Comments on Draft Public Procurement Bill			
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Introduction

1. This is a joint submission made by Equal Education ("**EE**") and the Equal Education Law Centre ("**EELC**") on the Draft Public Procurement Bill ("**Draft Bill**").

2. EE is a membership-based, democratic movement of learners, parents, teachers and community members advocating for the provision of both an equal and quality education in South Africa.

3. The EELC is a public interest law centre using legal advocacy, research, and litigation to advance the struggle for equal and quality education in South Africa.

4. This submission is not exhaustive of all issues pertaining to the Draft Bill. We highlight some of the key concerns emerging from our experience in the basic education sector. We do so through both general and section-specific comments on the following issues:

    a. The role, structure and independence of the Regulator;

    b. Functions of Provincial Treasuries;

    c. Decision-making of procuring institutions;

d. Debarment;

e. Infrastructure delivery management;

f. Dispute resolution;

g. Transparency;

h. Public participation; and

i. Emergency procurement.

5. Our detailed comments are provided in the table below.

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A. ROLE, STRUCTURE AND INDEPENDENCE OF THE REGULATOR			
General comments In principle, the concept of the Public Procurement Regulator (the "**Regulator**") is welcome. That said, it is concerning that the role, structure and independence of the Regulator are not clearly defined in the Draft Bill. Generally speaking, provisions are drafted in broad and vague terms which leads to significant confusion on the structure and specific functions of the Regulator. More particularly, it is not clear how the functions of the Regulator are intended to align with and be carried out relative to those of Provincial Treasuries or institutions. Various provisions in the Draft Bill illustrate the implications of this lack of clarity. For example, the Regulator is empowered to *"intervene by taking appropriate steps to address a serious or persistent material breach of this Act by an institution".* Provincial Treasuries are empowered to do so in respect of *"an institution within its provincial administration"*. However, whilst Provincial Treasuries have the power to *"investigate any procurement policy applied by an institution"*, the Regulator has no similar power. There is also no guidance on what would constitute "appropriate steps" for intervention by either the Regulator or Provincial Treasury. This type of confusion is endemic to the Draft Bill's articulation of the role of the Regulator and we recommend that the provisions generally be carefully reconsidered to ensure that there is clarity and consistency in this regard. We address more specific provisions relating to the Regulator below.			
Section	**Reference**	**EE / EELC Comments**	**EE / EELC Recommendations**
Section 4 - Establishment of Public Procurement Regulator	Sections 4(1) and (2)	Section 4 of the Draft Bill establishes a Public Procurement Regulator *"within the National Treasury"*, and requires the Head of the Regulator to *"ensure that the business of the Regulator is conducted impartially and that powers are executed without fear, favour or prejudice"*. The Draft Bill is insufficiently clear on the envisaged structure of the office of the Regulator, including the	EE and the EELC recommend that the Draft Bill be amended to include comprehensive provisions on: 1) The role and appointment of the Head of the Regulator, including: ● that the Head of the Regulator be appointed by the Minister following a public nomination process to be confirmed by Parliament;

		appointment of the Head of the Regulator, the employment of staff by the Regulator, and how the independence of the Regulator will be ensured as a body which sits inside the National Treasury. The current Office of the Chief Procurement Officer is also established within National Treasury and its independence has come under scrutiny. Some would argue that the Regulator should be entirely independent, such as the current Competition Commission, established in terms of the Competition Act, 89 of 1998. However, to the extent that the Regulator remains in National Treasury, added measures must be put in place to ensure its independence.	● the process in terms of which the Head of the Regulator is appointed; ● the maximum term of the appointment and terms of renewal; ● how, and under what circumstances the Head of the Regulator may be removed from office; ● required qualifications of the Head of the Regulator. 2) The employment of staff by the Regulator, including: ● that this must be performed directly by the Head of the Regulator. The Draft Bill must also be amended to include a provision clearly setting out the independence of the Regulator, including: 1) clarifying the relevant reporting structures within the Regulator; 2) prohibiting the Head of the Regulator and each employee from: ● engaging in any activity that undermines the integrity of the Regulator; ● participating in any investigation, hearing or decision concerning a matter in respect of which that person has a direct interest;

			● making private use of, or profit from, or divulge to a third party any confidential information obtained as a result of performing that person's official functions.
Section 5 - General functions of the Regulator	Section 5(1)	Section 5(1) of the Draft Bill sets out the general functions which the Regulator *must* perform, ranging from various monitoring, oversight, intervention and support roles. The functions of the Regulator as articulated in the Draft Bill require further scrutiny as they are often overly broad, or unclear and incomprehensible.	We recommend that the functions of the Regulator generally be carefully reconsidered to ensure that there is clarity and consistency in this regard. See specific recommendations per sub-section below.
	Section 5(1)(c)	Section 5(1)(c) provides that the Regulator must: *"promote and ensure the integrity of the procurement system and monitor and integrate revisions and learning in procurement from institutions with oversight of the procurement system*". The wording of this subsection is entirely incomprehensible. If one was to try to make sense of it, the intention might have been to articulate the following Regulator functions: ● promotion of the integrity of the procurement system; ● monitoring the efficacy of the procurement system as observed in institutions; ● integrating changes into the procurement system based on such monitoring; and	EE and the EELC recommend that the wording of section 5(1)(c) be amended and clarified to properly articulate the intended functions and limitations of the role of the Regulator as well as the process for introducing changes to the procurement system in so far as it does not involve an amendment to this Draft Bill. Moreover, the use of the term "procurement system" should either be abandoned or properly defined.

