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South African Society of
Cardiovascular Intervention

SASCI Submission

to the National Treasury

pertaining to the Draft Procurement Bill of 19 February 2020

Cardiovascular Disease (CVD) is the leading cause of death in South Africa after HIV/AIDS. More South Africans die of CVD than of all the cancers combined. CVD is responsible for almost 1 in 6 deaths (17.3%) in South Africa. On an average, each day in this country sees more than 200 victims of stroke, more than 100 victims of heart attacks resulting in more than 200 deaths per day. Hypertension is a major risk factor in the population and if left untreated, results in even more hospitalisations and deaths from heart failure and stroke

Cardiology is a recognised sub speciality of Medicine recognised by the HPCSA. After qualifying with a basic MBChB and completing Community Service, qualification as a Cardiologist requires a further 4 years to become a Specialist Physician, and then a further 3 years in Cardiology. This means that graduates are often in mid-thirties before attaining this level of specialisation. There are only about 200 registered cardiologists in the country of 160 who are active in clinical practice. This represents a ratio of three cardiologists per a million population. To put that into context, the average country in European Union has average of 200 cardiologists per a million population. The situation is compounded by the fact that >40% of practising cardiologists are facing retirement age within the next 15 years. Despite this, the South African cardiology community have a proud record of excellence equivalent to the best in the world with many becoming frequent faculty guests and participants in the major conferences of Europe, USA and elsewhere.

The **South African Heart Association** (SA Heart®) is the official professional body recognised by the HPCSA for cardiologists in the country and membership includes cardio-thoracic surgeons, physicians, medical technologists, radiographers, nursing personnel and scientists involved in cardiovascular research. The special interest groups affiliated to SA Heart include the Paediatric Cardiac Society, the Arrhythmia Society, the Cardiac Imaging Society, the Society of Cardiovascular Intervention, the Heart Failure Society, the Society of Cardiac Research and the Lipid and Atherosclerosis Society. SA Heart®

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H Weich (President), D Kettles (Ex-officio President), C Badenhorst (Treasurer), G Cassel (Secretary), S Khan, M Ntsekhe
C Zambakides, J Vorster, G Angel, JP Theron, M Makotoko, A Vachiat, S Pandie, J Hitzeroth, F Dube, W Howell (ISCAP)
Tel - 083 458 5954 - Fax 086 603 9885 - sasci@sasci.co.za - www.sasci.co.za





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together with all these subspecialty groups, is the scientific leader in South Africa in cardiovascular healthcare delivery, research, and education. Its mission is to champion equitable and sustainable healthcare, to lead and innovate in the cardiovascular sciences, to educate healthcare professionals and the public as well as influence cardiovascular healthcare policy. SA Heart ultimate vision is the advancement of cardiovascular healthcare for all those living in South Africa.

The **South African Society of Cardiovascular Intervention (SASCI)** as one of the sub-speciality interest groups of SA Heart®, is an organisation of physicians, scientists and allied professionals with a particular interest and activity in interventional cardiology which deal with invasive vascular procedures to open obstructive and diseased coronary and peripheral arteries. The techniques used in these procedures are potentially life-saving in patients suffering from myocardial infarction (heart attack) stroke, heart valve disorders and heart failure, improving life expectancy and quality of life in many patients. Although other health professionals are involved in the fight against cardiovascular disease, cardiologists remain the cornerstone of prevention, diagnosis, and treatment of these patients. SASCI acts in an advisory capacity to funders; industry; members and the government on matters relating to interventional cardiology and is also a key enabler of CPD accredited education in interventional cardiology.

Therefore, any analysis of needs and resources must consider the availability and requirements of cardiologists in a national health service. Interventional cardiology is a highly technical sub-specialty and requires the utilisation of complex highly specialised devices and components thereof. Advances in the field are being made constantly and many of these need to be continuously adopted to enable colleagues to provide improvements in the care of their patients.

