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COMMENTS ON DRAFT GENERAL PUBLIC PROCUREMENT REGULATIONS

1. We write to you as Law for Energy Transitions Africa, Natural Justice, the Green Connection and the Centre for Environmental Rights.
2. Law for Energy Transitions Africa is a collaborative of NGOs in Africa (including the Centre for Environmental Rights¹ and Natural Justice²), it provides technical legal input to shape laws, policies and decisions that advance just transitions to equitable renewable energy power systems across Africa, while strengthening civil society participation so that reforms reflect local contexts and deliver access, affordability, environmental protection and public benefit.
3. The Centre for Environmental Rights³ is a non-profit organisation and law clinic of activist lawyers who defend the right of communities and civil society organisations to an environment not harmful to health or wellbeing.
4. Natural Justice⁴ is a registered South African non-profit organization. Its mission is to facilitate the full and effective participation of indigenous peoples and local communities in the development and implementation of laws and policies that relate to the conservation and customary uses of biodiversity and the protection of associated cultural heritage.
5. The Green Connection⁵ is a registered non-governmental organisation, that believes economic growth and development, improvement of socio-economic status and conservation of natural resources can only take place within a commonly understood framework of sustainable development. It aims to provide practical support to both the government and civil society sectors, which are an integral part of sustainable development.
6. We submit herein our comments on the draft General Public Procurement Regulations, 2026, to be published in terms of section 63(1) of the Public Procurement Act, 2024 (“the Act”) (“the draft regulations”).

¹ <https://cer.org.za/>.

² <https://naturaljustice.org/>.

³ <https://cer.org.za/>.

⁴ <https://naturaljustice.org/>.

⁵ <https://thegreenconnection.org.za/>.

7. While overall we are supportive of the draft regulations insofar as they mandate improved transparency and public disclosure of important procurement information, we set out below our comments on the draft regulations and recommendations for critical amendments to fulfil South Africa's constitutional and public interest requirements.
8. Our comments focus on five key areas of the regulations that would benefit from revision to strengthen the protection of the public interest and constitutional rights: i) the need for strengthened transparency, ii) inclusion of environmental and climate risk considerations in the foundational definition of "value for money," iii) alignment with climate impact considerations and the Climate Change Act, 2024, iv) providing more explicitly for the rights of communities impacted by procurement decisions; and v) strengthened vetting considerations to assess whether a bidder has a history of environmental non-compliance, pollution or harm to communities.
9. We also wish to stress the importance of strengthening the regulations' provisions on modernisation of public procurement approaches to include approaches and methodologies that help ensure open, transparent, standardized and efficient processes that can secure the best value for money and alignment with the public's best interest.

General comment on the draft regulations

i. The draft regulations need to be centred on mandatory environmental and social impact considerations

10. The regulations must be sufficiently aligned with the objects of the Public Procurement Act, which include the object to "*(g) promote innovation, sustainable development and the environmental rights in section 24 of the Constitution.*" This also means that the draft regulations must be fully aligned with the public interest.
11. Environmental and social impacts need to be mandatory and upfront considerations in designing and conducting any procurement processes. For example, part 9 explains how bids must be assessed. Regulation 24(1)(a) says every bid must be judged on cost-effectiveness (including lifecycle costs, value for money and affordability), the bidder's ability and capacity to do the work, and whether the bid meets the required technical standards. These criteria are *mandatory*. By contrast, environmental sustainability appears only in regulation 24(1)(b), which says evaluation criteria *may* include measures linked to an institution's development objectives or measures under sections 21 and 22 of the Act. Section 21 of the Act also uses optional language: a procuring institution may include measures to support sustainable development. Every procurement decision according to the objects of the Act must be subject to an environmental rights dimension. Regulations that are inconsistent with the objects of s2(2)(g), including regulations that make environmental and climate criteria merely discretionary, are potentially vulnerable to challenge on the grounds that they undermine the Act's own stated objects.
12. If section 2(2)(g) of the Act imposes a duty to promote section 24 environmental rights, it is difficult to reconcile that duty with a regulatory framework that makes most environmental measures optional. Either the objects clause is meaningful, in which

case the permissive framework is inadequate, or the permissive framework is intentional in which case the objects clause is performative. There therefore appears to be incoherence between the Act and the corresponding draft regulations.

13. This is a weakness in the proposed regulatory framework and is not aligned with the objects of the Act or the Constitution of the Republic of South Africa. A procuring institution can legally award a contract for major infrastructure without giving any score to environmental or social issues. In other words, the regulations do not build environmental accountability into the design and requirements of the procurement from the start. Instead, they treat environmental concerns as an optional extra, to deal with later through project-level environmental impact assessments, rather than as a key issue when public money is being allocated. Although the objects clause uses the term “promote” rather than “require,” constitutional jurisprudence generally interprets such language as imposing a positive duty of progressive realisation, rather than reflecting a mere aspiration.
14. There are many examples of jurisdictions that centre environmental considerations more directly in their procurement legislation.⁶ They include: Australia, Brazil, and the European Union.
 - 14.1. Brazil mandates the integration of environmental and sustainability criteria into government acquisitions.⁷ These frameworks require public agencies to prioritize goods, services, and works that minimize environmental impacts, promote energy efficiency, and support sustainable supply chains.⁸
 - 14.2. Australia's primary legal and policy framework requiring environmental consideration in public procurement is driven by the Commonwealth Procurement Rules and the Environmentally Sustainable Procurement Policy. Together, these require agencies to evaluate environmental impact as a core component of "Value for Money".
 - 14.3. European Union laws allow—and often require—public buyers to integrate environmental criteria into their tender evaluations, giving legal backing to life-cycle costing and eco-labels.⁹
15. The definition of "value for money" in the draft regulations should be broadened to include environmental and climate risks. The regulations must require decision-makers to consider environmental costs such as greenhouse gas emissions, pollution, stranded asset risks or climate impacts. The “value for money” definition refers to lifecycle costs but it is woefully incomplete without requiring assessment of these wider social and environmental costs. Without that, "value for money" can still end up meaning the lowest upfront price without consideration of the external costs that are, and will be, borne by society.
16. This is particularly troubling from an environmental justice perspective. Communities that carry the harm caused by polluting infrastructure, often poor Black communities,

⁶ See examples references in the comments table below.