		● exercising its oversight function. Still, it is not clear what is meant by integrating changes or revisions into the procurement system. Moreover, the term "procurement system", which is used throughout the Draft Bill, has not been defined. Whilst the Regulator is rightly placed to provide guidance and advice, the power to change the procurement system is potentially too wide.	
	Section 5(1)(e)	Section 5(1)(e) provides that the Regulator must: *"intervene by taking appropriate steps to address a serious or persistent material breach of this Act by an institution*". The Draft Bill does not provide any guidance on *how* the Regulator may a) determine that an institution is in breach of the Act, or b) what appropriate steps for intervention might include.	EE and the EELC recommend that the Draft Bill should provide clarity on the process the Regulator would undertake to determine whether an institution is in "serious and persistent material breach" of the Act. The Draft Bill should also be amended to clearly indicate what steps the Regulator may take to intervene.
	Section 5(1)(h)	Section 5(1)(h) provides that the Regulator must: *"continuously revise and provide guidance on procurement and the procurement system"*. It is unclear what is meant by the Regulator "revising" the procurement system.	EE and the EELC recommend that the wording of the Draft Bill be amended and clarified to properly articulate the intended functions and limitations of the role of the Regulator and the process for making revisions to the procurement system.
	Section 5(2)	Section 5(2) of the Draft Bill sets out the powers which the Regulator *may* exercise.	We recommend that the powers of the Regulator generally be carefully reconsidered to ensure that there is clarity and consistency in this regard.

		The powers of the Regulator as articulated in the Draft Bill require further scrutiny as they are often overly broad, or unclear and incomprehensible.	See specific recommendations per sub-section below.
	Sections 5(2)(a) and (d)	Section 5(2)(a) provides that the Regulator may *"issue, review and amend standard bid documents for use by institutions"*. Section 5(2)(d) allows the Regulator to *"determine a model procurement policy"*. It is unclear how these powers of the Regulator relate to the functions of institutions or whether institutions are entitled to deviate from standard bid documentation or model procurement policies.	EE and the EELC recommend that the wording of the Draft Bill be amended and clarified to properly articulate the intended powers and limitations of the role of the Regulator.
	Sections 5(2)(f), (g) and (h)	Sections 5(2)(f), (g) and (h) grant the Regulator powers to: *"(f) issue a directive to declare certain procurement practices undesirable;* *(g) issue binding instructions;* and *(h) issue non-binding guidelines for information purposes to assist institutions with the implementation of the Act or any procurement related matter".* Broadly speaking, the Draft Bill's use of multiple binding and non-binding instruments has the potential to create significant regulatory confusion. More specifically, there is unclear, and in some cases, inconsistent use of the term "instructions" throughout the Draft Bill. For example, even though "instruction"	EE and the EELC recommend that: 1) Section 5(2)(f) be amended as follows: "*issue a directive to declare certain procurement practices undesirable <u>in terms of section 6 of this Act</u>*"; 2) The definition of "this Act" in section 1 of the Draft Bill be amended to remove reference to "instructions"; and 3) A section be introduced in the Draft Bill that details and circumscribes the specific issues around which a Regulator may issue binding instructions.

		is defined as *"an instruction issued by the Regulator in terms of section 5",* the instrument of instructions can also be used by Provincial Treasuries. Significantly, the definition of "this Act" in section 1 of the Draft Bill includes reference to "instructions". This has wide-ranging implications for the legal effect of instructions. For example, any offence committed in terms of the Act, would include an offence committed in the implementation of any instruction. The power afforded to the Regulator to issue *"binding instructions in accordance with this Act"* is too broad since the only other provision which specifies / guides the scope and exercise of that power is section 5(3), which simply states that instructions may be issued for different categories of institutions, goods, services or infrastructure. This results in an overly broad power/ discretion.	
	Additional comment on section 5	The Draft Bill does not clearly provide for a process whereby complaints can be submitted directly to the Regulator, either by institutions, or by the public.	The Draft Bill must be amended to provide for such a complaints mechanism
THE ROLE OF PROVINCIAL TREASURIES			
General comments We have already noted above the general concerns regarding the lack of clarity as to how the functions of the Regulator are intended to align with and be carried out relative to those of Provincial Treasuries or institutions; and the gaps relating to enforcement powers for both.			