Kindly find below SASCI's submission on the Bill, representing SA Heart® and the Cardiac Arrhythmia Society of South Africa (CASSA).



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1. INTRODUCTION

This Bill is meant to consolidate all public procurement legislation and to streamline the legal framework in which the government can procure goods, services, and infrastructure. Furthermore, the Bill purports to address seemingly contradictory legislation and to address the justiciability of various instruments published by the National Treasury. As it appears, the Bill sets out to provide practical guidelines for the implementation of procurement rules. This commentary looks at the various new provisions suggested by the Bill with a view to identifying possible loopholes and suggesting ways to plug them.

Procurement in the Bill is defined as the acquisition of goods, services, or infrastructure, by purchasing, renting. This is a very apt definition to the extent that it recognizes leased goods and services as falling within the scope of procurement rules.

- 1.1. SASCI welcomes the opportunity to comment on the Draft Public Procurement Bill, especially in view of the potential substantial impact this Bill might have on the National Health Insurance Bill.
- 1.2. Section 38 of the NHI Bill creates the Office of Health Product Procurement in consultation with the Minister which will “coordinate” and “set parameters” for procurement. Clause 38(6) provides however that the service provider and health establish (therefore not the NHI Fund) must procure. (This sentence is not clear) Product procurement is therefore seemingly centralized, as well as decentralised.
- 1.3. The Bill defines “procurement” in section 1 as “the acquisition of goods, services or infrastructure by purchasing, renting, leasing or other means”. SASCI and, the SASCI members will be suppliers of services to the state, possibly under the National Health Insurance dispensation and will therefore be impacted by the Bill.
- 1.4. Section 217 of the Constitution obligates competitive bidding, yet the National Health Bill 11 of 2019 explicitly excludes the Competition Act from its provisions and sets price-determination as

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a principle for healthcare professionals¹ and for medicines². Section 217 gives rise to the Public Finance Management Act and the National Treasury Regulations relating to procurement and it is unclear how such a system could, legally and constitutionally be reconcilable with a system of price setting.

- 1.5. It seems that, the Draft Public Procurement Bill of 19 February 2020 (Bill) is National Treasury's response to the obligations set in section 217 of the constitution by regulating public procurement.

2. ABOUT OUR COMMENTS

- 2.1. Whilst an attempt has been made to comment on the Bill in its entirety, an omission to comment on any provision does not amount to an acceptance of that provision. We have singled out provisions that specifically impact SASCI as a society and its members.
- 2.2. SASCI is aligned with the introductory part of the Bill stating the purpose, aims and justifications of the Bill. A single regulatory framework for public procurement is noble and so is the Bill's intention to specifically address fragmentation in the regulation of public procurement.

3. COMMENTS ON SPECIFIC SECTIONS OF THE BILL

Chapter 1: Definitions

- 3.1. Various terms in the Bill that should be defined are not defined, e.g. "*competitive bidding process*." The Bill refers to quality in section 10 in providing that institutions must obtain the best value for money in terms of price, quality, and delivery, having regard to set specifications and criteria.

¹ Sections 10(1)(g), 41(1), 41(3)(b), 41(4) and 55(1)(b).

² See Schedule to the Bill proposing to amend section 22G of the Medicines Act.

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However, no criteria are against which this is gauged are mentioned. The same can be said about terms such as 'quality' and 'functionality'.

- 3.2. The terms 'market' and 'market-related' are not defined, important as they are relative to regulation 121 that empowers the making of regulations relating to the setting of ceiling prices.
- 3.3. Certain terms, though defined, the definitions are not clear, e.g. "value for money". The general definition which has been utilized does not bear much relevance as it pertains to healthcare services.
- 3.4. The definitions at times seem to be inadequate, e.g. the term "bid" does not take into account unsolicited bids in its definition.