⁷ Through Federal Law No. 14,133/2021 and Normative Instruction SLTI/MPOG No. 01/2010

⁸ See <https://www.ibanet.org/june-2021-new-public-procurement-law>

⁹ European Union Public Sector Directive (2014/24/EU).

have no guarantee that procurement decisions will take those harms into account. A precautionary approach, as mandated for decision-making by section 2 of the National Environmental Management Act, 1998 (NEMA),¹⁰ means environmental risks should be considered *before* decisions are made, not only after contracts are signed. Under the current framework, procurement decisions can still lock in harmful infrastructure for decades without any mandatory environmental checks.

17. Further, part 10 of the draft regulations does not clearly require contract management systems to track environmental performance, monitor compliance with environmental conditions, or report on sustainability results. Chapter 3 does include some environmental and heritage compliance duties for infrastructure projects, such as environmental impact assessments, environmental management plans and penalties for non-compliance. But those duties apply only to infrastructure procurement, not to the wider procurement of goods and services under Part 10.
18. Part 10 should require ongoing monitoring of environmental performance, regular environmental audits linked to contract milestones, and enforceable penalties, including cancellation of the contract and debarment, where suppliers break environmental commitments.

ii. The draft regulations should go further on transparency

19. The draft regulations could and should go further on transparency – expressly mandating publication of a number of key documents and decisions¹¹ specified in the regulations, and providing clearer and more direct recourse for accessing information if it is not available on the provided platform or portal.
20. The draft regulations currently state that one can use the Promotion of Access to Information Act, 2000 (PAIA) to access documents if they are not available on the portal, platform or relevant websites, but PAIA does not provide suitable means to obtain the information in real time. In practice, PAIA requests are often slow; burdensome for those seeking to access information; costly and difficult for affected communities to use.
21. The confidentiality exceptions are also broad. Regulation 36(3) says published information must not reveal "confidential information". That term is defined by referring to PAIA's grounds for refusing access. As a result, procuring institutions have wide scope to withhold information about environmental risks, prices and costs, supplier performance or contract terms by relying on claims of commercial confidentiality. Furthermore, the public interest override in PAIA (section 46) does not provide adequate protection for ensuring information in the public interest is made available. It is too onerous. It requires evidence of a substantial contravention of, or failure to comply with the law; or an imminent and serious public safety or environmental risk; *and* proof that the public interest in the disclosure of the record clearly outweighs the harm.

¹⁰ S2(4)(a)(vii) National Environmental Management Act, 1998.

¹¹ Such as the full RFBs and RFP; deliberations, decisions, and reasons for proceeding with emergency procurement (reg 21(3)); infrastructure procurement strategies (reg 39(2)); infrastructure procurement plans (reg 40); gateway reviews (reg 41); needs analysis (reg 42(1)).

22. The confidentiality exception should be narrowed so that it does not cover environmental compliance information or important information with cost implications in the public interest. Further, publication should be in formats and languages that affected communities can access.
23. Part 13 should require proactive publication of all environmental commitments in procurement contracts, ongoing reporting by suppliers on environmental compliance, and a single searchable public register of environmental performance across procurement.

iii. The draft regulations need to align with climate impact considerations and the Climate Change Act, 2024

24. While the draft regulations make mention of procurement measures to advance sustainable development (regulation 67), they make no mention of the need for procurement plans and strategies to consider the impacts of climate change or align with climate change laws and policies.
25. The Climate Change Act, 2024 (section 7) specifically requires the review and, if necessary, revision, amendment, coordination and harmonisation of relevant policies, laws, measures, programmes and decisions, in order to ensure that the risks of climate change impacts and associated vulnerabilities are taken into consideration.
26. It is important to note that the Act commendably ensures alignment between the revised B-BBEE Codes of Good Practice and the Public Procurement Act, representing a significant mechanism for advancing transformation objectives. However, although the Climate Change Act was enacted in the same month as the Public Procurement Act, neither the Act nor the draft regulations make any reference to climate change, despite their contemporaneous development.
27. Climate change considerations are unquestionably pertinent to public procurement. These regulations therefore need to be more explicitly aligned with climate considerations, in order to meet the section 7 Climate Change Act requirements. This could be achieved in a number of ways, including the following:
 - 27.1. Regulations requiring climate risk assessments as a mandatory component of procurement planning or gateway reviews;
 - 27.2. Regulations that require disclosure of lifecycle greenhouse gas emissions of a proposed project in bid proposals;
 - 27.3. Regulations establishing minimum sustainability and climate resilient performance standards for infrastructure goods and services procurement; and
 - 27.4. Regulations that require the Public Procurement Office to develop climate sensitive procurement standards in consultation with environmental regulators.

iv. The draft regulations need to more explicitly protect the rights of communities impacted by procurement decisions