More specific comments are listed below.			
Section 9 - Functions of Provincial Treasuries	Section 9(1)(c)	Section 9(1) lists various duties that Provincial Treasuries must perform in relation to procurement including overseeing institutions within its provincial administration in respect of the procurement function. Section 9(1)(c) requires Provincial Treasures to intervene by "taking appropriate steps to address a material breach of this Act by an institution within its provincial administration". The provision does not provide sufficient clarity as to the specific enforcement powers that Provincial Treasuries have in order to address a material breach of the Act by institutions.	Section 9(1)(c) to be revised so as to specifically list the type of enforcement powers Provincial Treasuries have in order to address a material breach of the Act by relevant institutions.
	Section 9(2)(b)	Section 9(2)(b) indicates that Provincial Treasuries "may" assist institutions in building their capacity for efficient, effective and transparent procurement management. We are encouraged by the recognition that institutions require capacity development. However, procurement capacity is an important challenge and the Provincial Treasuries should not just be empowered but should be clearly required to provide such support.	EE and EELC recommend that section 9(2)(b) be made a mandatory function of Provincial Treasuries. This would be achieved by amending section 9(1) to include the underlined wording: *"9(1) A provincial treasury must-* *...* *(g) assist institutions in building their capacity for efficient, effective and transparent procurement management."*
DECISION-MAKING OF PROCURING INSTITUTIONS			

Section 11 – Decision-making for institution	Sections 11(1) and 11(2)	Sections 11(1) and 11(2) of the Draft Bill make reference to an "accounting officer" and "accounting authority" respectively, which are responsible for decisions on behalf of the institution. These terms, defined in the Draft Bill in terms of the Public Finance Management Act and the Municipal Finance Management Act, are used interchangeably and without clear distinction throughout the Draft Bill.	The use of the terms "accounting officer" and "accounting authority" should be carefully reviewed throughout the Draft Bill to ensure consistency and appropriateness.
Section 12 – Duties of institution	Section 12	Section 12 sets out the duties of the institution. It does not, however, specify *who* in the institution is responsible for carrying out particular duties. That is, there is no specific reference to an accounting authority/officer or other functionary.	To ensure clarity, the Draft Bill should specify which functionaries in an institution are responsible for carrying out particular duties.

DEBARMENT

General comments:

EE and EELC welcome specific attention given to debarment processes in the Draft Bill. However, there is ambiguity as to how the debarment processes outlined in the Draft Bill will align with/relate to existing debarment processes. Existing debarment processes, which bar bidders and suppliers from participating in procurement, include the following:

1. In terms of infrastructure procurement, a bidder or supplier's name can be removed from the Construction Industry Development Board's ("**CIDB**") **Register of Contractors**. In terms of the Construction Industry Development Regulations, 2004, this can be done following a formal inquiry by an investigating committee appointed by the CIDB. The CIDB allows for any aggrieved individual to bring a complaint against a contractor which may lead to their debarment.
2. A bidder or supplier's name may be added to the National Treasury's **List of Restricted Suppliers**. Under the Preferential Procurement Regulations, 2017, an organ of state must initiate an investigation into any contractor that submits false information affecting the evaluation of their tender and

refer the results of the investigation to National Treasury. National Treasury then has the discretion to place a contractor on the List of Restricted Suppliers for up to ten years.

3. A bidder or supplier's name may be added to National Treasury's **Register for Tender Defaulters**. In terms of the Prevention and Combating of Corrupt Activities Act, Act 12 of 2004, companies must be convicted of corruption, and a court must make a special order that the company is placed on the defaulters register. Any individual with standing can bring such a court application.

There have been important shortcomings in existing debarment processes, especially in terms of the ability of these processes to hold accountable stakeholders responsible for school infrastructure delivery.

- **CIDB registration:** According to an EE interview with the CIDB conducted in 2017, there are no examples of hearings that have related to implementing agents, who may be appointed to build schools on behalf of national and provincial education departments. Furthermore, the CIDB has been incredibly slow in finalising the investigation processes that it does embark on. Challenges include a lack of investigation officers.[1]
- **List of Restricted Suppliers:** Neither the national DBE nor provincial education departments have added a contractor or an implementing agent to this list in the past ten years. Internal departmental investigations into contractor malpractice are often protracted and do not result in punishment. [2] This also suggests a failure on the part of National Treasury to adequately enforce this debarment process.
- **Register of Tender Defaulters list:** There are currently no companies listed on this list. This may relate to a lack of knowledge among stakeholders involved in court cases related to tender fraud about the requirement for a specific order. EE meetings with provincial education department officials in the Eastern Cape and IAs in the Eastern Cape, have revealed that departments and IAs are reluctant to launch protracted court procedures against contractors. This also suggests a failure on the part of National Treasury to adequately enforce this debarment process.

It is crucial that the Draft Bill addresses and avoids these challenges, including:

- Cumbersome and protracted processes that discourage institutions from reporting malpractice by bidders and suppliers;
- A lack of accessible processes through which the public can report bidders and suppliers for investigation;
- A lack of capacity within institutions tasked with investigating malpractice; and

[1]The 2017/18 CIDB Annual Report states that it received 58 complaints during the reporting period, of which 42 were carried over from the previous reporting period. Only 10 formal enquiries were instituted and only 4 finalised. This shows how slow progress with finalising formal enquiries has been. This is attributed in the report to the struggle to appoint investigation officers. The 2018/19 Annual Report reflects some, but insufficient improvements with 72 complaints received, of which 5 were carried over from the previous year, and only 11 finalised, while a further 14 were closed.

