



ADVISORY

Strengthening anti-corruption elements of the Public Procurement Bill

January 2024

1. Introduction

- 1.1 Public procurement is the pillar of service delivery in the country, of making real the aspirations of our constitution, of driving social and economic development. According to the Office of the Chief Procurement Officer in National Treasury, government spends around one trillion rands per annum on goods, services and works.¹ Public procurement consumes a large portion of the budget of the country.
- 1.2 As a nation, we have made extraordinary progress in the fight against state capture and corruption but there is much work that lies ahead, to rebuild our institutions and the capacity of the state, to ensure accountability, to restore trust and confidence, and to rekindle our hope in a better future for all.
- 1.3 Institutional checks and balances and improvements in existing rules within the executive will not by themselves prevent a recurrence of state capture. Much more needs to be done to prevent a future occurrence of state capture. Nevertheless, state capture revealed vulnerabilities and

¹ See National Treasury's State Of Procurement Spent in National and Provincial Departments

deficiencies in existing procurement systems and processes, the tightening of which could help prevent recurrence.

- 1.4 The public procurement system was the primary site for the redirection of state resources, particularly in state-owned entities, which have by far the largest procurement, capital, and operational budgets.
- 1.5 Enhancing the integrity of the public procurement system is therefore a central component of the state's response to the State Capture Commission. Enhancing the integrity of the public procurement system is also a pillar of our National Anti-Corruption Strategy. The strategy anticipates a public procurement system that is insulated from corruption and better structured to drive development, expand the productive base of the economy and support innovation and investment.

2. State Capture Commission Recommendations

The State Capture Commission made several recommendations regarding the strengthening of procurement systems in the country:

2.1 Recommendation 1: The National Charter against Corruption

That the Government, in consultation with the business sector prepare and publish a National Charter against corruption in public procurement, such Charter to include a Code of Conduct setting out the ethical standards which apply in the procurement of goods and services for the public;

2.2 Recommendation 2: The establishment of an independent Agency against corruption in public procurement

That the Government introduce legislation for the establishment of an independent Public Procurement Anti-Corruption Agency (PPACA).

2.3 Recommendation 3: Protection for Whistle Blowers

That the Government introduce legislation or amend existing legislation to afford whistleblowers protection, to identify the correct channels for reporting corruption and to incentivise the making of disclosures;

2.4 Recommendation 4: Deferred Prosecution Agreements

That the government introduce legislation for the introduction of deferred prosecution agreements by which the prosecution of an accused corporation can be deferred on certain terms and conditions;

2.5 Recommendation 5: The Creation of a Procurement Officer's Profession

That consideration is given to enacting legislation that will establish a professional body to which all officials who work in the area of public procurement should belong.

2.6 Recommendation 6: The Enhancement of Transparency

That set standards of transparency consistent with the OECD Principles for integrity in public procurement be formulated by National Treasury for compulsory inclusion in every procurement system adopted by a public procurement entity.

The full details of these recommendations are captured in Annex 1.

In terms of this advisory on the Public Procurement Bill, all these recommendations, other than the first one relating to the National Charter, are relevant.

3. Strengthening Anti-corruption in the Public Procurement Bill

This advisory is focused on the Public Procurement Bill that is currently before Parliament. As of the date of this Advisory (January 2024), the Bill has been revised and passed by the National Assembly but has yet to be considered by the National Council of Provinces.

3.1 It is the view of the National Anti-Corruption Advisory Council that the Bill, in its current form, has not properly addressed the recommendations of the Zondo Commission, and may, despite its best intentions, open the doors for corruption.