28. Communities whose constitutional rights under section 24 are threatened by a procurement process or decision, should be meaningfully consulted at the outset. Regulation 49 should be strengthened in this regard, as affected communities' free, prior and informed consent should be explicitly required as a mandatory part of any procurement process.
29. The regulations should make provision for a complaints mechanism and an accessible independent dispute resolution forum to challenge procurement decisions. For example, a major infrastructure project that would affect environmental rights, should confirm affected communities' standing to challenge gateway review decisions, and at a minimum to participate in the specification phase of a procurement decision. The current regulatory framework provides no mechanism for the balancing of rights of communities with bidders' whatsoever.

v. Vetting considerations need to be strengthened

30. Regulation 27 deals with security vetting. It focuses on criminal records, ownership checks, financial due diligence and legal compliance. These requirements are too narrow. It does not require any checks on whether a bidder has a history of environmental non-compliance, pollution or harm to communities. There should be required consideration of the bidder's relevant experience, performance history, environmental compliance track record and ethical conduct. This is a missed chance to build accountability across the life of the contract, and importantly, to avoid contracting with suppliers who do not have a good environmental or ethical track record.
31. The draft regulations also fail to state that a bidder who does *not* demonstrate a satisfactory track record through the vetting process, must be disqualified. Importantly, the regulations must ensure that bidders who do not pass the vetting process, cannot be appointed as preferred bidders.
32. Further, the requirements in regulation 27 only apply to the bidding entity – and not to affiliate companies, subsidiaries, or directors. This is problematic. Nothing prevents a company or group of individuals with poor compliance or social and environmental performance history, from simply setting up a new entity, with no historical track record, as the bidding entity, in order to avoid scrutiny under regulation 27.
33. Ultimately the draft regulations need strengthening and they need further checks and balances in place to avoid contracts being awarded to persons that are not fit and proper.

vi. Internal drafting inconsistencies

34. There are some visible errors and inconsistencies between the empowering Act and the draft regulations. For example, section 3(2) of the Act states that "Section 1, Chapter 4, regulations made under section 63, including section 24(1)(d), applicable to Chapter 4, apply to Parliament and provincial legislatures."

35. Regulation 3 of the draft regulations purports to implement the above section 3(2) but limits it to "Part 9 of Chapter 2 and Chapter 5" of the Act. There is no part 9 of Chapter 2 of the Act. The alignment between section 3(2) of the Act and Regulation 3 of the Regulations requires careful verification. It is unclear whether Regulation 3 fully captures the Act's scope.

Section-specific comments on the draft regulations

36. In the table below we set out our comments on some of the draft regulations. Please note that we do not provide comment on *all* the regulations. The absence of a comment or recommendation on a regulation should not be construed as approval of that regulation.

37. Proposed additions to the regulation text are **underlined in bold**, whereas proposed deletions are **~~struck-out~~**.

Section	Comment	Recommendation
Reg 2: definitions		
"Value for money" means the optimal use of public resources to achieve intended procurement outcomes across the full lifecycle of goods, services, infrastructure or capital assets to be procured, taking into account the following factors –	Good examples of value for money definitions can be taken from Canada,¹² Costa Rica,¹³ Peru¹⁴ and Australia.¹⁵ All of these jurisdictions recognise that value for money is not only about lowest price, but also requires the realisation of	The definition of "value for money" should be changed so that it clearly includes environmental and social considerations, including externalities such as the social cost of carbon, pollution impacts, stranded asset risk and climate resilience.

¹² Canada's Policy on the Planning and Management of Investments defines "best value" as: "The extent to which a solution or investment achieves the optimal balance of resource expenditure and realization of outcomes, including socio-economic and environmental returns, throughout the asset or service life cycle. For acquisitions, the lowest price is not always representative of best value."

¹³

https://pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?nValor1=1&nValor2=94469.

¹⁴ <https://cdn.www.gob.pe/uploads/document/file/8257063/6892275-ley-n-30225-ley-de-contrataciones-del-estado-y-modificatorias.pdf?v=1750721336>.

¹⁵ Australia's Commonwealth Procurement Rules (Section 4.5) state:

"Price is not the sole factor when assessing value for money. When conducting a procurement, an official must consider the relevant financial and non-financial costs and benefits of each submission including, but not limited to the:

- quality of the goods and services;
- fitness for purpose of the proposal;
- potential supplier's relevant experience, performance history and ethical conduct;
- flexibility of the proposal (including innovation and adaptability over the lifecycle of the procurement);
- environmental sustainability of the proposed goods and services (such as energy efficiency, climate change impact, environmental impact, circularity of the goods and services and use of recycled materials); and
- whole-of-life costs."

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(a) their economical acquisition at the lowest possible price, which is consistent with the required standards of quality, functionality, and sustainability; (b) their efficient use to maximise outcome with minimal waste or duplication; and (c) their effectiveness in achieving their intended objectives, including service delivery and Transformation imperatives, sustainable development goals, and infrastructure performance targets.	social and environmental outcomes, and consideration of environmental sustainability of the proposed goods and services (such as energy efficiency, climate change impacts, environmental impact, circularity of the goods and services and use of recycled materials).	Lifecycle costing should cover environmental and social costs, not just the financial costs to the procuring institution.
Reg 4: promotion of strategic procurement		
4(1): A procuring institution must develop and implement its procurement system in a structured, systematic and data-driven approach to plan, manage, and develop its supply base in line with its objectives by ...	This should include express provision for transparency, as well as environmental and climate considerations, in line with the general comments made above.	Recommended wording: “A procuring institution must develop and implement its procurement system in a structured, systematic, <u>transparent</u> and data-driven approach to plan, manage, and develop its supply base in line with its objectives by ... (b) using the information from this analysis to– ... (ii) develop a strategic procurement plan to achieve, at a strategic level, value for money balancing the objectives of fairness, competitiveness, transparency and equitability, <u>taking into account any material environmental and climate-related</u>

