

An Evaluation of the “Designation” of Products, Sectors and Industry for Local Production and Content under the Preferential Procurement Policy Framework Act 5 of 2000

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Abstract

This paper explores the designation framework in South Africa within the confines of the Preferential Procurement Policy Framework Act 5 of 2000 (the PPPFA). The PPPFA is substantiated by the Preferential Procurement Regulations, 2017. This discussion is pertinent in light of the proposed Public Procurement Act, which seeks to consolidate all legislation on public procurement in South Africa and, in particular, to provide for the designation of products, sectors, and industries for local production and content. It is thus prudent to assess the problems with the current designation framework that is plagued by secrecy and non-compliance to avoid replicating the same problems in the proposed Public Procurement Act.

Keywords: public procurement; designation; local content; transparency; accountability

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Introduction

The Constitution of the Republic of South Africa, 1996 (the Constitution), requires the creation of a public procurement framework that allows prioritising the acquisition of products from local producers who use local components. The Constitution also compels the Parliament of South Africa to pass legislation to give effect to this imperative. Parliament responded to this obligation by promulgating the Preferential Procurement Policy Framework Act 5 of 2000 (the PPPFA). The PPPFA is augmented by the Preferential Procurement Regulations, 2017 (the Regulations), which allow the Department of Trade, Industry and Competition (the DTIC), in consultation with the National Treasury (the NT), to designate products, industries, or sectors for local production and content. Organs of state can also self-designate a product, sector, or industry for local production and content, but this threshold must be done in accordance with the DTIC and in consultation with the NT. In this regard, designation is viewed as a procurement mechanism that ensures the growth of domestic industry and attainment of black economic empowerment (Vinti 2020). Against this backdrop, this paper evaluates the designation regime under the PPPFA. This evaluation will be conducted through an analysis of relevant legislation and case law. This inquiry is particularly instructive in light of the proposed Public Procurement Act that will replace the PPPFA.

The Legal Framework for “Designation”

Section 217 of the Constitution stipulates that when an organ of state in the national, provincial or local level of government, or any other body stipulated in national legislation contracts for goods or services, it must do so in line with the principles of fairness, equity, transparency, competitiveness, and affordability.¹ This does not preclude these organs of state from implementing a procurement policy providing “for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination”.² “Designation” falls within the “categories of preference in the allocation of contracts” in that it favours the preferential award of contracts to local producers and products. The Constitution mandates Parliament to pass legislation to give effect to this mandate.³ In pursuance of this obligation, Parliament promulgated the Preferential Procurement Policy Framework Act 5 of 2000. The PPPFA does not explicitly provide for designation, but it does provide for the promulgation of regulations that are necessary or expedient to achieve the objects of the PPPFA.⁴ The PPPFA substantiates section 217(2) of the Constitution, which requires the implementation of the preferential allocation of contracts. It includes the designation of products/sectors/industry for local content and production. This then led to the inclusion of the designation

1 Constitution, s 217(1). *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC) paras 32–33. *Groenewald NO v M5 Developments (Cape)* 2010 (5) SA 82 (SCA) para 3.

2 Constitution, s 217(2).

3 Constitution, s 217(3).

4 PPPFA, s 5.

provision in the Preferential Procurement Regulations of 2011, which were later revised and replaced in 2017 by the Preferential Procurement Regulations of 2017 (Regulations) to substantiate section 217 of the Constitution and section 5(1) of PPPFA.⁵ As stated below, these Regulations were declared invalid in their entirety by the Constitutional Court in the *Afrubusiness v The Minister of Finance* case. However, the majority decision of the Constitution Court in the case did not pronounce on the suspended declaration of invalidity of the Regulations and thus, it is accepted in this paper that this period commenced when the court handed down its judgment on February 16, 2022. Therefore, the Regulations remain valid until February 16, 2023.

Under the Regulations, the DTIC is allowed to designate an industry, sector, or product for local content and production taking into consideration economic factors and other aspects and to specify the “minimum threshold of local production and content”.⁶ The NT must publish a circular to alert organs of state of the designation.⁷ The organs of state can self-designate after consulting the DTIC and NT.⁸ In this regard, all organs of state in a designated sector are required to indicate in the invitation for tenders that only bids that comply with the stipulated “minimum threshold for local production and