- 3.2 It is also our view that the processing of the Bill has been problematic, particularly in relation to the significant changes to the Bill made in relation to preferential procurement during the parliamentary process, on which there has been very limited consultation.
- 3.3 The parliamentary participation process has been limited and problematic.² On 18 August 2023, the National Assembly's Standing Committee on Finance opened the Bill for public comments. Despite short notice, a total of 112 stakeholders made submissions amounting to 2200 Excel rows of comments by close of comments on 11 September 2023.
- 3.4 Two months later, when the Treasury responded to these submissions in front of the standing committee, it appears from records to have given cursory attention to only 36% of them; 64% had not been processed at all. Treasury's subsequent recommendations - often with opaque origins outside of the participatory process itself - retained serious flaws in the Bill, rolled back integrity provisions, and included an entirely new preferential procurement chapter.
- 3.5 This treatment of submissions arguably mocks the efforts of participating stakeholders and did not give members of Parliament in the National Assembly adequate information. The last-minute imposition of sweeping changes to the Bill, where impact on rights requires further consultations between social partners in Nedlac and with the public in Parliament, contradicts the participatory spirit of the Constitution, the Nedlac Act, and broader law.
- 3.6 The Standing Committee on Finance's own superficial engagement in participatory procedures and executive oversight erodes its status as the people's assembly and violates the separation of powers.

² South African Veterinary Association v Speaker of the National, Assembly and Others [2018] ZACC 49; the word "veterinarian", section 22C(1)(a) of the Medicines and Related Substances Act 101 of 1965 (Act) was declared to have been amended in a manner inconsistent with the Constitution

- 3.7 When compared with participatory processes conducted for Bills with a similarly far-reaching public impact (such as the Basic Education Laws Amendment Bill and the Traditional and Khoisan Leadership Act)³, it is apparent that Parliament has put much less effort in this Bill into involving as many affected parties as possible.
- 3.8 Stakeholders who have participated were not given meaningful opportunity to address issues in the changed Bill. A process of minimal consultation and only marginal rewriting in the National Council of Provinces will not sufficiently remedy these defects.
- 3.9 This lack of consultation may well have contributed to instances of diluting or leaving unclear the guardrails against corruption in procurement in the Bill as tabled. For example, the Bill introduced into the National Assembly gave the proposed Public Procurement Office and provincial treasuries the power to review procurement policies of procuring institutions. The Bill now passed by the National Assembly removes these provisions.
- 3.10 Further, when the Bill was introduced into the National Assembly, leaders of political parties were automatically excluded from participating in procurement as bidders and suppliers. Persons related to officials were also automatically excluded from submitting bids to the procuring institutions within which they are employed. The Bill that the National Assembly passed instead proposes to regulate these potential conflicts through ordinary conflict of interest provisions.
- 3.11 Finally, regarding debarment which is a key instrument against procurement corruption, several questions of interpretation pointed out by the public and practitioners in section 15 remain unaddressed such as whether the list of grounds of debarment is a closed list. These questions

³ The Constitutional Court of South Africa ruled on May 30, 2023 that the Traditional and Khoi-San Leadership Act 3 of 2019 was unconstitutional and invalid. The court held that the National Assembly, the National Council of Provinces, and the provincial legislatures failed to fulfil their constitutional obligations to facilitate reasonable public involvement in the passing of the Act

are largely considered 'grey areas' under the status quo regime and it would be useful if the Bill clarified them.

4. Aligning the Bill with the Anti-Corruption Objective

In the opinion of the NACAC, two structural features of the Bill require significant revision in order to align with the anti-corruption objective that is the heart of the NACS: institutional arrangements in public procurement and the framework for preferential procurement proposed by the Bill.

4.1 Institutional Arrangements in Public Procurement

The Public Procurement Bill has failed to address the recommendation from the Zondo Commission that there should be an independent Public Procurement Anti-Corruption Agency (PPACA), an anticorruption recommendation that itself ultimately should be measured against the Constitution.⁴

4.2 In terms of the recommendation for an independent PPACA, the Commission explicitly noted that the location of such an entity *within* any government department would not be advisable. The Commission stated in this regard (in part 1 of its report): "The vulnerability of any government department to undue political interference remains and will always remain and the answer to state capture does not lie in replicating the very same features that allowed state capture to succeed in the first place." The Commission's report continues to record that even National Treasury became subject to the project of state capture, albeit for a brief period.