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		considerations as part of value-for-money, lifecycle costing and risk management assessments.”
4(7): A procuring institution must publish its strategic procurement plan and a summary of the analysis contemplated in subregulation (1)(b)(ii) on its official website within 7 days of approval.	It is not clear what the approval process is, for a strategic procurement plan or if there is any opportunity for members of the public to engage with the plan before it is finalised.	<i>Before publishing a strategic plan, the regulations must require that a draft plan be published for consideration and comment.</i>
Reg 8: request for bid (RFB) method		
8(4)(a) & (b): A procuring institution - (a) must publicly advertise an RFB in the eTender Publications Portal for a minimum period of 21 days before closure, except in emergency procurement contemplated in regulation 21; (b) may publicly advertise an RFB in any other media	The full RFB itself must be made publicly available, and the regulations must explicitly state this. The regulations must also make clear that emergency procurement does not obviate the need for publication in advance. If anything, it should only mean that a shorter publication time period could be accepted. Given that affected members of the public may not know to regularly check the eTender Publications Portal or may have difficulty accessing it, it should be mandatory for the RFB to be published in the Gazette or in a local newspaper.	Recommended wording: “A procuring institution - (a) must publicly advertise, <u>and make available</u>, an RFB in the eTender Publications Portal for a minimum period of 21 days before closure, except in emergency procurement contemplated in regulation 21, <u>in which case a shorter advertising period may be permitted on good cause shown</u>; (b) <u>must</u> publicly advertise an RFB in ~~any~~ other media <u>such as a local newspaper and the Government Gazette</u>”
Reg 9: request for proposals method		
9(3): A procuring institution – (a) must publicly advertise an invitation in the form of an RFP in the eTender Publications Portal for a	The full RFP itself must be made publicly available, and the regulations must explicitly state this.	Recommended wording: “A procuring institution - (a) must publicly advertise, <u>and make available</u>, an RFP in the eTender Publications Portal for a

Section	Comment	Recommendation
minimum period of 21 days before closure, except in emergency procurement contemplated in regulation 21; (b) may publicly advertise an RFP in any other media	The regulations must also make clear that emergency procurement does not obviate the need for publication in advance. If anything, it should only mean that a shorter publication time period could be accepted. Given that affected members of the public may not know to regularly check the eTender Publications Portal or may have difficulty accessing it, it should be mandatory for the RFB to be published in the Gazette or in a local newspaper.	minimum period of 21 days before closure, except in emergency procurement contemplated in regulation 21, <u>in which case a shorter advertising period may be permitted on good cause shown;</u> (b) <u>must</u> publicly advertise an RFP in <u>any</u> other media <u>such as a local newspaper and the Government Gazette</u>”
Reg 14: direct procurement method		
14(1): A procuring institution must procure directly from a supplier (a) if the supplier has exclusive intellectual property or licensing rights to provide the required goods or services; (b) if there is only one supplier of the required goods and services because of its unique expertise or the specialised nature of its product; (c) on grounds of national security; or (d) if the required goods and services are provided by an international organisation in terms of an international or bilateral government agreement.	The grounds permitting direct procurement are problematic in that, inter alia: - They are mandatory, and should not be; - The considerations are not required to factor in value for money or alignment with the public interest; and - There is no provision for recourse or contestation. Section 103 of Kenya’s Public Procurement and Asset Disposal Act also provides grounds for direct procurement, but they are heavily qualified and use	Recommended wording: “A procuring institution ~~must~~ may procure directly from a supplier (a) if the supplier has exclusive intellectual property or licensing rights ...” The circumstances in which direct procurement may take place must be substantially narrowed, and must ultimately still meet value for money and public interest requirements. Further, the bilateral agreement referred to in 14(1)(d) informing direct procurement must be published.

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14(2): A procuring institution may use the direct procurement method – (a) in emergency situations that cannot be accommodated using the RFQ, RFB or RFP Methods ...	of direct procurement is not mandatory. ¹⁶	
14(5): A procuring institution must publish the details of, and the reasons for, the use of the direct procurement method on the institution's official website within 7 days of the award.	The decision to utilise the direct procurement method, and reasons therefor, should be published before the award.	Recommended wording: “A procuring institution must publish the details of, and the reasons for, the use of the direct procurement method on the institution's official website, <u>following the approval referred to in subsection (4), and must publish the award</u> , within 7 days of the award.”
Reg 18: unsolicited bids		
18(3): If the unsolicited proposal meets the requirements referred to in subregulation (1), the procuring institution must (a) publish an Expression of Interest to test the market for the existence of other suppliers capable of providing the product or service or alternative products or services;	It is not clear where or how the expression of interest must be published.	The procuring institution should be required to publish the Expression of Interest on a broadly reachable platform, such as a local newspaper, or government gazette, as well as on its website.
Reg 21: emergency procurement		

¹⁶ Section 103 of Kenya's Public Procurement and Asset Disposal Act states “(2) A procuring entity may use direct procurement if any of the following are satisfied— ...

(b) due to war, invasion, disorder, natural disaster or there is an urgent need for the goods, works or services, and engaging in tendering proceedings or any other method of procurement would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;

(c) owing to a catastrophic event, there is an urgent need for the goods, works or services, making it impractical to use other methods of procurement because of the time involved in using those methods”.