5 It bears mentioning here that the Regulations were declared to be invalid by the decision in *Afrubusiness NPC v The Minister of Finance* 2021 (1) SA 325 (SCA) where the Supreme Court of Appeal found them to be in violation of section 217 of the Constitution and sections 2 and 5 of the PPPFA. In essence, the Minister of Finance was found to be acting outside of the powers conferred by the empowering legislation. This decision turned on the issue of the discretionary pre-qualification criteria as stipulated by sections 3(b), 4 and 9 of the Regulations. Even though section 8 of the Regulations, which authorises designation was not the subject of this litigation, the court somehow viewed all these aforementioned sections as “interconnected” and thus, proceeded to declare the whole set of Regulations invalid. However, this order was suspended for twelve months from the date it was issued, which was November 2, 2020. Regardless, this decision was then appealed to the Constitutional Court, which heard the matter on May 25, 2021 and reserved the judgment. Subsequently, the Constitutional Court in *Minister of Finance v Afrubusiness NPC* [2022] ZACC 4 then upheld the decision of the Supreme Court of Appeal and declared the whole set of Regulations as invalid, but did not rule on the suspension of the declaration of invalidity. The problem here is that this decision was handed down on February 16, 2022, which was after the lapse of the suspension of the period of invalidity on November 2, 2021. This has caused confusion as to whether there is still a legal regime for public procurement with government stating that it has sought a declaratory order from the apex court on this point. It goes without saying that the government could not have promulgated a new set of regulations while awaiting a decision on the validity of the impugned Regulations. Regardless, the Minister of Finance published for comment the Draft Preferential Procurement Regulations, 2022 on March 10, 2022 to replace the 2017 Regulations. A significant development here is that the proposed Regulations will not provide for designation, which is now regarded as outside of both the powers of the Minister of Finance and the scope of the PPPFA. It is unclear whether this will remain the case after the public comments process. For a further discussion, see Volmink, P and Anthony, A. 2021. “A Discussion of the Recent Ruling of the South African Supreme Court of Appeal in *Afrubusiness NPC v Minister of Finance*”. *African Public Procurement Law Journal* 8(1):1–19. J. Klaaren. 2021. “Back to the drawing board?: *Afrubusiness NPC v Minister of Finance* [2020] ZASCA 140 and the potential for reconsideration of preferential procurement law & policy in South Africa”. *African Public Procurement Law Journal* 8 (1):32.

6 Regulations, s 8(1).

7 Regulations, s 8(2).

8 Regulations, s 8(3).

content” will be evaluated.⁹ The goods or products in question must be locally produced.¹⁰

In the same breath, the *Implementation Guide: Preferential Procurement Regulations, 2017 Pertaining to the Preferential Procurement Policy Framework Act 5 of 2000* provides that bids are evaluated by following a two-leg bidding process. In essence, the first leg assesses the stated “minimum threshold for local production and content”.¹¹ A tender must be disqualified if it contravenes the stated “minimum threshold for local production and content”, and the Declaration Certificate for Local Content is not tendered.¹² The second leg requires the assessment according to the 80/20 or 90/10 preference point systems, where the price and BEE scores are evaluated.¹³ Only bids that are in accordance with the minimum required threshold for local production and content must be assessed further in accordance with the 80/20 or 90/10 preference point systems prescribed in clauses 6 and 7 of the Regulations.¹⁴ It follows then that the calculation of the local content is vital for any designated tender.

To this end, the *SANS 1286:2017 edition 1–Local goods, services, and works–Measurement and verification of local content* prescribes a definition and formula to calculate local content. According to the document, “local content” is that part of the tender price that is not included in the “imported content”, subject to the proviso that local manufacturing is taking place calculated according to the “local content formula”.¹⁵ “Imported content” means the cost of the imported product and cost of parts, which have been or are still to be imported.¹⁶ In the alternative, the DTIC’s *Guidance Document* provides that “local content” is the tender price less the value of “imported content” expressed as a percentage.¹⁷ These documents must be read together, and their calculation of the “local content” yields the same answer whether you commence the calculation from the “imported content” or “local content” perspectives.¹⁸

9 Regulations, s 8(4)(a).

10 SANS 1286: 2017 para 2.3. Accessed June 12, 2020.<http://www.thedtic.gov.za/wpcontent/uploads/SANS-1286-2017.pdf>

11 *Implementation Guide Preferential Procurement Regulations, 2017 Pertaining to the Preferential Procurement Policy Framework Act 5 of 2000* (hereafter, *Implementation Guide*) para 16.1. Accessed June 11, 2020. https://www.govpage.co.za/uploads/2/4/0/5/24052997/09_attachment_6_for_info_implementation_guide_pppfa_regulations_2017.pdf.

12 *Implementation Guide* (n 11) para 16.1.2.13.

13 *Implementation Guide* (n 11) para 16.2.

14 *Implementation Guide* (n 11) para 16.2.1.

15 *SANS 1286:2017* (n 10) para 2.3. See Volmink and Anthony (n 5) 4–5.

16 *SANS 1286:2017* (n 10) para 2.2.

17 DTIC. 2012. *Guidance Document for the Calculation of Local Content and the SANS 1286: 2017 edition 1 – Local goods, services, and works – Measurement and verification of local content* (hereafter, *Guidance Document*) para 2.2. Accessed June 10, 2020. http://www.dti.gov.za/industrial_development/docs/ip/guideline.pdf.

18 *ibid* para 2.2.

In this regard, “manufacturing” is defined as any kind of processing or working, including assembly or specific operations.¹⁹ “Products” refers to goods, services, works, or manufacture goods as defined in the PPPFA.²⁰ “Components” means element or portion of a product.²¹ “Tender price” means the “price offered by the tender excluding Value Added Tax”.²²

The tenderer must attach the local content declaration signed by the Chief Financial Officer or a “legally responsible person nominated in writing by the Chief Executive Officer”, or senior person with management duties to the purchaser stating the local content percentage of the product and confirming the final tender price.²³ This document is called the *Annex C - Local Content Declaration Summary*. It shows how the tenderer in question calculated and complied with the local content percentage requirement for the product. Annexure C is supplemented by *Annexure E - Local Content Declaration - Supporting Schedule to Annexure C*, which calculates the local content for the whole tender, whereas Annexure C calculates local content for a single product. These two documents are read together with *Annexure E - Imported Content Declaration*, which establishes the value of imported content in a product whose value must be in conformance with the value reflected in Annexure C.