4.3 Despite this, the Bill has put forward the creation of a Public Procurement Office as a unit within the National Treasury. This is not the optimal placement of a structure that should have the necessary institutional independence to provide effective oversight.

⁴ Glenister v President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) (17 March 2011)

- 4.4 Furthermore, the single-sentence statement in the Bill that “the Head and officials of the Public Procurement Office must perform their functions in terms of this Act impartially and without fear, favour or prejudice”, is meaningless in the absence of any further institutional arrangements and protections (e.g. on grounds for dismissal of the Head) in support of institutional independence in the Bill.
- 4.5 Building on the recommendations of the Zondo Commission, the appropriate approach from an anti-corruption perspective would be to create an independent procurement oversight body. This is an approach which is in place in many countries, especially those that have recently adopted new regulatory regimes.
- 4.6 NACAC thus advances the recommendation to create an independent procurement oversight body, such as a Public Procurement Regulatory Authority (PPRA). There are thus many regulatory examples available on which one can draw, such as the Kenyan Public Procurement Regulatory Authority. It is imperative to mention that South Africa can learn much from the Kenya Public Procurement Policy and Institutional Framework which is well researched and benchmarked among global leaders in public procurement – including Germany, Switzerland, Luxembourg, America – USA, Canada, and Chile as well as, closer to home, Zambia, Namibia, Rwanda, Tanzania, Burundi and Uganda.
- 4.7 The PPRA’s oversight structure should enjoy real protection from any political interference and as part of its oversight mandate should have appropriate powers to investigate and act against alleged abuse of the procurement process.
- 4.8 This is also in line with Pillar 5 of the National Anti-corruption Strategy (NACS) which refers to strong anti-corruption agencies and the independence of dedicated anti-corruption agencies.
- 4.9 It is recommended that, in line section 217 of the Constitution of South Africa, an independent Public Procurement Regulatory Authority (PPRA) should be established.

4.10 It is imperative to split procurement regulatory responsibility from procurement operations to enhance the capacity of the state to regulate procurement, improve procurement oversight, enhance enforcement for breaches of procurement prescripts, and enhance the transparency of the system.

The proposed institutional arrangement is this:

- the chief buyer (operational) functions of the current Office of the Chief Procurement Officer (OCPO) are split from its public procurement regulatory powers;
 - the chief buyer functions stay under the Chief Procurement Officer within the NT;
 - the public procurement regulatory powers of the OCPO (including appropriate enhancements as proposed by the Bill and including the proposed Public Procurement Tribunal (PPT) but without an additional exclusive anti-corruption investigative function and powers) are placed within a new Public Procurement Regulatory Authority which is given Competition Commission-like independence from National Treasury and the Minister of Finance;
 - in order to link regulation and enforcement, a duty of and mechanisms for cooperation and coordination is placed upon the PPRA and on a potential new general anti-corruption agency (NACA) as envisaged under the NACS and as also recommended by the Zondo Commission;
 - the PPRA is given civil investigative powers over non-compliance with public procurement legislation;
 - the Tribunal as currently contained in the Bill should be granted independence by statute and be housed within the PPRA, in accordance with the principle of anticorruption efficacy.
- 4.11 As empowered and constrained by the Bill, the Public Procurement Regulatory Authority shall set out the regulatory framework for public procurement, issue directives and regulations, deal with procurement tender complaints and disputes, investigate procurement complaints and

corruption, and refer issues to the relevant law enforcement agencies where appropriate. It will monitor standards and criteria for tenders and compliance with procurement legislation.

4.12 It will also propose improvements in the regulatory system to ensure an effective, equitable and competitive procurement system that functions optimally in the interests of the state and the South African public. As such, its remit covers more than purely anti-corruption in public procurement, although it will be a key element of the anti-corruption arsenal.