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(3) A procuring institution must – (a) record the deliberations, decisions, and reasons for procurement under this regulation	Members of the public must have access to the deliberations, decisions and reasons that informed the decision to proceed with emergency procurement. These aspects will not necessarily be covered in the post-emergency report published under 21(3)(c) Regulation 21 allows significant departures from competitive procurement requirements, and this creates risks. For communities affected by disasters — floods, fires, infrastructure failures — emergency procurement is often the primary mechanism through which government responds. The regulation requires post-emergency reporting (Regulation 21(3)) but does not require community notification of emergency procurement decisions, community participation in identifying emergency needs, or assessment of whether emergency procurement responses address the underlying vulnerabilities of affected communities.	Recommended wording: “A procuring institution must – (a) record and publish the deliberations, decisions, and reasons for procurement under this regulation ... <u>(d) notify and consult with any communities affected by the emergency and/or emergency procurement, identify emergency needs, and assess whether proposed emergency procurement responses address underlying vulnerabilities of affected communities;</u> <u>(e) in procurement that could have material negative environmental and climate impacts, consider available alternatives, with fewer negative impacts, and reasons must be recorded where higher-impact options are selected.</u>”
Reg 24: evaluation criteria		
24(1)(a): Subject to subregulation (2), evaluation criteria – (a) must include – (i) cost-effectiveness, taking into account	Missing from reg 24(1)(a) is an explicit requirement to consider: the public interest; environmental; climate and social impact considerations; and the compliance track record of	Reg 24(1)(a) should make environmental sustainability a mandatory evaluation criterion, not an optional one.

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lifecycle costs, value for money, and affordability ...	a bidder and its affiliate companies; as part of criteria. This is required in order to align the regulations with the Climate Change Act and Constitution. Furthermore, it is concerning that climate risk is not a mandatory evaluation criteria in alignment with the Climate Change Act. Regulation 24(1)(a)(i) includes "lifecycle costs" in cost-effectiveness evaluation, which partially captures long-term value. However, lifecycle costs as conventionally calculated in procurement do not routinely include climate adaptation costs, or the social cost of greenhouse gas emissions. The regulations do not require or define a methodology for lifecycle costing that integrates climate risk or impact.	Recommended wording: "Subject to subregulation (2), evaluation criteria – (a) must include – <u>Resilience to the impacts of climate change and the duty to reduce greenhouse gas emissions;</u> <u>The public interest;</u> <u>climate adaptation costs,</u> <u>the social and environmental costs of greenhouse gas and other pollutant emissions, and energy transition risks, as part of value-for-money and lifecycle costing assessments."</u>
Reg 25: weighting of criteria		
25(2): The total score must be out of 100 points, which a procuring institution may allocate among the following evaluation criteria – (a) capability and capacity to deliver; (b) functionality and technical; (c) preference; and (d) price.	Again, and as above, social and environmental considerations are missing from this list. Also missing, is any direction on the weighting that should be afforded to environmental and social considerations. In Norway, as an example, since 1 January 2024, contracting authorities are required to include environmental	Recommended wording: "The total score must be out of 100 points, which a procuring institution may allocate among the following evaluation criteria – (a) capability and capacity to deliver; (b) functionality and technical; (c) preference; and (d) price. <u>(e) environmental impact</u>

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	and/or climate considerations as an award criterion, weighted at a minimum of 30%. ¹⁷	<u>(f) social impacts</u> <u>(g) impacts on climate change</u> Every bid above a set threshold should have to show its historic environmental performance (including the performance of affiliate companies and subsidiaries), and this should carry a minimum weighting in the evaluation score.
Reg 27: security vetting of bidder before award of bid		
27(2): The procuring institution must subject bidders who are shortlisted following bid evaluation to mandatory security vetting to verify a bidder's background, integrity and financial standing including – (a) criminal background checks; (b) verification of ownership and beneficial interest; (c) financial due diligence; and (d) legal and regulatory compliance.	All checks and verifications in sub-regulation (2) must apply not only to the bidder company but to any affiliate and subsidiary company and to directors of the bidder and affiliate companies as well. This is a relevant consideration as a bidder with a poor compliance or financial track record could simply set up a new company, with no compliance history, in order to bid. The checks should also be broader than just compliance, financial due diligence and criminal conduct. There should be consideration of the potential supplier's relevant experience, performance history and ethical conduct.	Recommended wording: “The procuring institution must subject bidders who are shortlisted following bid evaluation to mandatory security vetting to verify a bidder's background, integrity and financial standing including – (a) criminal background checks of <u>the bidder, its directors and affiliate companies;</u> (b) verification of ownership and beneficial interest; (c) financial due diligence of <u>the bidder, its directors and affiliate companies;</u> and (d) legal and regulatory compliance of <u>the bidder, its directors and affiliate companies;</u> <u>(e) environmental due diligence of the bidder,</u>

¹⁷ <https://nordics.dlapiper.com/en/news/nordic-public-procurement-bulletin-december-2025>.