[2] Dreisbach, T. "Contested Terrain: Reforming Procurement Systems in South Africa, 2013-2016." *Innovations for Successful Societies*. June 2017.

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- A lack of accountability for institutions who fail to implement adequate consequence management practices to hold suppliers and bidders accountable.

It is further important that, to the extent that the intention of this Draft Bill is *not* to replace existing debarment processes, clarity is provided in terms of the relationship between these various processes and the implication of a contractor being debarred by one of these processes and not the others. In the absence of clarity on these issues, there may also be confusion around which entity to report a specific complaint to.

Under the Draft Bill, only "*an institution*" is explicitly listed in section 22(2) as able to report a contractor to the Regulator. If the intention is that the Draft Bill will invalidate, replace or override the other debarment processes, then it appears to extinguish the ability of the public to report contractors and initiate debarment proceedings. The Draft Bill does not contain any mechanism or channels for the public to hold contractors accountable.
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<tr><td>Section 2 - Objects of the Act</td><td>Section 2(e)</td><td>In terms of section 2(e) of the Draft Bill*, "One of the primary objectives* "*[is] to create a single regulatory framework for public procurement to eliminate fragmented procurement prescripts.*"</td><td>EE and the EELC recommend that the Draft Bill explicitly refers to existing debarment processes, such as those under the Construction Industry Development Board Act, 38 of 2000, the Preferential Procurement Regulations, 2017 and the Prevention and Combating of Corrupt Activities Act, 12 of 2004, and clarifies the relationship between these various processes as well as their implications for procurement processes.</td></tr>
<tr><td>Section 22 - Debarment</td><td>Section 22(2)</td><td>This section states that: *"An institution must inform the Regulator in writing of any bidder or supplier who commits any of the acts listed in sub-section 1 for possible debarment"*.

This section only allows for "institutions" to report suppliers and bidders to the Regulator and does not provide an opportunity for any other concerned party to submit complaints to the Regulator. In the case of schools, EE and the EELC are concerned that this limits the ability of EE members, who are learners, parents,</td><td>EE and the EELC recommend the insertion of the following additional provisions under section 22 of the Draft Bill:

"Any interested party may inform the Regulator orally or in writing of any bidder or supplier who has potentially committed any of the acts listed in sub section 1 for possible debarment. The Regulator must establish a process to receive and consider written or</td></tr>
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		teachers and community members, to hold defaulting contractors to account. In addition, the section does not introduce any consequences for institutions or individuals who fail to implement adequate consequence management processes to address contractor and implementing agent malpractice. It also does not stipulate consequences for institutions or individuals who are aware of a bidder or supplier who commits any of the acts listed in sub section 1, but fails to report this to the Regulator.	*oral submissions by any institution or any interested party."* EE and the EELC also recommend that a process be implemented, whether in the Draft Bill itself or through the creation of regulations, that allows for transparency in the Regulator's evaluation of complaints. This must include requiring the Regulator to inform institutions or interested parties of the individual heading the investigation as well as notifying them timeously of the outcome of the investigation. Moreover, we recommend that the section be expanded to place a clear obligation on the Regulator to investigate instances where institutions fail to develop adequate consequence management systems or fail in terms of section 22(2) to report malpractice to the Regulator. Clarity should also be provided in terms of the consequences for such failures.
	Section 22(3)	This section states that: "*A debarment order prohibits the bidder or supplier, for the period specified in the debarment order, from participating in procurement generally or in circumstances specified in the order*." This provision is overly broad. It does not provide factors to be taken into account in determining the period specified in the debarment order; it does not stipulate a maximum or minimum period that may be	EE and EELC recommend that this section be amended to include a minimum debarment period of one year and maximum debarment period of ten years. We further recommend that this section be amended to stipulate factors that must be considered in determining the period of debarment including, but not limited to:

		imposed; nor what other circumstances may be specified in the order.	● The severity of the contractor's acts or omissions; ● The financial cost to the state resulting from the contractor's acts or omissions; ● The delay in delivering the service procured, resulting from the contractor's acts or omissions; ● A pattern of transgressions by a contractor. To the extent that the Draft Bill contemplates specific circumstances under which a contractor may be barred from participating in procurement, as opposed to being generally debarred from participating in procurement, these specific circumstances must be outlined in the Draft Bill.
	Section 22(6)	In terms of section 22(6), *"An institution that becomes aware of a debarment order issued against a bidder or supplier must take all reasonable steps to comply with the conditions of the debarment order."* The phrasing of this section, especially the use of "*becomes aware*" and "*all reasonable steps*" creates an impermissible loophole. This loophole would allow institutions to potentially continue using debarred bidders and suppliers by claiming that they were unaware of the debarment order. It further implies that there is no obligation on an institution to preemptively determine whether a bidder or supplier is debarred, nor any consequences for failing to do so.	EE and the EELC recommend that this section be removed entirely and that section 24 be expanded, as suggested below, to stipulate a clear responsibility on institutions to proactively determine whether a bidder or supplier is debarred and to introduce penalties for not doing so.