4.13 The version of the Bill that was tabled in the Standing Committee gave the proposed Public Procurement Office and provincial treasuries the power to review procurement policies of procuring institutions and to propose changes. The version of the Bill that has been passed by the National Assembly has removed these provisions, and this weakened the already circumscribed powers of the proposed Public Procurement Office. This power should be restored.

5.2 Preferential procurement

The provisions on preferential procurement in the current Bill are extremely concerning in several aspects.

5.3 Firstly, as noted above, these sections have been introduced late in the process which means that neither the public, nor affected organs of state have been able to comment on the provisions.

5.4 Secondly, S217 of the Constitution envisages that national legislation will prescribe a framework which enables organs of state to depart from the prescribed system requirements relating to the contracting for goods and services to implement a preferential procurement policy.

5.5 The Bill as it stands currently has introduced a welter of possible exclusions from tendering, resulting in the potential of any organ of state to limit the individuals and institutions that are eligible to tender for any particular

tender. The Bill does not provide implementation principles with clear checks and balances.

- 5.6 Thirdly, the preferential procurement provisions fail to provide set standards of transparency consistent with the OECD Principles for integrity in public procurement,
- 5.7 Fourthly, Chapter 4 has significant uncertainty regarding its content. The relative weight of preferences, set-asides, prequalification criteria, subcontracting or local content, as against other evaluation criteria such as price and functionality, is left to the Minister to decide by means of regulations.
- 5.8 No guidance is given to the Minister in this regard. Sections 17, 18, 19 and 20 refer to other “prescribed criteria which may include complementary goals”. No legislative guidance is provided as to the nature of these ‘complementary goals’.
- 5.9 The removal of price as one presumptively required criterion in evaluating the value for money of tenders offered to organs of state increases the potential for rampant corruption and higher costs which undermine growth and employment. As the President, citing the Zondo Commission, has noted, “one of the inherent problems with the current procurement regime is that it does not make clear whether the primary intention of the Constitution is for goods to be procured at least cost or for the procurement system to prioritise transformation. The Commission recommended that procurement officials be advised that “maximum value for money” must be primary.”
- 5.10 As noted above, the version of the Bill that was tabled before the Standing Committee excluded leaders of political parties from participating in public procurement as bidders and suppliers. Immediate family members of officials were also excluded from submitting bids to the procuring institutions within which the official is employed.
- 5.11 The version of the Bill that the National Assembly passed has removed these provisions, aiming to regulate these issues through ordinary conflict

of interest provisions. These provisions have proved to be largely ineffective in curbing corruption in the past and, contrary to the recommendation of the Zondo Commission relating to enhancement of transparency, present a risk to the integrity of the public procurement system.

5.12 The complexity of the proposed approach in Chapter 4, its relationship to changes made in the Bill, and the lack of clear definition of concepts making up the framework proposed, means that these sections may well open the door to further corruption.

5.13 It is widely recognised that the more complex the procurement process is, the greater the risk of corruption and the lower the possibility of tracking corrupt processes. The preferential procurement sections of the Bill as they currently stand introduce precisely the type of complexity and vagueness that should be avoided from an anti-corruption perspective.

5.14 It is therefore **recommended that a period of consultation** on these sections of the Bill be mandated to enable the development of an approach that supports transformation objectives but that does not increase the opportunities for corruption.

5.15 Finally, the retained power of the PPO in the Bill to issue binding instructions and notices, and the sheer volume of substantive matters to be dealt with in regulations will simply continue the current highly fragmented nature of public procurement regulation in South Africa, contrary to the explicit object of the Bill and certainly to the detriment of creating a clear, relatively simple procurement regulatory system that will be able to withstand corruption better than the current one. The Zondo Commission also noted how the complexity of the current regulatory system contributed to state capture.

6. The Creation of a Procurement Officer's Profession

6.1 The Zondo Commission recommended that consideration be given to enacting legislation that will establish a professional body to which all officials who work in the area of public procurement should belong. The

opportunity to increase professionalisation in procurement has been missed in the current Public Procurement Bill and that should be addressed.