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		its directors and affiliate companies; (f) the relevant experience, performance history and ethical conduct of the bidder; and (f) any other evidence demonstrating that the bidder is not a fit and proper person.”
27(6): If a bidder fails or refuses to comply with security vetting requirements, it must be disqualified.	The regulations do not state what should happen following particular outcomes of the vetting process. For example, if the vetting process is complied with but still reveals evidence of previous non-compliances, or a poor environmental and social track record. This should bar the bidder from being selected, but the regulations do not state this.	Recommended wording: “If a bidder fails or refuses to comply with security vetting requirements, and if the vetting process reveals that the bidder is not a fit and proper person or has not satisfactorily met the requirements in sub-regulation 2 , it must be disqualified.”
Reg 28: notification of award		
(3) A procuring institution must hold a briefing session on any award in excess of R 50 million- (a) to which the public, civil society and the media are publicly invited; (b) the content of which may be guided by the Public Procurement Office.		Briefings should also be held, or at least there should be a public notification process, for awards smaller than R50 million.
Reg 29: contract management		
29(2): A procuring institution must ensure that a contract with a supplier– (a) is in a standard form approved or endorsed by	It’s important that the public has access to standard form contracts (standardised power purchase agreements, for example), and that these forms remain standardised	Recommended wording: “A procuring institution must ensure that a contract with a supplier– (a) is in a standard, publicly-available form approved or endorsed by

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the Public Procurement Office, which form may be adapted or modified depending on circumstances or conditions;	and not easily subject to change – for consistency purposes.	the Public Procurement Office, which form may be adapted or modified depending on circumstances or conditions, <u>with any material changes requiring prior approval by the Public Procurement Office, following a public participation process.</u>
29(4): An accounting officer or accounting authority may approve a variation or amendment of the scope of a contract in excess of the thresholds in subregulation (3) if there are good grounds for doing so.	Regulation 29(3) sets variation thresholds for contract amendments — 15% for infrastructure, 10% for consultancy, 20% for other goods and services — but regulation 29(4) allows the accounting officer to exceed these thresholds "on good grounds." The phrase "good grounds" is undefined. In administrative law terms, undefined discretionary standards create legal uncertainty. ¹⁸ Furthermore there is no cross-reference to a definition, no list of qualifying circumstances, no procedural requirement attached to the determination of good grounds, and no	Recommended wording: "(4) An accounting officer or accounting authority may approve a variation or amendment in excess of the thresholds in sub-regulation (3) <u>only if — (a) the variation is necessitated by unforeseen circumstances that could not reasonably have been anticipated at the time of award; (b) the variation does not constitute a material change to the original scope of the contract such that, if originally included, it would have attracted a different pool of bidders; (c) the reasons are recorded in writing and published on the</u>

¹⁸ Under PAJA and the constitutional principle of legality, administrative decisions must be rationally connected to the purpose for which the power was granted. Where the empowering provision provides no standard against which rationality can be assessed, the decision-maker effectively exercises an unconstrained discretion. South African courts have repeatedly held that wide, undefined administrative discretions are constitutionally suspect — the decision-maker must be able to articulate reasons, and reviewers must be able to assess them against something. "Good grounds" as currently drafted gives a reviewer almost nothing to work with. A court applying a rationality review would ask: good grounds for what purpose, assessed against what standard? The provision provides no answer. The goal of any amendment should therefore be to distinguish between variations that represent genuine unforeseen circumstances (which the threshold exception was presumably designed to accommodate) and variations that represent poor planning, scope creep, or opportunities for irregular enrichment.

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	publication or oversight obligation triggered by an approval under this subregulation.	<u>institution's official website within 7 days; and (d) for variations on infrastructure contracts above R100 million, an independent technical review is conducted before approval.</u>
(6) A procuring institution must publish on its official website, excluding confidential information ...		Recommended wording: “A procuring institution must publish on its official website, excluding confidential information ... <u>all standard form contracts approved or endorsed by the Public Procurement Office under subregulation (2).</u> ”
Reg 34: bid committee system		
34(2): Subject to section 27(3) of the Act, the committees referred to in subregulation (1)(e) – (a) are composed of officials; and (b) may include consultants or advisors who may participate in committee deliberations in an advisory capacity.	Any third party consultants or advisors participating in committee deliberations, must be suitably qualified to do so, and they must be independent.	Subject to section 27(3) of the Act, the committees referred to in subregulation (1)(e) – (a) are composed of officials; and (b) may include <u>suitably qualified, independent</u> consultants or advisors who may participate in committee deliberations in an advisory capacity.
Reg 35: establishment of central online portals and platforms		
(1) The Public Procurement Office – (a) must establish – (i) the single platform contemplated in, and in accordance with, section 28(2)(a) of the Act; (ii) a central online portal for public access to information contemplated in section 31(2)(b)(ii) of the Act;	The Act specifically requires that the information referred to in section 31(2)(a) be made available “in a format that enables tracking of information relevant to the entire process of a specific procurement; is electronic and interoperable ...” (S 31(2)(b)(ii)). This is the ‘central online portal’	Recommended wording: “A procuring institution must collate and publish the information contemplated in section 31(2)(a) of the Act, excluding confidential information, on the single platform referred to in subregulation (1)(a)(i) <u>and on the central online portal referred to in subregulation (1)(b)(ii).</u> ”