In respect of imported content, it is important to note that when the tenderer imports products directly, they must submit proof of components that were procured from a foreign source.²⁴ This proof must be verifiable and relate to the whole tender.²⁵ If the tenderer acquires imported services, payments concerning the tender must be included when computing imported content.²⁶ If the bidder uses components imported by any third party, such a bidder must acquire verifiable proof from the third party.²⁷ The bidder must acquire Declaration D from all third parties for the tender in question, and the third party must unceasingly update Declaration D.²⁸ When a third party acquires imported services, such payments must also be included when computing imported content.²⁹ The tenderer also has to ensure the accuracy of the information, including the imported content in the supply chain.³⁰ If the data on the origin of parts is unavailable, the parts will be regarded as imported content.³¹ In short, a bidder must complete Declarations D

19 SANS 1286:2017 (n 10) para 2.4.

20 SANS 1286:2017 (n 10) para 2.6.

21 SANS 1286:2017 (n 10) para 2.1.

22 SANS 1286:2017 (n 10) para 2.7.

23 SANS 1286:2017 (n 10) para 4.

24 *Guidance Document* (n 17) para 2.3.1.1.

25 *Guidance Document* (n 17) para 2.3.1.1.

26 *Guidance Document* (n 17) para 2.3.1.1.

27 *Guidance Document* (n 17) para 2.3.1.2.

28 *Guidance Document* (n 17) para 2.3.1.2.

29 *Guidance Document* (n 17) para 2.3.1.2.

30 SANS 1286:2017 (n 10) para 3.2.3.

31 SANS 1286:2017 (n 10) para 3.2.4.

and E and collate the information on Declaration C.³² Declaration C must be handed in with the tender bid by the closing date and time as stipulated by the Tender Authority.³³ The Tender Authority is entitled to demand that Declarations D and E also be submitted.³⁴ If the bidder is awarded the tender, the tenderer must regularly update Declarations C, D, and E with correct values for the length of the contract.³⁵

Once a bid has won the bidding process, it is then sent to an accredited verification body, i.e., the South African Bureau of Standards (SABS), for verification.³⁶ This is a discretionary power.³⁷ In this regard, once information is provided to SABS for verification, it will assess the scope of the work and produce a quotation to be sent and paid by the winning bidder (Govender 2013). Thereafter, a verification audit process, which occurs at two stages, commences. First, there is the verification of documents to ensure compliance with the local content requirement and second, a factory shop floor technical verification of the local content as specified in the documentation verified before.³⁸ This audit consists of at least two tiers at the full assembly level and sub-assembly level depending on discussions with the DTIC and the organ of state (Govender 2013). A report is compiled, and a conclusion prepared (Govender 2013). Thereafter, the audit trail of documents and the conclusion are submitted to the relevant manager who verifies the audit documents and the conclusion and then submits them to the Approval Board (Govender 2013). The Approval Board also authenticates the audit documents and the conclusion, and then makes its decision (Govender 2013). If it approves the award, a Certificate of Compliance is issued, and if it does not approve, a Certificate of Non-Conformance is issued (Govender 2013). The Approval Board Meeting will have minutes detailing the decision taken (Govender 2013). The Minutes of the Approval Board and the certificate will cause a database entry (Govender 2013). Organs of state will have access to this database, and it will contain all the relevant information in this regard (Govender 2013). The verification can also be done by an independent, registered, and qualified auditor or a qualified technical industry specialist.³⁹ Those conducting the verification must have clear and documented procedures for the verification activities.⁴⁰

However, the designation requirements can be avoided if one applies for an exemption. It is unclear where the exemption mechanism emanates from. However, according to the DTIC, for one to be exempted, they must apply and provide the following information to the relevant official:

32 *Guidance Document* (n 17) para 2.1.

33 *Guidance Document* (n 17) para 2.1.

34 *Guidance Document* (n 17) para 2.1

35 *Guidance Document* (n 17) para 2.1

36 *SANS 1286:2017* (n 10).

37 *SANS 1286:2017* (n 10) para 5.1.

38 *SANS 1286: 2017* (n 10) para 5.1.

39 *SANS 1286: 2017* (n 11) para 5.1.

40 *SANS 1286: 2017* (n 11) para 5.3.