Section 23 - Consultation before making a debarment order	Section 23(4)	Section 23(4) provides that: *"The Regulator must consider the reasons submitted in terms of subsection (2)(c) and -* *(a) confirm the debarment and issue a final debarment order; or* *(b) remove the provisional debarment"* This provision gives no indication of how long a Regulator should take in assessing reasons and granting final orders in relation to debarment. This could result in delays in finalising the debarment status of a specific bidder or supplier.	EE and the EELC recommend that a specific timeframe be provided in this provision to allow for the requisite certainty and accountability within the debarment process. An example where specific timeframes are utilised to ensure accountability in a process, and which could be incorporated within this Draft Bill, is in the Public Protector processes. This process requires that once an investigation is launched, a party will be provided with feedback every 6 weeks.
Section 24 - Automatic exclusion from procurement processes	Section 24	This section outlines which "*persons*" are excluded from participating in procurement "*by virtue of their interest or membership in an entity supplying or rendering goods or services*". These include: *"(a) A bidder or supplier subject to a debarment order in terms of section 22(1);* *(b) a public office bearer;* *(c) an official or an employee of any organ of state."* The phrasing of this section is unclear and confusing. The reference to "persons" suggests that the list that follows is a list of "persons", when, in fact, both entities and persons may be debarred from procurement. This section also obscures the fact that both public officials/employees *and* entities in which	EE and EELC recommend that this section be rephrased to avoid confusion and be expanded to include all existing debarment processes as well as an obligation on institutions to consider these factors before awarding a bid. Specifically, we recommend the following wording: *"The following persons or entities must be excluded from participating in procurement:* *(a) A bidder or supplier subject to a debarment order in terms of section 22(1);* *(b) A bidder or supplier listed on National Treasury's List of Restricted Suppliers;* *(c) A bidder or supplier listed on National Treasury's Register of Tender Defaulters;*

		they have an interest, are barred from participating in procurement. Moreover, this section only refers to the debarment process contemplated in the Draft Bill, and does not refer to existing debarment processes referenced earlier in this submission. Finally, the Draft Bill does not currently place a strong enough obligation on institutions to ensure that a bidder or supplier is debarred from procurement, before awarding a bid to that bidder or supplier.	*(d) In terms of construction procurement, a bidder or supplier who is not on the Construction Industry Development Board's Register of Contractors;* *(d) a public office bearer or an entity supplying or rendering goods or services in which they have an interest;* *(e) an official or an employee of any organ of state or an entity supplying or rendering goods or services in which that official or employee has an interest.* *An institution must determine that a bidder or supplier does not fall into any of these categories, before awarding a bid."* EE and EELC further recommend that the Draft Bill stipulate the consequences for an institution that awards a contract without taking reasonable steps to determine whether the bidder or supplier is excluded from participating in procurement, and the steps the Regulator must take in such a case.
Section 25 - Publication of debarred bidders or suppliers	Section 25(1)	In terms of section 25(1): *"An institution must immediately inform the Regulator of the debarment of a bidder or supplier in terms of section 22(1).* This section appears to contradict Section 22(1) which states that "*The Regulator must issue a debarment order…*" This contradiction creates confusion as it is not clear	EE and the EELC recommend that this material contradiction be rectified by removing this section.

		under which circumstances a bidder or supplier can be debarred without the Regulator being aware of this.	
Section 25 - Publication of debarred bidders or suppliers	Section 25 (2)	Section 25(2) requires that: *"The Regulator must publish the names of debarred bidders or suppliers and must make such names available to institutions upon request."* Although institutions will have access to these names, the Draft Bill fails to clarify how such publication should take place, and does not require general, public access to such information. It has been EE and EELC's experience that obtaining information regarding debarred contractors in the context of school / education-related procurement is extremely difficult. Public access to these names is therefore critical to ensuring transparency and accountability, and essential to curbing corruption in procurement processes. Moreover, in order to encourage accountability and accessibility, the publication of such names should not be limited to inclusion in the government gazette.	EE and EELC recommend that section 25(2) of the Draft Bill be amended by the insertion of the following underlined words: "(2) The Regulator must publish *a regularly updated list of* the names of debarred bidders or suppliers *on a publicly accessible website.* and must make such names available to institutions upon request. *This list must include the following information:* *(a) the name of the contractor concerned;* *(b) the period of debarment;* *(c) the reason for debarment; and* (d) *the name of the organ of state that was party to the agreement in terms of which the contractor was found to be in default.* "
INFRASTRUCTURE DELIVERY MANAGEMENT			
General comments: EE and the EELC have a specific interest in school infrastructure delivery. EE members, with the support of the EELC, have been campaigning for safe, adequate and dignified school infrastructure at all public schools since 2008. In 2013, EE's campaign achieved a significant victory with the promulgation of the Regulations Relating to Minimum Norms and Standards for Public School Infrastructure ("**Norms and Standards**"), which provide clear deadlines by when certain minimum infrastructure standards and basic services such as adequate toilets, classrooms, water and electricity must be provided at all public schools.			