Chapter 1: Objects of the Bill

- 3.5. The Bill unequivocally acknowledges the aim of merging of the disjointed regulatory regimes as one of the fundamentals of this legislative developments. The Preamble states one of the objectives of the Bill as to "create single regulatory framework for public procurement to eliminate fragmented procurement prescripts". This is repeated in the objects provision in section 2(e). SASCI welcomes the initiative.

Chapter 2: Public Procurement Regulator, Provincial Treasuries and Procuring Institutions

- 3.6. SASCI welcomes the establishment of a Public Procurement Regulator within the National Treasury. The Regulator will be mandated to make certain that state institutions comply with the rules by guiding and providing a supportive role to state officials towards proper compliance with the regulatory framework and by ensuring generally that state funds are spent cautiously. The Bill

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defines and strengthens central regulatory and oversight authority in the Public Procurement Regulator.

- 3.7. The concern which SASCI holds in this instance is that, it seems that the Public Procurement Regulator is endowed with both powers of enforcement and also appeal and/or review powers in that it could “intervene” in breaches of the law and even “reconsider decisions” made by an institution. The intervention envisaged in clauses 5(1)(e) and clause 5(1)(f) is therefore of great concern.
- 3.8. It is concerning that; the establishment of the Procurement Regulator could demand an enormous budget. The defined function of the office seems to be to assist the government to hold itself accountable. There is therefore need to strike a balance between the service and the costs associated with setting up the function.
- 3.9. Section 4(2) obliges the Head of the Regulator to ensure that the Regulator exercises its mandate “impartially” and “without fear, favour or prejudice”. There are, however, no further mechanisms in the Bill that would effectively enable the Regulator to act in this independent manner.
- 3.10. The Bill provides no guidance on the institutional functioning of the Regulator. For example, the Bill is silent about the appointment or dismissal of the Head of Regulator or to whom this person is accountable.
- 3.11. In terms of the Bill, a procurement Authority would be introduced which has multiple functions. The Authority would be established within the Department of National Treasury with provincial treasuries acting on its behalf in their respective provinces. Provincial treasuries would have the capacity to act of their own accord and to take appropriate action when there is a serious or material breach of the relevant legislation. A Public Procurement Tribunal is established to review administrative decisions taken by provincial treasuries.

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- 3.12. The concern to be raised is that, there should be consistency of functions in all provinces in terms of e.g. processing timelines.
- 3.13. Even though procurement institutions can allow the public to observe their adjudication processes, and they can “publish information” on their procurement proceedings – this is a discretionary power given to the Public Procurement Regulator; it is not an actual duty on the procurement institutions. The procurement institutions are only required to publish the “results” of a procurement process. There is also no clarity on the extent of the “information” that should be published about the adjudication process of procurement. Is this the same as “results”? As a result, we may still have transparency and accountability issues. While the word ‘instruction’ is defined in section 1 of the Bill as an instruction of the Bill as an instruction issued by the Regulator in terms of section 5, however, whether the Bill would be binding or the legal status of the instruction is however not addressed.
- 3.14. The Public Procurement Regulator should be an independent entity separate from the Furthermore, the Regulator is depicted as forming part of the National Treasury, which position would be incorrect as the Regulator ought not to form part of any specific government department, but rather constitute an institution on its own in order ensure complete independence and transparency. Our suggestion is that the status of Regulator be elevated from the current level to the status of a chapter 9 institution. Ideally the office would carry the same clout as that of the Public Protector, considering that it would have oversight over large amounts of taxpayer funds.

Chapter 3: Procurement Integrity

- 3.15. SASCI supports the notions of procurement integrity provisions in the Bill and hopes such can be translated into good governance accordingly. In the same vein part 3 of the chapter provides for the carrying out of feasibility studies for major capital projects. This is clearly a new provision which is very welcome. This provision does not only ensure that the need for the envisaged project is established but also that capacity for the implementation of the project exists and this leads to

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the obviation of wasteful expenditure. Part 4 also makes a review process mandatory. This is an independent peer review process which examines projects at certain key points to determine whether the scheduled deliverables are delivered. This is a good provision because it gauges the progress and the likelihood of success of the project. In addition, the Bill makes reference to quality in section 10 in providing that institutions must obtain value for money in terms of price, quality and delivery having regard to set specifications and criteria. Be that as it may, the criteria against which this value for money is determined are not provided.