- i. Procuring entity/government department/state-owned company.
- ii. Tender number.
- iii. Closing date.
- iv. Item(s) for which the exemption is being requested.
- v. Description of the goods for which the requested exemption item will be used and the local content that can be met.
- vi. Reason(s) for the request.
- vii. Supporting letters from local manufacturers and suppliers.⁴¹

The DTIC requires that an exemption letter be submitted together with the bid documents on the closing date and time of the bid, and this exemption is given by the DTIC in consultation with the procuring body if the number of materials cannot be wholly acquired in South Africa; the turnaround time in response to exemption letters depends on the designated product and varies from two to seven working days.⁴² If the product is already exempted, it is forty-eight hours.⁴³ If it is volume-based or based on a particular type of material, the DTIC consults with the relevant industry, and it can be one week.⁴⁴ Proof of the exemptions must be submitted and incorporated into Declaration D.⁴⁵

Some of the designated products include cement – 100 per cent, bus bodies – 80 per cent, power pylons and substation structures – 100 per cent, steel products and components for construction – 100 per cent, steel conveyance pipes – 80–100 per cent, textile, clothing, leather, and footwear – 100 per cent and rail rolling stock – 65 per cent.⁴⁶

The PPPFA must also be read with the *Government of South Africa: General Procurement Guidelines*, which provides that valid government procurement hinges on the fundamental five principles of “value for money; open and effective competition;

41 DTIC. *Process when requesting exemption letters*. Accessed June 9, 2020. http://www.thedtic.gov.za/wp-content/uploads/IP-Exemption_letters.pdf.

42 DTIC. 2017. *Local Content Policy and the New PPPFA Regulations Presentation for the Western Cape Bidders* (hereafter, *DTIC Local Content Policy*) 17. Accessed June 10, 2020. <http://furniture.org.za/docs/DTI-%20WC%20Bidders%20presentation.pdf>.

43 *DTIC Local Content Policy* (n 42) 17.

44 *DTIC Local Content Policy* (n 42) 17.

45 Guidance Document (n 17) para 2.3.1.3.

46 *DTIC Local Content Policy* (n 42) 19.

ethics and fair dealing; accountability and reporting; and equity”.⁴⁷ The following discussion will assess this posited designation regime.

An Evaluation of the “Designation” Framework in South Africa

“Designation” under the PPPFA

Firstly, a commendable aspect of the designation process is the verification process that evaluates whether a winning bid has complied with the stipulated minimum threshold for local production and content. The appointment of SABS as one of the verification bodies ensures that the process of determining local content is subject to proper scientific evaluation. The SABS verification process ensures transparency, because it guarantees an audit report and conclusion as well as a database that has a complete record of the decision on compliance and non-conformance.

Secondly, section 14(1) of the Regulations provides for a mechanism that seeks to prevent the falsification of information relating to local production and content. According to section 14, when it is detected that a tenderer submitted false information concerning local production and content, the organ of state must inform the bidder accordingly and allow the tenderer to submit representations within fourteen days as to why:

- i. the tender submitted must not be disqualified, or if the tender has already been awarded to the tenderer, the contract must not be expunged in whole or in part;
- ii. the tenderer must not pay a penalty up to 10 per cent of the value of the contract if the tenderer has sub-contracted a part of the tender to another person without divulging it; and
- iii. the NT must not limit the tenderer from doing any business for not more than ten years with any organ of state.

If the organ of state finds, after assessing the submissions cited in section 14(1)(b), that the tenderer submitted such false information, then it can disqualify the bidder or expunge the contract in whole or in part and if possible, claim damages from the bidder; or if the successful bidder sub-contracted a part of the tender to another party without divulging, then penalise the bidder up to 10 per cent of the contract value.⁴⁸ Furthermore, section 14(2)(a) provides that an organ of state must notify the NT in writing of any actions taken in terms of section 14(1) and provide written representations as to whether the bidder must be limited from doing business with any organ of state. It must also

47 See Government of South Africa: General Procurement Guidelines. Accessed June 12, 2020. <http://www.treasury.gov.za/legislation/pfma/supplychain/General%20Procurement%20Guidelines.pdf>, for definition of these five principles or “pillars”.

48 Regulations, s 14(1)(c).

submit written submissions from the bidder explaining why that bidder must not be restricted from doing business with any organ of state.

The NT may request an organ of state to avail further information about section 14(1) within a specified period.⁴⁹ Section 14(3) then provides that the NT, after assessing the submissions of the bidder and any other pertinent data, can make a finding as to whether to limit the bidder from doing business with any organ of state for a period of not more than ten years and keep and publish on its official website a list of restricted suppliers. Section 14 builds on section 2(1)(g) of the PPPFA, which provides that any contract awarded based on fabricated information provided by the bidder to obtain preference in respect of this Act may be terminated at the behest of the organ of state without detracting from any other relief the organ of state may have.

The question of the submission of false information in respect of local content requirements was adjudicated upon in *Powertech Transformers (Pty) Ltd v City of Tshwane Metropolitan Municipality Others*.⁵⁰ In this case, the applicant, Powertech, sought an order that the first respondent, the City of Tshwane Metropolitan Municipality (the City of Tshwane), be directed to take steps against the second respondent, Sopityo Engineering and Civil CC (Sopityo), in terms of Regulation 14.⁵¹ According to the court, the provisions of Regulation 14 contemplate an investigative process which must result in a finding.⁵² During this process, interested parties are given an opportunity to submit comments and argue their case.⁵³ The court was of the view that the applicant had established a case which merited an investigation as required by section 14.⁵⁴ Sopityo did not address the important averments that its tender misrepresented its position in relation to the local minimum threshold content in its documents tendered to the City of Tshwane and that it could not comply with the local content requirements.⁵⁵ It was found that Sopityo's arguments were wholly insufficient to meet the case averred by Powertech and merely constituted a bare denial of wrongdoing, which did not create any *bona fide* dispute of fact.⁵⁶ Thus, the court accepted the version put up by Powertech.⁵⁷

Sopityo further argued that the City of Tshwane should have detected the wrongdoing before section 14 was applicable and that the relief sought contravened the principle of separation of powers and the court has no jurisdiction to make such an order.⁵⁸ According to the court, this contention was ill-conceived as section 172(1)(b) of the

49 Regulations, s 14(2)(b).

50 (44499/2017) [2018] ZAGPPHC 772 (20 March 2018).

