the Constitution read with *Du Toit v Minister of Transport* at para 26 that states that [Government action] must comply with the Constitution, including its spirit, purport and objects generally.
[104] *Van Heerden* at paras 36 through 44.
[105] As per para 30 of *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Smith* 2004 (1) SA 308 (SCA), unless the procurement framework expressly authorises a departure from that threshold, the decision-maker lacks the power to condone such non-compliance.
[106] As per paras 13 through 17 of *Millenium Waste* where the Supreme Court of Appeal held that a procurement authority that has been granted a discretion to condone non-compliance may not treat every **procedural defect** as automatically fatal. While *Millenium Waste* dealt with a procedural defect, our law permits condonation of non-compliance with **peremptory requirements** in cases where condonation is compatible with public interest **and** if such condonation is granted by the body in whose benefit the provision was enacted (See *SA Eagle Co Ltd v Bavuma* 1985 (3) SA 42 (A) at 49G – H). *Millenium Waste* held that it is in the public interest to promote competition and the constitutional principles of fairness, competitiveness and cost-effectiveness.
[107] Section 217 of the Constitution.

weighted in each application.

60. The Foundation submits that this brief submission will be of assistance to Treasury.

Sincerely,

Daniela Ellerbeck

Constitutional Rights Programme Manager

FW de Klerk Foundation

Email: daniela@fwdeklerk.org

Ismail Joosub

Constitutional Advancement Programme Manager

FW de Klerk Foundation

Email: ismail@fwdeklerk.org

END.