- 6.2 The thinking behind the Zondo Commission recommendation is twofold. Firstly, that the professional body will establish the qualifications, training and experience for membership together with standards of integrity and a commitment to resist mismanagement, waste and corruption.
- 6.3 Secondly, that disciplinary action can be taken against professionals in the field of procurement by simply removing membership. This would not only professionalise those engaged in public procurement but also remove those who breach standards of integrity from participating in public procurement processes. In these ways, professionalisation advances the anticorruption objective.
- 6.4 In NACAC's view, the Bill should grasp this opportunity to enable greater professionalisation in procurement. It is intended to issue a further more detailed Advisory on this procurement and anticorruption issue.

7. Whistleblowing and Supplemental Information Disclosure to the State in the Public Procurement Sector

- 7.1 The actions of whistleblowers and the information they have provided to the public and law enforcement agencies were crucial in fighting state capture. The NACAC strongly supports the ongoing effort led by the DOJCD to strengthen and extend the whistleblower protection framework in the Protected Disclosures Act⁵ and has drafted an Advisory on that issue.
- 7.2 In addition to the general regulation of whistleblowing in the PDA, Parliament has inserted provisions in several statutes in specific fields that provide supplemental facilitation of (and in some cases providing rewards/incentives for) disclosure of information to regulatory authorities.

⁵ Invitation for Public Comments: Discussion Document on Proposed Reforms for the Whistleblower Protection Regime in South Africa (29 June 2023).

- 7.3 These supplemental information disclosure regimes assist the anticorruption objective. These sector-specific statutes include the Companies Act, the Financial Intelligence Centre Act, the National Environmental Management Act, the Marine Living Resources Act, the National Forest Act, and the Pension Funds Act.
- 7.4 From an anticorruption perspective, the procurement sector must be added to this list of supplemental information disclosure regimes. As the Zondo Commission specifically and explicitly recognized, information disclosure in the form of cash for information can be a powerful enforcement tool in the public procurement space. Its use in procurement in nations across the globe echoes the South African experience of the crucial role played by whistleblowers against state capture.
- 7.5 In procurement, unprotected but incentivized information disclosure is a leading anticorruption enforcement tool in numerous comparative jurisdictions. It is a tool that should be added by Parliament into the South African public procurement sector.
- 7.6 Unfortunately, there is no mention of whistleblowing in the Bill. Nor are there any specific provisions in the Bill to facilitate information disclosure about procurement corruption or contract fraud to the appropriate regulatory or law enforcement authorities. The Bill is deficient by omission in these respects.
- 7.7 In line with supplemental information disclosure regimes in other sectors, this Advisory proposes that a basic empowering provision facilitating incentivized procurement information disclosure to state authorities be added to the Public Procurement Bill. Like the provisions in other existing statutes, this provision would be supplemental to and not inconsistent with the PDA regime.
- 7.8 Such a provision should enunciate broad principles around several issues including:

- (a) proportionate rewards/incentives for informants disclosing information materially assisting with recovery of funds from public procurement fraud or corruption;
- (b) differentiation among eligible persons (including civil servants);
- (c) disqualification of persons offering information with false motives from incentives; and
- (d) the appropriate regulatory or law enforcement body to be receiving these procurement information disclosures.

8. Transparency: Procurement Methods and Open Data Standards

The Zondo Commission recommended “that set standards of transparency consistent with the OECD Principles for integrity in public procurement be formulated by National Treasury for compulsory inclusion in every procurement system adopted by a public procurement entity.”