51 *ibid* para 4.

52 *ibid* para 6.

53 *ibid*.

54 *ibid* paras 7–8.

55 *ibid* para 15.

56 *ibid* para 16.

57 *ibid*.

58 *ibid* para 17.

Constitution and section 8 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) accord a generous jurisdiction on courts in proceedings for judicial review to make just and equitable orders.⁵⁹ Section 14 is triggered when it is detected that a tenderer has submitted false information.⁶⁰ Once section 14 is triggered, the process is mandatory and not discretionary.⁶¹ Thus, in this regard, there is no antecedent process required on the competent authority to detect that false information has been submitted.⁶² In the papers, there was no doubt that Sopityo misrepresented the minimum local content threshold in its tender documents.⁶³ These facts were left uncontroverted.⁶⁴ The allegations relating to the misrepresentations made in the tender documents submitted to the City of Tshwane were raised in Powertech’s papers.⁶⁵ Since June 2017, the City of Tshwane knew the facts which triggered its statutory obligations under section 14.⁶⁶ Thus, the court held that the City of Tshwane had failed to comply with its statutory duty and had not tendered an affidavit evincing compliance with those obligations.⁶⁷ The court then held that as the City of Tshwane had not taken any steps to comply with the statutory duties, it was in the interests of justice to compel it to comply with its obligations under section 14 of the Regulations.⁶⁸ The complete failure on the part of both the City of Tshwane and Sopityo to address the allegations of fraud in relation to the tender was described as “disturbing and warrants investigation in the public interest”.⁶⁹ Sopityo would have an adequate opportunity to address the fraud allegations levied against it during the process envisaged by section 14.⁷⁰ The circumstances leading to the award of the tender to Sopityo would have to be reported and investigated in compliance with the prescripts of section 14.⁷¹ Thus, the court held that the City of Tshwane must comply with the provisions of section 14 of the Regulations within thirty days from the date of service of the court order. Thus section 14 of the Regulations offers a remedy for parties affected by a false declaration on the local content requirements.

Challenges with “Designation” under the PPPFA Regime

There are several problems with designation under the PPPFA regime. First, the government of South Africa provides that products will be designated in instances

59 *ibid* para 18.

60 *ibid* para 19.

61 *ibid*.

62 *ibid* para 20.

63 *ibid* para 22.

64 *ibid*.

65 *ibid* para 24.

66 *ibid*.

67 *ibid*.

68 *ibid* para 25.

69 *ibid* para 26.

70 *ibid* para 27.

71 *ibid*.

where it buys an imported product(s) which cause(s) an import leakage that displaces local production. Designation proposals based on research studies are approved by the Minister of Trade, Industry and Competition if there is proof that designation will facilitate local production, reverse the trade deficit, generate jobs, and aid economic growth (Vinti 2020). However, these criteria for the designation are vague, and it is unclear how they are construed and applied. It is also unclear if these criteria are cumulative. In my view, it is unduly cumbersome to saddle a company that is seeking designation of products to prove that the said designation will reduce the trade deficit and contribute to economic growth. Moreover, the factors to decide on designation cannot be found in the PPPFA and the Regulations.

Second, the process of designation is ambiguous. According to the DTIC, the process of designation entails the following steps: review and research of industry or sector; consultation and stakeholder management; approval by IDD Exco; designation and gazetting of regulations; and circulation of practice notes. It is unclear how this process unfolds as there are no investigation reports to explain each step. This also means that the DTIC has not availed information on the reasons for the current product/sector designations. Thus, the parties wishing to apply for a designation do not have any information relating to what they must prove to succeed. It is also required that the designation process develops an application form for parties applying for designation. Similarly, the lack of investigation reports impedes the transparency and accountability of the designation process as required by section 195 of the Constitution.

Third, the designation of products is not linked to the Harmonized Commodity Description and Coding Systems (HS). The HS is an international mechanism for the classification of products, which allows participating countries to classify products that are traded on a mutual basis for customs purposes.⁷² This means that the current product designations are often vague and sometimes overarching. It is necessary then to connect designation to the HS.

Furthermore, a tenderer can be exempted from the designation requirements. The problem here is that there is no legislative basis for this exemption mechanism in respect of a bidder. In this regard, the PPPFA allows organs of state to be exempted from the requirements of the PPPFA if it is in line with the interests of national security or the prospective bidders are international suppliers, or it is in the interests of the public.⁷³ It is unclear if these grounds are self-standing or cumulative. However, as this exemption is only granted to organs of state, this does not apply to parties who want to be exempted from the designation process. Presumably, an organ of state may request that it be exempted from the designation regime in respect of a tender pertaining to certain designated products. Absent an exemption to the organ of state, interested parties do not

72 United Nations Trade Statistics. "Harmonized Commodity Description and Coding Systems (HS)". Accessed June 12, 2021. <https://unstats.un.org/unsd/tradekb/Knowledgebase/50018/HarmonizedCommodity-Description-and-Coding-Systems-HS>.