Chapter 4: Preferential Procurement

- 3.16. The most contentious provision in the Bill is likely to be the repeal of the Preferential Procurement Policy Framework Act, 2000 which defines the parameters for the current preference points system, generally known as the 90/10 and the 80/20 preference points systems. There, the Bill is short on detail providing instead that the Minister of Finance must prescribe a framework for preferential treatment for categories of preferences, and the protection or advancement of persons, or categories of persons, previously disadvantaged by unfair discrimination. The Bill ought to define a specific preferential procurement system for the award of preference points. Such award is a requirement of sections 217 (2) and (3) of the constitution therefore the legislation which regulates public procurement ought to spell out the rules by which preference points are awarded in procurement contracts. The Minister's discretion seems to be unfettered and it is theoretically possible for the Minister to go for an extreme such as a 95/5 or 50/50 preference points system. Whatever decision the Minister makes, it would be an excellent bet that the decision will be challenged under the provisions of the Promotion of Administrative Justice Act, 2000 or under the rubric of legality. There is no indication when the Minister will publish the framework.
- 3.17. It promotes a more flexible and expanded approach to preferential procurement from black people, women, and disabled people. The bill goes on to formalise some existing practices that are not yet explicitly authorised in South African law, such as geographical set-asides in the allocation of contracts, to businesses located in specific provinces, municipalities, and underdeveloped areas.

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- 3.18. The draft bill requires that the minister of finance determines a preference points system but, unlike the current laws, does not provide any constraint on the way the preference points system is structured. The minister could for example decide in regulations to provide for a preference points system in terms of which 50 points are awarded to price and 50 to preferences.
- 3.19. The minister thus has a wide discretion to determine how the preference points system would function, with no real guidance from parliament and could quickly and easily change that system (though the regulations must be submitted for parliamentary scrutiny). This is arguably unconstitutional as the constitution requires that the framework for preferential procurement must be set out in national legislation — the framework must be determined by parliament rather than by the minister in his sole discretion.
- 3.20. New businesses that are fostered through preferential procurement will likely not be viable and developmental, unless the state incorporates them into processes that reliably compel them to deliver and improve efficiencies, productivity, and adherence to public goals.

Chapter 5: Procurement Methods and Bidding Process

- 3.21. The Minister also has a broad discretion to prescribe types of procurement methods, as well as the requirements and procedure for each type of procurement method in addition to the regulations the Minister is able to make regarding numerous other issues.
- 3.22. The Bill is silent on the various procurement methods that may be used to procure goods, services and works. Since the Bill is meant to repeal all other legislation which regulates public procurement, it is vital that it does in fact prescribe the various methods through which construction works can be procured.
- 3.23. It is disappointing that the Bill does not make provision for the procurement process or even any part of the procurement process to be conducted electronically. The construction industry has started doing so in the form of its Register of Contractors in terms of which contractors that wish

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to contract with the government should apply to do so while complying with certain criteria in order to be placed on the Register. The only indications of the use of technology are found in section 15 of the Bill which provides that “[i]nstitutions must, to the extent possible use information and communication technology to implement any of the procurement methods of this Act” and in section 57(2) which refers to the proceedings of bid committees which must be recorded electronically or in writing. The Bill further simply says in section 5(1)(k) that the use of technology in procurement must be promoted instead of a rule that compels the South African procurement system to become electronic. The legislator thus missed a golden opportunity to create a streamlined electronic procurement system which the construction industry has already started doing to some degree.