- 8.1 Transparency in primary legislation necessitates the formulation and placement in the Bill rather than in subordinate legislation the policy principles for procurement, and to establish checks and balances framed around section 217 of the Constitution. Having clear procurement principles at the level of statute enables effective and strategic action by procuring institutions as well as facilitating across-government coordination, and eliminates reliance on regulations and instructions to interpret and apply the constitutional principles. This is necessary to inform the range and variety of procurement methods that could be prescribed by the Minister.
- 8.2 An Act with purposive interpretation and clearer objectives embedded could guide and shape procurement methods to be developed and implemented in the years to come. The absence of a guiding framework in the Bill for procurement principles around which a range of procurement methods which can be developed will both hamper service delivery and open the door to large-scale wrongdoing, influence and manipulation.

- 8.3 While the Bill does address the issue of open data standards, it has weakened some of the transparency provisions in the tabled version of the Bill and has failed to take the opportunity to truly embed critical anti-corruption provisions.
- 8.4 Open data is defined in the Bill to mean machine-readable data that is made available with the technical and legal characteristics necessary for it to be freely used, reused and redistributed without restrictions, based on a standard determined by an instruction.
- 8.5 The Bill mandates that the Public Procurement Office must develop and implement measures to ensure transparency in procurement and must ensure the development of a single platform that at least provides access for officials, bidders, suppliers and members of the public to all procurement related services. It also requires that the Minister must prescribe requirements to disclose information regarding procurement.
- 8.6 These provisions are to be welcomed, as are the provisions regarding beneficial ownership transparency provisions. However, these provisions should be more clearly aligned to recent amendments to the Companies Act.
- 8.7 The definition of ‘confidential information’ in the Bill also is extremely wide and could be used by corrupt actors to hide important information such as names of directors and owners of companies. Confidential information should be limited to what is non-disclosable under PAIA and the Constitution.
- 8.8 Finally, public procurement information and data falls into one of three broad categories, namely transaction transparency, public procurement policy transparency and data base transparency. The minimum requirements for disclosure of procurement information in the Bill appear to only deal with transaction transparency. There is no explicit requirement in the Bill for public procurement policy transparency nor for data or database transparency. There is no similar requirement for the procurement policies and similar elements of the “procurement system” of a procuring entity to be disclosed nor the machine-readable data (open data) be disclosed.

8.9 The Bill should thus require the disclosure for public procurement policies at procuring institution level, as well as disclosure of open data in the form of databases at procuring institution level as well as at the level of the central ICT system required in terms of the Bill Section 30.

9. Summary of NACAC Recommendations re the Public Procurement Bill

Amend the Public Procurement Bill to:

- i. Refer to Establishment of an independent Public Procurement Regulatory Authority
- ii. Simplify and clarify the clauses on preferential procurement and exclusions.
- iii. Refer to Establishment of a Procurement Professional Body and accreditation system
- iv. Align the beneficial ownership provisions with recent amendments to the Companies Act
- v. Limit 'confidential information' to what is non-disclosable under PAIA and the Constitution.

Conform to public participation legislation process for major changes in the Public Procurement Bill

Refer to disclosure of corruption and procurement fraud, encourage procurement information disclosures as a countenance to procurement corruption

Introduction of e-procurement that integrates vetting of tendering entities

10. Conclusion

NACAC supports the establishment of Public Procurement legislation, however, the Public Procurement Bill should allow the amendments to be effected when NACAC recommendations are finalised on an independent procurement oversight body and professionalisation oversight body. Public Procurement Office and Tribunal shall be recommended to form part of an independent procurement oversight body for effective procurement oversight and separation of responsibilities.