73 PPPFA, s 3.

have a right to apply for an exemption, which brings into question the current practice of allowing tenderers to apply for an exemption when the goods in question are not available locally. This view does not question the utility of the exemption mechanism as it is pragmatic; instead, it is that the legal basis for the exemption mechanism is questionable.

The DTIC has also identified issues within the following areas of designation as problematic in terms of compliance, including among others:

- i. Advertisement of tenders with local content requirements;
- ii. Declaration of correct minimum thresholds for local production by tenders;
- iii. Proper assessment of bids as per local content requirements; and
- iv. Comprehension of local content requirements and industrial policy goals by both Bid Evaluation and Adjudication Committees.⁷⁴

Furthermore, there are no robust enforcement mechanisms.⁷⁵ The government is presently fragmented and incapable of ensuring compliance with the localisation requirement.⁷⁶ This fragmentation is caused by the fact that public procurement is regulated by a plethora of legislation implemented at different levels of government, leading to regulatory uncertainty, overlap and duplication of duties.⁷⁷ This implies the need for stronger alignment and co-operation between the DTIC and the NT. It also signals a necessity to build capacity and identify challenges in the current regulatory framework that need to be addressed.⁷⁸ This brings to the fore the issue that the DTIC has power to designate products but lacks the power to penalise non-compliance.⁷⁹ Thus, the designation framework under the PPPFA and the Regulations is riddled with uncertainty, fragmentation, weak enforcement, and non-compliance. Consequently, the government has responded by proposing the Draft Public Procurement Bill [B–2020] (the Draft Bill).

“Designation” under the Draft Bill

To this end, the Draft Bill proposes a unified and single regulatory framework for public procurement under this statute.⁸⁰ The Draft Bill defines “procurement” as the acquisition

74 *South Africa Industrial Policy Action Plan 2018/19- 2020/21* (hereafter, IPAP) 64. Accessed June 10, 2020. https://www.gov.za/sites/default/files/gcis_document/201805/industrialpolicy-action-plan.pdf.

75 Vinti (n 1).

76 IPAP (n 74) 65.

77 National Treasury. 2015. *2015 Public Sector Supply Chain Management Review*. 10–11. Accessed November 17, 2021. <http://www.treasury.gov.za/publications/other/SCMR%20REPORT%202015.pdf>.

78 IPAP (n 74) 65.

79 IPAP (n 74) 65.

80 Draft Bill, s 3(3).

of goods, services, or infrastructure by buying, renting, leasing, or other means.⁸¹ As a general rule, a bidder may not be prohibited from participating in procurement based on nationality, or any other ground that does not pertain to their eligibility or qualification, except to the extent specified by the Act.⁸² The Draft Bill recognises that the Constitution allows for the designation through the allocation or setting aside of contracts to facilitate, among others, a “category or categories of persons or businesses or a sector, goods that are manufactured in the Republic”, and local technology and its exploitation.⁸³ This is an explicit recognition of the preferential procurement framework or designation unlike the PPPFA, which evinces little or no details on designation.

In this way, the Draft Bill seeks to ensure that the state uses procurement to promote local content and production.⁸⁴ The relevant objectives of public procurement in this regard include developing the economic capability in the Republic through ensuring opportunities for local suppliers to participate in procurement, to include in the procurement system categories of preference in the allocation of contracts, the protection and advancement of persons and categories of persons disadvantaged by unfair discrimination, and to develop a unified legislative framework for public procurement to address fragmentation.⁸⁵ This provides specific objectives for the procurement process and by implication, designation. This differs from the fragmented approach of the PPPFA. The PPPFA lacks details on the criteria, objectives, and the process for the designation of products. This task was left to the Regulations and other guiding documents which are characterised by a paucity of detail on the actual designation process and the criteria to designate.

However, the Draft Bill is not without blemish. First, the critical problem with the Bill is that it does not specify the body that will regulate designation and this power is left to the Minister of Finance to decide on it as is done under the PPPFA. Under the Regulations, this power to designate resides with the DTIC in consultation with the NT.⁸⁶ This power appears to be exclusively that of the DTIC, and the NT is merely consulted in this regard. As noted earlier, organs of state may also self-designate through section 8(4) (a) of the Regulations. The glaring anomaly in this regard is that under the Draft Bill, the proposed Public Procurement Regulator (Regulator) lacks the power to designate (Vinti 2020).

In essence, the primary duty of the Regulator is to guarantee the integrity of the procurement system, exercise an oversight of the procurement system, and to develop and implement measures to ensure transparency and public participation in the

81 Draft Bill, s 1.

82 Draft Bill, s 10(2).

83 Draft Bill, Preamble read with s 26(2)(c). See further, Reyburn, P. 2020. “Preliminary comments on the Draft Public Procurement Bill”. *African Public Procurement Law Journal* 7:47–48.