- 3.24. Procurement and the bidding process are the heartbeat of any procurement process. The parameters set herein will determine whether one is disqualified from bidding in the first place, or whether the process is not adhered to thereby making procurement and bidding a highly litigious area of law.
- 3.25. SASCI supports clause 38(7) of the Bill states that all procurement must take place in accordance with section 217(1) of the Constitution, which reads as follows, with section 217(2) and (3) regulating the adoption of laws to govern preferential procurement:

217. Procurement.—(1) *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.*

Chapter 6: Supply Chain Management (SCM)



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- 3.26. Rules regarding gender equality, environmental concerns in procurement and human rights violations in supply chains which are currently excluded from the Bill, should be specifically addressed.
- 3.27. SCM is one of the current vulnerabilities in the public health sector system. It is made clear that SCM must comply with specific legal frameworks, including “other applicable legislation”. This implies the Medicines and Related Substances Act; the Foodstuffs, Cosmetics and Disinfectants Act; NRCS; SANAS; etc. (“health sector legislation”). For healthcare professionals bidding to provide services to for example, the Compensation Fund, to municipalities, RAF, etc. the institutions calling for bids often lack understanding of the legal constraints applicable to healthcare professionals, or even health products (e.g. who can prescribe and use certain products, and who can and should bill for it).
- 3.28. The Draft Bill envisages that every institution (e.g. provincial DoH, NDOH, CF, etc.) establish a procurement unit, which must be responsible for ensuring compliance with the law, including the health legislative frameworks. They must render support to line function managers undertaking procurement responsibilities. Each institution must establish a –
- 3.29.1 Bid Specification Committee;
- 3.29.2 Bid Evaluation Committee;
- 3.29.3 Bid Adjudication Committee.
- 3.29. These Committees must be involved in all types of procurement “where the Act requires that a committee be part” – leaving it unclear whether they should also be involved in RFQs and RFPs.
- 3.30. The Draft Bill stipulates how the Committees will be appointed, their specific compositions and functions. The Draft Bill also gives the authority to an institution, via its accounting officer to appoint, in writing “technical advisors and subject experts” to assist in the bid process.

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- 3.31. There is also a provision covering disagreements between the bid evaluation and bid adjudication committees. Rejections by the adjudication. Committee, or the accounting officer rejecting the final recommendation, must all be reported to the relevant treasury. Abuse of the system is prohibited by placing legal duties on the accounting officer in an institution. It also empowers him/her to cancel a contract in cases of misrepresentations, fraud or corruption.
- 3.32. A key element in the Draft Bill is demand management. This covers aspects that have been challenging for suppliers, namely infrastructure and operational requirements, time, price, quality and quality. All institutions must have an annual procurement plan.
- 3.33. Part 4 of this chapter governs acquisition management, which includes management of expenditure on goods and services; procurement in terms of authorized processes; thresholds being complied with and all bid documentation (incl. GCC and SCC) aligning with the Act.
- 3.34. There is a lone section on strategic procurement (also cf. mention thereof in chapter 5), simply requiring of the accounting officer to “apply strategic sourcing principles”, yet those principles are not entrenched in the law as proposed.
- 3.35. Contracts and contract management are mandatory under the Draft Bill. Very specific duties exist, such as ensuring there is a contract register; monitoring of contracts and reporting (not clear to whom); monitoring of contract timelines; SLA’s in cases of transversal agreements; the application of price adjustments; variations and extensions of contracts; performance and non-performance; etc.
- 3.36. Of particular concern to the pharmaceutical industry is logistics management. It is the duty of the accounting officer to ensure “an efficient and effective logistics management system”. It must prevent theft, loss, wastage, and misuse, as well as ensure optimum stock levels, as well as quantity

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and quality of goods. SOPs are required for requisitioning, orders, receipt, distribution, vouchers, and reconciliation. There is also a provision on inventory management.