11. Acknowledgements

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PARI

Corruption Watch

AGSA

“END”

Annex 1: State Capture Recommendations on Public Procurement

Recommendation 1: The National Charter against Corruption

51. 1 . That the Government, in consultation with the business sector prepare and publish a National Charter against corruption in public procurement, such Charter to include a Code of Conduct setting out the ethical standards which apply in the procurement of goods and services for the public;

The National Charter should be signed by or on behalf of:

- the President and the Cabinet
- the Provincial Premiers and members of the Provincial Cabinets;
- the local authorities;
- all State-Owned enterprises;
- the political parties represented in Parliament;
- constitutional entities;
- the institutional representatives of the business sector;
- listed public companies;
- Trade Unions
- Anti-corruption bodies in civil society;
- every procurement officer in the public service shall, on assuming duty, be required to sign a commitment to observe and uphold the terms of the National Charter;

51.4. every natural or juristic person tendering or contracting to supply goods or services by way of public procurement must sign a like commitment to uphold and to adhere to the terms of the Charter and its Code of Conduct;

51.5. the content of the National Charter and the Code of Conduct should be widely publicised ;

51.6. the National Charter and Code of Conduct should be given legal status and effect by an Act of Parliament.

Recommendation 2: The establishment of an independent Agency against corruption in public procurement

52. That the Government introduce legislation for the establishment of an independent Public Procurement Anti-Corruption Agency (PPACA).

53. That such legislation constitutes the Agency:

53.1. as an independent body subject only to the Constitution and the law;

53.2. which has jurisdiction throughout the Republic;

53.3. which is impartial and must perform its functions without fear, favour or prejudice;

which is financed from:

- money that is appropriated by Parliament for the Agency;
- fees payable to the Agency by all tenderers for public procurement contracts;
- money received from any other source.

54. That such legislation must provide that the Agency consists of:

- The Council consisting of 5 members:
 - of whom the chairperson shall be a senior legal practitioner with expertise in procurement matters; and
 - 4 members chosen for their special skills in accounting, finance and economics with expertise in public procurement matters one of whom shall be a member of the academic staff of a University who is a specialist in matters of public procurement;
 - the said members of the Council are to be selected by a panel consisting of the Chief Justice, the Auditor-General and the Minister of Finance following a public process."
- an Inspectorate;
- a Litigation Unit;
- a Tribunal;
- a Court.
- That the function of the Council is to:
 - initiate measures to protect procurement systems from corruption
 - issue guidelines for the betterment of procurement practice;
 - prohibit any practice which facilitates corruption, fraud or undue influence in public procurement;
 - formulate measures for the making of reports to the Agency by whistle blowers and for their protection and incentivisation;
 - implement measures to increase the integrity and transparency of public procurement practices;

- negotiate agreements with any regulatory or oversight authority to co-ordinate and harmonise the exercise of jurisdiction over public procurement;
- participate in the proceedings of any regulatory or oversight authority and advise or receive advice from such authorities;
- issue regular reports for public and media attention, detailing the nature and extent of corruption, fraud and undue influence identified by the AACIPP.
- That the function of the Inspectorate is to:
 - monitor and inspect public procurement activity to detect and expose corruption;
 - establish, maintain and update a comprehensive and secure data base recording and listing:
 - every public procuring entity, together with its procurement procedures and the names and qualifications of the procurement officials employed;
 - information obtained from Whistle Blowers and complaints registered by tenderers;
 - the reports and information provided by oversight authorities;
 - reports of disciplinary proceedings relating to procurement officials conducted by any governmental, SOE or constitutional entity;
 - any other information in respect of the foregoing;
 - institute electronic procedures to facilitate the monitoring and inspection of public procurement activity;
 - undertake in situ inspections, where necessary without notice, of public procurement activity by the procuring entities;
 - review the procurement systems utilised by the procuring entities to ensure the adequacy of in-built protections against corruption;
 - issue Mandatory Compliance Notices requiring the prompt implementation of remedial measures by a procuring entity to address deficiencies or irregularities detected in any procurement system or in respect of any tender or the award of any contract calling upon the affected entity to take immediate steps to rectify same;
 - refer all instances of non-compliance with such Notices to the Litigation Unit for further action;

- promptly investigate any information received concerning fraud or corruption in the grant of tenders or contracts and take active steps to protect informants against intimidation or revenge;
- investigate any circumstances suggesting the giving of a bribe or other gratification for the award of a tender or contract including the making of donations to political parties in connection with the award of tenders;
- investigate all complaints concerning corruption made by tenderers or other informants and refer matters arising from such investigations to the Tribunal.