Despite this law, there have been significant delays in delivering infrastructure and basic services to schools, with the first deadline (November 2016) not yet met and the second deadline (November 2020) set to be missed as well. There are multiple reasons for these delays, one of which is multiple challenges experienced with Implementing Agents ("**IAs**") - entities who are appointed on behalf of national and provincial education departments to oversee construction projects. In various reports and public presentations, the Department of Basic Education ("**DBE**") and provincial education departments, have blamed delays in infrastructure delivery on poor performing IAs. In a presentation to Parliament's Portfolio Committee on Basic Education on 29 October 2019, the DBE highlighted various procurement and supply chain management ("**SCM**") challenges related to IAs, including:

- non-compliance with SCM processes resulting in irregular expenditure;
- late appointment of service providers;
- inaccurate reporting;
- poor programme and project management;
- failure to meet milestones and expenditure targets;
- a lack of capacity among IAs resulting in delays and poor quality work; and
- contractual obligations not carried out.

In the same meeting, the Director General of the DBE, Mr. Hubert Mweli, acknowledged that there has not been sufficient consequence management for IAs. EE's Implementing Agents report makes a number of proposals on ways in which IA accountability can be strengthened. These include:

- developing effective processes that ensure the debarment or blacklisting of defaulting IAs and contractors;
- developing clear guidelines for the appointment of IAs, which, among others, considers their capacity as well as current projects they are responsible for, against capacity requirements of the project;
- empowering the public with access to critical information related to procurement projects, by making systems such as the Education Facilities Management System ("**EFMS**") publicly available; and
- strengthening other accountability structures such as, in the case of school infrastructure, steering committees, which bring together school communities, contractors, IAs and government officials to discuss progress and challenges with construction projects.

We recommend that the Draft Bill give effect to these proposals by implementing specific proposals provided below and in the comments on section 22 above.

Section 85 - Implementation by another institution	Section 85 (1) and (2)	Section 85 of the Draft Bill empowers an accounting officer or accounting authority to delegate responsibilities to implement infrastructure projects	The EELC and EE recommend that the Draft Bill place an increased emphasis on the accountability and transparency of IAs in infrastructure procurement.

		to another institution. This section fails to provide any criteria that must be used to determine the suitability of such an institution for the delegated responsibility. The section also fails to introduce sufficient measures to ensure accountability and transparency when IAs oversee procurement processes.	Accordingly, we recommend the following: ● That there be publically available criteria for the selection of IAs based on their capacity and prior performance. ● That there be mechanisms for interested parties to challenge the selection of IAs. ● That minutes of IAs' procurement meetings be made publicly available, especially regarding deliberations on awarding contracts. ● That a list of bidders being considered for a specific contract be made available by IAs upon request by interested parties. ● That community monitoring of infrastructure projects be encouraged. This will include allowing for public input on contractor selection, allowing public access to necessary data, and creating a system for community members to report contractors mismanagement to IAs. ● That the Regulator be empowered to place sanctions on IAs should they consistently and materially breach the Act.
Section 85	Section 85(3)	This provision specifically allows for School Governing Bodies ("**SGBs**") to undertake the role of an IA. The role of an IA is an onerous task, requiring technical expertise. It should be carefully considered whether	EE and EELC recommend that this clause be removed.

		SGBs should be responsible for these tasks. This provision furthermore states the following: "*3(a) A school governing body, established in terms of section 16 of the South African Schools Act…, and which makes a substantial financial contribution towards a project at that particular school may be delegated to act as an implementing agent for projects at that particular school subject to the approval of the provincial education department*" This provision is unclear as to whether a school need only make a substantial financial contribution to one project in order to qualify as an IA for any project at the school. It furthermore does not detail how the requisite approval is obtained from the provincial education department, nor does it provide detail on what the approval is based on. The singling out of SGBs as infrastructure providers seems arbitrary and no clear rationale for this is provided in the Draft Bill. Moreover, no clarity is provided on measures to ensure accountability and transparency. National and provincial education departments already do not have sufficient capacity to oversee the limited number of IAs they oversee, which will be even more challenging when SGBs also start fulfilling this role. Similarly,	

		transparency in terms of infrastructure procurement and delivery will be very difficult to ensure in such a fragmented system.	
DISPUTE RESOLUTION			
Section 94- Reconsideration or review of decision	Section 94(1)	Section 94(1) in the Draft Bill permits a bidder to apply for a reconsideration or review of a decision or a failure to take a decision by an institution. We are concerned that the Draft Bill does not allow for a third party to apply for reconsideration or review of a decision.	We recommend that the Draft Bill be amended to include an application for review or reconsideration by a third party. Applicants must cite the section of the Draft Bill in terms of which the application is being brought.
Section 96- Reconsideration by institution	Section 96(7)	Section 96(7) provides that nothing prevents an institution from reconsidering its own decision made in terms of the Act relating to any procurement process that the institution has undertaken. This provision undermines the *functus officio* doctrine and creates the possibility of institutions reversing decisions made in relation to *any* procurement process at *any* time and for *any* reason. This *carte blanche* for institutions reversing decisions creates unacceptable uncertainty in procurement processes and has the potential for severe prejudice to bidders and other stakeholders.	Section 96(7) should be deleted.
Section 101- Composition of Tribunal	Section 101(1)	Section 101 regulates the composition of the Tribunal. We are concerned that the provision is overly broad. As it stands, the Draft Bill stipulates that the Tribunal	We recommend that the Draft Bill stipulate a maximum number of members of the Tribunal. Additionally, members of the Tribunal must be