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(iii) the prospective supplier database contemplated in section 24(6) of the Act; and (b) may establish any other database contemplated in section 5(1)(i) of the Act that is easily accessible on a central online portal that is publicly available free of charge. (2) A procuring institution must collate and publish the information contemplated in section 31(2)(a) of the Act, excluding confidential information, on the single platform referred to in subregulation (1)(a)(i).	referred to in reg 35(1)(a)(ii). In other words, the platform and the portal referred to in the regulations are required to make available the information listed in s31(2)(a) of the Act.	
Reg 36: publication of information on procurement processes		
36(2): If the information sought is not publicly available on the portals, platforms or websites referred to in subregulation (1), access to information must be granted by the Public Procurement Office or procuring institution on request made under the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).	Where the requisite information is not available on the portal, platform or websites, this cannot be remedied through PAIA, but must be addressed through recourse provided in the regulations. PAIA should only be used in instances where information is sought that is not required to be publicly available under the Act or regulations.	The information that is required to be published and publicly available under the Act and regulations, must be publicly available – if the responsible party fails to make it available, there must be provision in the regulations for a notification and complaint procedure with time-frames for the responsible person to remedy the failure, and sanctions where they fail to make the information public.
Reg 39: programme level procurement planning and approval		
39:(2) In order to achieve the strategic outcomes referred to in sub-regulation (1), a procuring institution must develop infrastructure procurement strategies.		The regulation must expressly state that these procurement strategies must be publicly available, on the procuring institution's website. The draft strategies should also

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		be subject to a public participation process before adoption.
Reg 40: infrastructure procurement plan		
40(1): A procuring institution must ensure that its infrastructure procurement plan – (a) is in accordance with its strategic procurement plan contemplated in regulation 4; (b) translates its institutional strategic and programmatic objectives into a coordinated set of procurement outcomes, ensuring that infrastructure investments are prioritised, resourced, and sequenced to maximise public value ...		The regulation must expressly state that infrastructure procurement plans must be publicly available, on the procuring institution's website. The draft strategies should also be subject to a public participation process before adoption. Recommended wording: “(1) A procuring institution must ensure that its infrastructure procurement plan - ... (e) promotes long-term value and sustainability by incorporating lifecycle costing into financial appraisals and decision-making processes at the planning stage of infrastructure procurement including consideration of material <u>environmental performance, operational emissions, and long-term external costs where relevant to the infrastructure asset concerned.</u> <u>(g) is publicly available; and</u> <u>(h) is subject to a public participation process before being adopted.</u>”
Reg 41: gateway reviews for projects		
41(1): A procuring institution must institute	Publication of gateway reviews is required, under	The gateway reviews should be publicly

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formal independent gateway reviews at key decision points in the lifecycle of a project.	reg 42(6) for reviews conducted under reg 42(2)(b). It is not clear whether there might be instances where a gateway review would be conducted under reg 41 and not 42(2)(b). For avoidance of doubt, reg 41 should require express publication as well.	available on the procuring institution's website.
41(2): For major projects and high-value and high-risk projects, the gateway review contemplated in subregulation (1) – (a) must be conducted by an independent multi-disciplinary team with specialists in at least– (i) engineering or architecture; (ii) project management; (iii) supply chain management or procurement; (iv) law; (v) finance or economics; and (vi) environmental and social impact assessments;	The independent gateway review team must include specialists in engineering, project management, procurement, law, finance, and environmental and social impact — but a climate specialist is not listed. In a country where infrastructure is increasingly exposed to extreme weather events, flooding, drought, and temperature stress, this is a material omission.	Recommended wording: “(2) For major projects and high-value and high-risk projects, the gateway review contemplated in subregulation (1) – (a) must be conducted by an independent multi-disciplinary team with specialists in at least– <u>(vii) climate risk and resilience assessments, including analysis of physical climate risks to infrastructure over its projected lifecycle.</u> ”
Reg 42: project inception and feasibility		
42(1): During project inception, a procuring institution must engage in – (a) a comprehensive needs analysis assessment to determine that a proposed project is technically, financially, economically, socially and		The regulations must state that the needs analysis must be publicly available on the procuring institution's website.

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environmentally feasible and locationally suitable ...		
42(6): The accounting officer or accounting authority of a procuring institution must – ... (b) submit the [gateway] review to the Public Procurement Office in cases of non-compliance or on request from the Office.		Cases of non-compliance should be published.
Reg 47: risk management and contingency planning for infrastructure procurement		
47(8): If a supplier fails or refuses to comply with its risk management obligations, a procuring institution may – (a) suspend works if there is a serious risk to safety or security; (b) cancel the contract on grounds of material breach of contract;	It is not clear where the supplier's risk management obligations referred to in this regulation are derived. Are these obligations as per the contract, or in the risk management plan itself? This should be clarified for avoidance of doubt.	The regulations should reference where the supplier's "risk management obligations" are based, whether these are in the risk management plan itself or in its contract. Either way, the risk management obligations should be publicly accessible.
Reg: 49: stakeholder consultation		
49(1): A procuring institution must implement a structured process for stakeholder consultation throughout the lifecycle of infrastructure projects which must – (a) be inclusive of affected communities and civil society for successful delivery and sustainability of the project; (b) comply with any consultation requirements in any relevant land use, environmental or heritage legislation; and (c) include mechanisms for – (i) public	As stated above, the draft regulations do not do enough to provide for explicit and comprehensive engagement with affected communities.	Recommended wording: 49(1)"(d) <u>where a procurement process may have adverse environmental, social or community impacts, establish a formal community participation process during the procurement planning stage and before commencing the procurement process, which must — (i) provide affected communities with accessible information about the nature and scope of the proposed procurement;</u>