That the function of the Litigation Unit is to:

- apply to the Tribunal for the giving of authority to the Inspectorate to exercise powers of search and seizure against any juristic or natural person including any political party in connection with any investigation into corruption, fraud or undue influence connected to public procurement;
- receive and negotiate Deferred Prosecution Agreements and refer such Agreements to the Tribunal for approval;
- seek remedial action from the Tribunal where Notices of Compliance issued by the Inspectorate have not been rectified;
- institute proceedings before the Court for the recoupment of monies stolen from, or damages suffered by the State as a consequence of corruption, fraud or undue influence in the procurement process;
- apply to the Tribunal for an order debarring any person from participating in any tender process or the grant of any procurement contract either permanently or for a stipulated time and either conditionally or unconditionally;
- apply to the Tribunal for an order striking any procurement official from the roll of professional procurement officers either permanently or for a stated period and whether conditionally or unconditionally.

That the function of the Tribunal is to:

- grant or refuse warrants of search and seizure of documents to the Inspectorate at the request of the Litigation Unit;
- review and approve either with or without conditions any DPA or to reject same;

- make any order requiring any procuring entity or other recipient of a Compliance Notice to comply forthwith or subject to such qualifications as the Tribunal may impose;
- issue, where appropriate, an order interdicting any procurement entity from conducting any procurement activity until it has properly complied with any order issued by the Tribunal;
- issue an order debarring any natural or legal person found guilty of corruption, fraud or exercising undue influence from again participating in any tender or receiving the grant of any procurement contract either for a period of time or permanently.

That the function of the Court is to:

- determine civil actions instituted by the Litigation Unit for recompense to the State in respect of losses suffered through corrupt acts;
- act as a Court of Appeal in respect of decisions of the Tribunal.

Recommendation 3: Protection for Whistle Blowers

That the Government introduce legislation or amend existing legislation:

- to ensure that any person disclosing information to reveal corruption, fraud or undue influence in public procurement activity be accorded the protections stipulated in article 32(2) of the United Nations Convention Against Corruption;
- identifying the Inspectorate of the Agency as the correct channel for the making of such disclosure;
- authorising the Litigation Unit of the Agency to incentivise such disclosures by entering into agreements to reward the giving of such information by way of a percentage of the proceeds recovered on the strength of such information;
- authorising the offer of immunity from criminal or civil proceedings if there has been an honest disclosure of the information which might otherwise render the informant liable to prosecution or litigation.

Recommendation 4: Deferred Prosecution Agreements

That the government introduce legislation for the introduction of deferred prosecution agreements by which the prosecution of an accused corporation can be deferred on certain terms and conditions:

- that a company has self-reported facts from which criminal liability could be inferred and has co-operated fully in making such report;
- that the company has agreed to engage in specific conduct intended to ensure that such conduct is not repeated;
- that the company has paid a fine;
- or been subject to other remedial action;
- that the terms and conditions of the agreement has been sanctioned by the Tribunal of the Agency.

Recommendation 5: The Creation of a Procurement Officer's Profession

It is recommended that consideration is given to enacting legislation that will establish a professional body to which all officials who work in the area of public procurement should belong.

Such professional body will fix the qualifications and the necessary training and experience necessary for membership of the profession.

Such training and qualification to include high standards of integrity and a commitment to resist mismanagement, waste and corruption.

That the procurement system in every procuring entity be managed by a duly qualified public procurement official being a member in good standing of the profession.

That the Tribunal of the Agency act as the disciplinary committee of the profession with power to strike a member from the Roll or to impose such other disciplinary sanction as the case may require.

Recommendation 6: The Enhancement of Transparency

The Commission recommends that set standards of transparency consistent with the OECD Principles for integrity in public procurement be formulated by National Treasury for compulsory inclusion in every procurement system adopted by a public procurement entity.