		may consist of "*as many members as appointed by the Minister*."	representative of a broad cross-section of the population.
Section 106- Finances of Tribunal	Section 106(c)	Section 106 of the Draft Bill regulates the finances of the Tribunal. The Draft Bill permits the financing of the Tribunal from "*money received from any other source*." We are concerned that the provision does not contain safeguards to ensure transparency and protection against corruption.	We recommend that the Draft Bill require that the Tribunal maintain a registered bank account and any money received by the Tribunal be deposited into that account and any payment on behalf of the Tribunal be made from that account. Additionally, the Draft Bill must require that within 6 months after the end of each financial year, the Tribunal prepare financial statements in accordance with established accounting practice, principles and procedures, including (i) a balance sheet reflecting the state of the Tribunal's assets, liabilities and financial position as at the end of the financial year; and (ii) a statement reflecting the income and expenditure of the Tribunal. Finally, the Auditor General must audit the financial records of the Tribunal annually.
Section 121- Regulations	Section 121(1)(n)	The Draft Bill permits the Minister to make regulations determining fees payable for services rendered by the Tribunal. We are concerned that this provision calls into question the independence of the Tribunal.	EE and EELC recommend the insertion of a provision stating that each organ of state is obliged to assist the Tribunal to maintain its independence and impartiality, and to effectively carry out its powers and duties. Additionally, the section must be amended to state that: *"the Minister may make regulations regarding the payment of <u>reasonable</u> fees for services rendered by the Tribunal."*
TRANSPARENCY			

General comments:

Section 195(1) of the Constitution states that the public administration must be governed by the democratic values and principles enshrined in the Constitution, which include the prescript that public administration must be accountable, and that transparency must be fostered by providing the public with timely, accessible, and accurate information.[3] In addition, section 217(1) of the Constitution states that:

> *"When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable,* ***transparent****, competitive and cost-effective."* (own emphasis)

Despite this constitutional imperative, which is also reiterated in the Preamble of the Draft Bill, the Draft Bill fails to adequately reflect the principle of transparency throughout its provisions. We note further that the Draft Bill makes reference to the "confidentiality of information"[4] or "confidential information"[5] in a number of instances, but does not define the meaning of these terms, creating the potential risk that the public's accessibility to relevant information may be arbitrarily limited under the guise of "confidentiality".[6]

In terms of section 195 of the Constitution, transparency must be fostered by providing the public with timely, accessible, and accurate information, and the State's failure to do so is not only unconstitutional, but limits the public's ability to properly monitor procurement processes that involve the spending of public funds. **EELC and EE therefore recommend that the principle of transparency find greater expression throughout the Draft Bill, that references to the "publication" of information not be limited to the use of a government gazette, and that the public's access to information be improved by, for example, greater use of electronic / online platforms or methods of publication, and requirements for information to be regularly updated**.

We make further comments on specific sections relating to 'Transparency' below.

[3] Section 195(2) of the Constitution states that the principles established in section 195(1) of the Constitution apply to administration in every sphere of government, organs of state, and public enterprises. In addition, section 195(3) of the Constitution states that all national legislation must ensure the promotion of the values and principles listed in section 195(1).

[4] See, for example, section 7(4) and section 17(g) of the Draft Bill.

[5] See, for example, section 8(1) and section 12(i) of the Draft Bill.

[6] As the Draft Bill fails to define "confidentiality of information" or "confidential information", we note and endorse the recommendation made in the joint submission on the Draft Bill compiled by the Budget Justice Coalition and Imali Yethu, which recommends that a definition of confidential information must be provided which balances the need to protect service provider's proprietary information, such as technical drawings and supply chain data, against the need for public scrutiny of the value of the contract and the contractual responsibilities of both the service provider and the institution. See Budget Justice Coalition and Imali Yethu "Joint Submission to National Treasury on the Draft Public Procurement Bill" (30 June 2020) page 12.

Section 2 - Objects of the Act	Section 2	Section 2 of the Draft Bill, which describes the Draft Bill's primary objectives, notes that these are "*with due regard to section 217 of the Constitution*", yet fails to list the promotion of transparency as a specific objective.	EE and EELC recommend the inclusion of the following subsection in section 2 of the Draft Bill: "(f) promote and advance transparency in procurement processes."
Section 5 - General Functions of the Regulator	Section 5(2)(c)(i)	Section 5(2)(c)(i) of the Draft Bill states that the Regulator may *"require institutions to publish information on their procurement proceedings"*. However, the publication of information on proceedings is not a mandatory requirement, and the Draft Bill fails to compel these institutions to make information concerning procurement proceedings publicly available. Furthermore, access to regularly updated information on project progress is equally important and institutions should be obliged to make regularly updated information publicly available. In the case of school infrastructure, the Education Facilities Management System, which will soon be used by all provincial education departments, contains critical information on school infrastructure delivery, which should be made publicly available.	EE and EELC recommend that section 5(2)(c)(i) be amended to oblige the Regulator to require institutions to publish regularly updated information on their procurement proceedings and project implementation, and to ensure that this is made publicly available. This may, for example, be achieved by posting information on an institution's website or making critical information on existing platforms publicly available. For example: ● The name of the IA overseeing a specific construction project (where there is one) as well as the name and contact details of the individual who is responsible for managing that specific project. ● The name of, and contact details for, the contractor and any subcontractors responsible for construction. ● The specifications of the construction project. ● The total budget for the project. ● Regularly updated information (including photos) on project progress. ● Regularly updated information on expenditure. ● Minutes from Steering Committee meetings or other committees responsible for overseeing the construction project