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notice of invitation for the public and civil society to participate and the media to attend; (ii) holding community meetings and stakeholder workshops; (iii) feedback of, and response to, material stakeholder concerns.		<u>(ii) create a documented mechanism for communities to submit concerns or conditions; and (iii) require that material community concerns be considered and addressed in the bid specifications and evaluation criteria."</u>
Reg 67: measures to advance sustainable development		
67(1): A procuring institution may include in its procurement policy and strategic procurement plan measures to advance sustainable development that are consistent with nationally and internationally recognised principles and standards	The language in reg 68 (measures for beneficiation and innovation) is not permissive but mandatory – “must” instead of “may”. The language in regulation 67 should also be mandatory. Regulation 67 uses permissive language throughout. This means a procuring institution that ignores all sustainability considerations is in full compliance with these regulations. There is no floor, no reporting requirement on sustainability performance, and no mechanism to aggregate whether public procurement is advancing or undermining the country's climate commitments. This represents a fundamental misalignment between the procurement regulatory framework and South Africa's climate obligations.	Recommended wording: “A procuring institution must include in its procurement policy and strategic procurement plan measures to advance sustainable development that are consistent with nationally and internationally recognised principles and standards” In addition to the above, further proposed addition — new regulation 67A: <u>"67A(1) a procuring institution must — (a) conduct and publish a climate risk assessment identifying physical and transitional climate risks to the asset over its projected lifecycle; (b) require bidders to disclose the estimated lifecycle carbon emissions of their proposed solution as part of their technical proposal; (c) include greenhouse gas emission reduction and climate</u>

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	Further, this regulation, while fully supported, should go further and include the need to prioritise and evaluate the impacts of climate change – either in reg 67 or more broadly in these regulations.	<u>resilience as weighted evaluation criteria."</u>
Reg 68: measures for beneficiation and innovation		
68: A procuring institution must include in its strategic procurement plan and procurement policy measures to promote beneficiation and innovation by – (a) advancing local beneficiation rather than procuring imported goods; (b) requiring suppliers to use goods made or services provided by South African entities or citizens of the Republic; (c) encouraging procurement of innovative solutions by adopting procurement methods to allow suppliers to propose innovative solutions.	While localisation to promote the development of industries domestically is preferred and a desirable outcome, a ‘next best’ is to develop and support a regional market within the southern African region and/or on the continent.	The listed measures to promote beneficiation and innovation should also include measures to boost a regional and continental market - rather than procuring imported goods from outside the continent.
Regulation 70: preference measures as conditions of contract		
70(1)(c): A procuring institution must, in accordance with its bid specification in respect of preference contemplated in sections 17 to 22 of the Act, stipulate conditions in respect of the preference obligations defined in the contract that – (c) provide for the tracking and monitoring of the	Regulation 70 creates enforceable preference obligations as conditions of a contract, including financial penalties and the forfeiture of performance bonds. This is substantively strong. However, the regulations should include strengthened reporting, verification and auditing provisions as well as	Recommended wording: "(d) provide for verifying and auditing the performance of those obligations, <u>which must</u> = <u>(i) require independent verification and auditing at intervals of not less than once every six months, which must include —</u> <u>(aa) direct confirmation</u>

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performance of those obligations; ...	community level monitoring, and obligations to publish performance data disaggregated by preference category. ¹⁹ The risk is that preference obligations are formally present but practically unenforceable in the absence of robust monitoring and auditing infrastructure.	<u>from each identified subcontractor or beneficiary enterprise that it has received the scope of work and payment to which it is entitled under the contract;</u> <u>(bb) verification of payment records showing amounts paid to each subcontractor against the amounts due in terms of the contract;</u> <u>(cc) site visits or other direct verification measures proportionate to the value and complexity of the contract, as determined by the preference compliance monitor;</u> <u>(ii) require the procuring institution to establish an accessible reporting channel through which —</u> <u>(aa) subcontractors and beneficiary enterprises may report concerns about non-compliance with preference obligations without fear of contractual or commercial retaliation;</u> <u>(bb) community members in a designated geographical area who are intended beneficiaries of preference obligations may submit observations regarding whether</u>

¹⁹ Section 591)(g) of the Act provides that the Public Procurement Office must monitor and oversee the implementation of this Act". Without aggregated, standardized monitoring data flowing from individual contracts upward through procuring institutions to the PPO, this function cannot be meaningfully performed in respect of preference obligations.

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		<u>preference benefits have been delivered;</u> <u>(cc) reports received through this channel must be investigated within 30 days and the outcome communicated to the person who submitted the report;</u> <u>(f) provide for a preference compliance monitoring report at the conclusion of each contract, or annually for contracts exceeding three years.</u>
Reg 87: complaints dealt with by procuring institution		
87(1): If the Public Procurement Office or the relevant provincial treasury refers a complaint or a member of the public lodges a complaint to a procuring institution, the accounting officer or accounting authority must – (a) log the complaint in a complaints register referred to in subregulation (2); (b) investigate the allegations against the official or role player in terms of section 26(1)(c) of the Act and, if necessary – – (i) take steps against that official or role player; and (ii) report any conduct that may constitute a criminal offence to the South African Police Service. (c) inform the complainant of the outcome of the	This regulation says nothing about a timeframe within which the procuring institution must conclude the investigation and make a decision. This risks complaints remaining unresolved with a procuring institution for an indefinite period of time with no recourse.	The regulation should stipulate a time period within which the procuring institution must complete its investigation and make its finding. We recommend six months. In the absence of a specified time period, it should at least require that the investigation should be concluded as expeditiously as possible.

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investigation and any steps taken.		

38. Please contact us should you have any questions or comments. We would welcome any opportunities to engage further on the draft regulations.

Yours faithfully



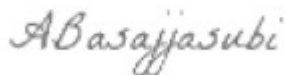
Law for Energy Transitions Africa

Nicole Loser



Centre for Environmental Rights

Dr Jonty Cogger



Natural Justice

Allan Basajjasubi



The Green Connection

Lisa Makaula