Chapter 9: Dispute Resolution

- 3.37. This chapter covers different types of dispute management:
- 3.38.1 **Reconsideration** by the institution, who can uphold (in part or in whole), or dismiss such an application;
 - 3.38.2 Reconsideration by the provincial treasury of the decision by the institution, who can uphold (in part or in whole), or dismiss such an application;
 - 3.38.3 Reconsideration of the provincial treasury decision by the Procurement Regulator; and
 - 3.38.4 A Review by the **Public Procurement Tribunal** of either the Procurement Regulator or a provincial treasury.
- 3.38. The composition, functions, term of office, termination, resources, rules, etc. and disclosures of Tribunal and its members are governed by the Draft Bill. The Tribunal can also establish Panels, to ensure that appropriate persons investigate and rule on particular matters.
- 3.39. There are no timelines for the above processes. In some instances, e.g. with capital equipment, installation or removal are required, which could have already commenced, making the reconsideration and possible Tribunal processes, even if won, unrealistic.

Chapter 10: General Provisions

- 3.40. Delegations of the Minister to the DG, and from the DG to any of his/her officials are authorized by the Draft Bill. The same with the Procurement Regulator.
- 3.41. Good faith actions by officials acting under this law are insulated from legal action for losses or damages. There is also a duty on the Procurement Regulator to ensure that all laws, guidelines, and codes, etc. are publicly available.



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- 3.42. The Draft Bill also authorises the establishment of a database of prospective suppliers of goods or services, and only from this database can institutions procure on written price quotations.
- 3.43. Various offences are created, including offences if there are losses of public assets or funds as result of negligence. Corruption must be dealt with under the Prevention and Combating of Corrupt Activities Act, 2004 (“Precca Act”).
- 3.44. Exemptions from this law, by the Minister of Finance, would only be possible if in national defence or security-related procurement. Deviations, to be further detailed in regulations, however, can be authorized by the Procurement Regulator in cases of:
- 3.45.1 exceptional circumstances making it impossible, impractical or uneconomical to comply with this law;
 - 3.45.2 market conditions or behaviour do not allow effective application of the method or instruction;
 - 3.45.3 there is an international agreement binding on the Republic in terms of section 231 of the Constitution; or
 - 3.45.4 national security is likely to be compromised.
- 3.45. The Minister may also authorise deviations from the Regulations, under the conditions stipulated in the Regulation-provision.
- 3.46. Apart from where regulations are envisaged in the Draft Bill through the use of the words “as prescribed”, regulations can be made to cover, for example:
- 3.47.1 The setting of price ceilings;
 - 3.47.2 Pre-qualifications;
 - 3.47.3 Transversal tenders and contracts;
 - 3.47.4 Percentages for contract variations;
 - 3.47.5 Grant funding;
 - 3.47.6 Emergency procurement;

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- 3.47. A good development is that, when regulations would substantially differ to the draft in which it was initially published, such regulations must be re-issued as drafts for comment.
- 3.48. Lastly, as transitional measures, the Draft Bill states that existing bid invitations and all contracts in place when the Bill becomes law, would continue as if the law was not enacted (i.e. under the previous system).

4. Conclusion

- 4.1 SASCI is of the view that there are flaws in the Bill which need to be addressed.
- 4.2 SASCI would also welcome the opportunity to make verbal submissions to the National Treasury and to provide any additional information that could assist the Committee in its work.
- 4.3 By the nature of the activities of SASCI members, in particular, many procedures are technical in nature and require the utilisation of a large variety of technical equipment and devices, including various components of equipment for vascular interventions, structural heart interventions, various pacemaker components, etc. These usually have highly technical specifications and we are anxious that procurement of these items is made under the guidance of experts in the field.
- 4.4 George Nel (SASCI Executive) can be contacted on 083 458 5954 and sasci@sasci.co.za

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Tel - 083 458 5954 - Fax 086 603 9885 - sasci@sasci.co.za - www.sasci.co.za