84 Draft Bill, s 2(a).

85 Draft Bill, s 2.

86 Regulations, s 8(1).

procurement policies of the government.⁸⁷ Nevertheless, these regulatory powers do not include the power to designate products for local production and content.

However, the Regulator can intervene upon application by a dissatisfied bidder to ensure compliance with the Act by all relevant institutions.⁸⁸ This power of intervention appears broad and overriding and may thus authorise the Regulator to instruct institutions to comply with the designation requirements to prevent fraud or other malfeasance (Brooks 2020). Thus, the power of intervention can operate as an enforcement mechanism.

In tandem with the intervention power, the Regulator can reconsider the bid decisions of institutions where required as contemplated in this Act.⁸⁹ In this regard, a bidder may, in line with sections 96, 97, 98, or 100, apply for a reconsideration or review of a decision or a failure to take a decision by an institution as stipulated by this Act.⁹⁰ For purposes of this discussion, according to this Act, a bidder may submit an application for reconsideration to the institution if aggrieved by a decision made by the institution.⁹¹ The institution can also, on its own accord, reconsider its own decisions in respect of any procurement process.⁹² This power appears to be limited to the process rather than the merits of a decision and may undermine enforcement of the local content requirements. Unless this application is dismissed or withdrawn by the tenderer, the institution must promptly conduct an investigation and provide a written decision within ten days after the submission of the application.⁹³ This decision must specify whether the application is successful, in whole or in part, or dismissed, the reasons for the decision, and any remedial measures that may be taken.⁹⁴ A bidder who is aggrieved by this decision may apply to the relevant treasury or Regulator, where applicable, to reconsider the decision.⁹⁵ Thus, the Regulator is an appeal authority in this regard.

By the same token, the Regulator may also reconsider an award of a bid upon application by a dissatisfied bidder if the application pertains to the process followed in the award of a bid through the competitive bidding process but only at national level.⁹⁶ The term “competitive bidding” is not defined in the Draft Bill; however, regardless of its definition, this provision obviously leaves a gap if the designation is awarded in a non-competitive bidding process. Clearly, the Draft Bill must define the “competitive

87 Draft Bill, s 5(1).

88 Draft Bill, s 5(1)(e).

89 Draft Bill, s 5(1)(f).

90 Draft Bill, s 94(1).

91 Draft Bill, s 96(1).

92 Draft Bill, s 96(7).

93 Draft Bill, s 96(4).

94 Draft Bill, s 96(5).

95 Draft Bill, s 96(6).

96 Draft Bill, s 5(1)(f) read with s 98. It must be noted that this decision of the Regulator can be appealed to the proposed Public Procurement Tribunal whose decisions are administrative and subject to review by the courts under the Promotion of Administrative Justice Act 3 of 2000 or any other applicable law.

bidding” process. However, this power falls short of the authority to designate products or sectors for local production and content. This appears to confer a residual and oversight power to the Regulator to make all designation decisions as provided by section 98(4) of the Draft Bill such that the Regulator can immediately institute an investigation, notify the institution that an application has been submitted according to section 98, and direct the institution not to give an award before the Regulator makes a final finding and gives a written decision to the bidder and the institution within at least thirty days from the date the bidder tendered an application. The decision of the Regulator must stipulate whether the application is successful, in whole or in part or not granted, the basis for the decision, and any remedial measures that may be implemented.⁹⁷

However, this power of the Regulator is limited to the national level, and thus, the process may countenance fraud on designations at the municipal level of government. Furthermore, this power does not allow a reconsideration of the decision on the merits as it is only triggered if there is an irregularity in the procurement process. Therefore, it is my view that the Regulator must also be given the power to reconsider all bids at national, provincial, and local spheres of government on the merits and process, even on its own accord when there are reasonable grounds to indicate that the Act has not been complied with during the designation process. This analysis of the powers of intervention and reconsideration proceeds from the assumption that “designation” is regarded as part of “procurement” as defined in section 1 of the Draft Bill, which means the “acquisition of goods”. It would be difficult to exclude designation from this definition as it essentially involves the acquisition of goods, albeit on a “preferential” basis.

In light of the narrow remedy to reconsider bids, it is suggested that the Draft Bill and the designation regulations must also provide for a right of internal appeal much like section 14 of Regulations which was outlined earlier. Section 14 of the Regulations is comprehensive in that it regulates designation decisions at all levels of government and thus, would augment the Regulator’s power to intervene and reconsider bids. In this regard, the Draft Bill must also make it clear that no rights accrue to any designation decision that is the subject of an internal appeal and that the bidder in question cannot proceed with any implementation of the tender award. However, the designation regulations must allow for an internal appeal power that is more robust than section 14(1)(c)(i)(bb) of the Regulations, which despite offering an opportunity to claim damages, does allow the tender award contract to be retained in full or in part where appropriate and only penalises up to 10 per cent of the value of the contract in instances where the successful bidder has sub-contracted a portion of the tender to another party without disclosing. This right of internal appeal must be available to any interested party that can prove that it has a direct and substantial interest in the matter. It may be argued that this generous approach to locus standi may be inefficient and may slow down economic development, but the same charges can be laid against the widespread

97 Draft Bill, s 98(5).

corruption in public procurement in South Africa. In fact, it may be that this broad approach to locus standi in designation decisions may be in accordance with section 38 of the Constitution (Vinti 2019, 462).⁹⁸ This will provide a bulwark against the impunity and malfeasance that has plagued public procurement in the past and even now during the COVID-19 crisis.