Section 22 - Debarment & 25 - Publication of debarred bidders and suppliers	Section 22(8) & Section 25(2)	Section 22(8) of the Draft Bill states that the Regulator must publish each debarment order, as well as any amendments to such orders. In addition, section 25(2) of the Draft Bill states that the Regulator must publish the names of debarred bidders or suppliers and must make such names available to institutions upon request. As stated similarly above, although institutions will have access to these names, the Draft Bill fails to clarify how such publication should take place, and does not require general, public access to such information. It has been EE and EELC's experience that obtaining information regarding debarred contractors in the context of school / education-related procurement is extremely difficult. Public access to debarment orders is therefore critical to ensuring transparency and accountability, and essential to curbing corruption in procurement processes.	EE and EELC recommend that section 22(8) of the Draft Bill be amended by the insertion of the following underlined words: "(8) The Regulator must publish each debarment order, and amendments envisaged in subsection (7) *in the Government Gazette and on a publicly accessible website*. *Following the finalisation of the debarment order, the Regulator must, within five working days, update its existing list of debarred contractors, to reflect the outcome of the order*." In addition, EE and EELC recommend that section 25(2) of the Draft Bill be amended in accordance with the recommendations made above on the same section (see page 18 of this submission).
Section 42 - Award of procurement contracts	Section 42(5)	Section 42(5) of the Draft Bill states that once a bidder is awarded a contract, "*[A]n institution must promptly and in a manner determined by instruction, publish the results of a procurement process*." Even though the Draft Bill requires an institution to publish the results of a procurement process, the manner of such publication is left open-ended as being "*in a manner determined by instruction*".	EE and EELC recommend that the Draft Bill includes a provision stating that instructions must provide that all the results of a procurement process must be published on the institution's website.
PUBLIC PARTICIPATION			
Section 5 - General functions of the Regulator	Section 5(1)(d) & section 5(2)(c)(ii)	Section 5(1)(d) of the Draft Bill provides that the Regulator must: "*develop and implement measures to ensure transparency in the procurement process and promote*	The Draft Bill should provide additional mechanisms that would allow the public to participate in different ways. This could include amending section 5(1)(d) to include the following underlined words:

		public involvement in the procurement policies of institutions". In addition, clause 5(2)(c)(ii) of the Draft Bill states that the Public Procurement Regulator may: "*allow the public to observe their adjudication processes for procurement above the prescribed threshold, unless for a national security reason, the institution is permitted by the Regulator not to allow the public to observe in a specific matter*". While these sections may potentially promote public participation, they lack clarity, and are too discretionary to allow for the adequate and consistent involvement of the public in these processes. In addition, references to "public involvement" or allowing "the public to observe", as mentioned in section 5(1)(d) and section 5(2)(c)(ii) of the Draft Bill respectively, should not limit public involvement to merely observing processes.	"*develop and implement measures to ensure transparency in the procurement process and promote public involvement in the procurement policies and processes of institutions, such as allowing the public an opportunity to enquire about the outcomes of specific procurement processes, and submit written queries or comments on these to relevant institutions within a specified period ".* EE and EELC recommend that section 5(2)(c)(ii) of the Draft Bill should make the power of the Regulator in this regard mandatory and not discretionary. This can be achieved by moving this provision to subsection section 5(1) (which provides a list of functions that the Regulator *must* fulfil). Additionally, section 5(2)(c)(ii) of the Draft Bill should be amended to include a provision that allows the public an opportunity to also submit written queries or comments before the start of the Public Procurement Regulator's adjudication of a specific procurement process.
EMERGENCY PROCUREMENT			
Section 121 - Regulations	Section 121(1)(*u*)	Section 121(1)(u) authorises the Minister to make Regulations concerning emergency procurement. Other than section 1 providing a definition for "emergency", there are no other substantive provisions relating to emergency procurement. As the current national state of disaster has demonstrated, emergency procurement requires careful regulation	The Draft Bill should be amended to make it clear that the Minister must issue Regulations in terms of section 121(1)(u) and must do so within a particular period after commencement of the Act.

		and oversight. It is therefore necessary to ensure that Regulations are published to deal with the issues set out at section 121(u) and it should be made clear that the Minister must publish such regulations, and do so within a particular period of time from the commencement of the Act.	