The narrow approach to *locus standi* in similar circumstances on public procurement, in respect of section 62 of the Local Government: Municipal Systems Act 32 of 2000 (Systems Act), countenances overtly fraudulent tender awards that have been set aside by the courts (Vinti 2019). This is because the beneficiaries of such tender awards financially benefit because section 62(3) of the Systems Act preserves the rights accrued by the successful tenderer in this regard (Vinti 2019). Thus, a court's decision to set aside such an order is academic. This defect must not be replicated in the internal appeal mechanism for designation decisions.

The Draft Bill also provides for public participation through section 5(2)(c), which confers on the Regulator the duty to allow the public to view the procurement process except on the grounds of national security. This right to public participation must be a mandatory duty on all public procurement proceedings, including designation. However, the national security ground requires a definition lest it functions as a tool to prevent public participation and transparency (Vinti 2020). Detailed and transparent criteria for national security must be provided in line with section 198 of the Constitution, which requires compliance with the domestic and international law and the authority of Parliament. A better approach to employing national security is provided by the yet to be promulgated section 18A of the Competition Act 89 of 1998, which provides detailed criteria for national security determinations in respect of certain mergers. This would add a counterweight that opens up procurement proceedings hidden behind the national security shield to fall under the oversight of Parliament. In this way, national security could paradoxically function as a tool of transparency and accountability through Parliament's oversight function.⁹⁹

Unfortunately, the obligation to demand the publication of procurement proceedings and the right to public observation of adjudication proceedings of procurement only falls on the Regulator.¹⁰⁰ Thus, this duty does not fall on the procurement institutions as defined by section 3 of the Draft Bill, which comprises national or provincial departments or a national or provincial government component, "constitutional institutions" as listed in Schedule 1 of the Public Finance Management Act 1 of 1999 (PFMA), municipalities or municipal entities and public entities as listed in Schedule 2 or 3 to the PFMA.¹⁰¹ It is unclear whether the right to "observe" equates with the right

98 See *Walele v The City of Cape Town* 2008 (6) SA 129 (CC) para 53–55.

99 See Constitution, s 55(2)(b).

100 Draft Bill, s 5(2)(c). *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 129.

101 See Draft Bill, s 1 read with s 3(1) and Public Finance Management Act 1 of 1999, s 1 and Schedule 1.

to “public participation”.¹⁰² It is my view that observation falls short of participation, which envisages meaningful consultation, accommodation of different views, and sharing of information in the process.¹⁰³

There will also be a prescribed threshold that will trigger the right to public observation of procurement processes. However, this will function as a barrier to this right in respect of tenders whose value is below this threshold.¹⁰⁴ Furthermore, the procurement institutions only have the duty to publish the results of a procurement process and thus, it is unclear which information should be published in this regard.¹⁰⁵ This is in contravention of section 195 (1) of the Constitution, which requires transparency and accountability through timely provision of accessible and accurate information.¹⁰⁶ Consequently, it should be a requirement that whoever has the authority to designate products in South Africa must be required to publish any initiation of such an investigation, the application documents, the details of the investigating body, the due date for comments by interested parties, the record of proceedings, and the decision of the said body in a public report published in the *Government Gazette*.

Conclusion

Designation has vast possibilities for import substitution which may help develop the domestic industries and transform the economy of South Africa. For it to work properly, it must embrace transparency and accountability. The framework for the designation of products for local content and production in South Africa has been hampered by noncompliance and lack of enforcement since the advent of the PPPFA. The PPPFA is scant on the details of designation, and that matter is left to the Regulations. The Regulations confer such power on the DTIC, which must consult with NT, with no guidance on how a designation decision is made. This is compounded by the fact that there are no investigation reports for designated products. This situation is untenable and flies in the face of the Constitution, which requires accountability and transparency in public administration, and contravenes the interested parties’ right to procedural fairness and is probably irrational.

Consequently, it is my view that the Draft Bill should address all these gaps in the PPPFA regime by providing for detailed and precise criteria for designating and appointing a regulatory body to investigate and decide on designations independently and impartially. This body must be endowed with investigative powers similar to those

102 *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 2 SA 709 (SCA) para 20. *Earthlife Africa Johannesburg and Another v Minister of Energy* 2017 (5) SA 227 (WCC) para 47.

103 *See Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) para 65–68.

104 Draft Bill, s 5(2)(c)(ii).

105 Draft Bill, s 42(5).

106 *Khosa v Minister of Defence and Military Defence and Military Veterans* 2020 (7) BCLR 816 (GP) para 8.

of the International Trade Administration Commission and the Competition Commission. The opaque adjudicative and investigative process of the current designation process must not be replicated in the new dispensation to be ushered in by the proposed Public Procurement Act. Finally, the internal appeal mechanisms, as well as judicial review in the Draft Bill, must be couched in such a manner that no rights accrue to successful bidders until these mechanisms are exhausted.

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