

GAUTENG PROVINCIAL GOVERNMENT

**GAUTENG FINANCE MANAGEMENT SUPPLEMENTARY ACT  
AMENDMENT BILL**

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*As introduced by the MEC for Finance;*

*Explanatory Summary of Bill published in Provincial Gazette No. of 2018*

*(The English text is the official text of the Bill)*

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**[G —2018]**

**GENERAL EXPLANATORY NOTE:**

[            ] Words in bold type in square brackets indicate omissions from existing enactments.

\_\_\_\_\_ Words underlined with a solid line indicate insertions in existing enactments.

## **BILL**

**To amend the Gauteng Finance Management Supplementary Act, 2000 (Act No. 1 of 2000) by introducing provisions intended to promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of provincial departments and provincial public entities when contracting for goods or services; to establish the Gauteng Bid Appeals Tribunal; to repeal obsolete provisions; and to provide for matters connected therewith.**

**BE IT ENACTED** by the Provincial Legislature of Gauteng as follows:—

### **Amendment of the long title of 1 of Act 1 of 2000**

1. The long title of the Gauteng Finance Management Supplementary Act, 2000 (hereinafter referred to as “the principal Act”) is hereby amended by substituting for it the following:

“To give effect to certain provisions of the Public Finance Management Act, 1999, in the Province; to promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of provincial departments and provincial public entities when contracting for goods or services; to establish the Gauteng Bid Appeals Tribunal; to repeal the Provincial Exchequer Act, 1994; and to provide for matters in connection therewith”

### **Amendment of section 1 of Act 1 of 2000**

2. Section 1 of the principal Act is hereby amended by substituting the following section for section 1:—

“(1) In this Act, unless the context otherwise indicates, any meaning ascribed to a word or expression in section 1 of the Public Finance Management Act, 1999 must bear the meaning so ascribed, and—

‘MEC’ means the member of the Executive Council of the Province responsible for finance in the province;

‘probity audit’ means the independent review of the process through which provincial departments and provincial public entities contract for goods and services to ensure its compliance with legislation and relevant prescripts;

‘Province’ means the province of Gauteng;

‘Tribunal’ means the Gauteng Bid Appeals Tribunal established in terms of section 3D.

‘the Act’ means the Public Finance Management Act, 1999 (Act No. 1 of 1999)[.];

‘this Act’ includes any regulations and instructions in terms of section 3D.

### **Repeal of section 3 of Act 1 of 2000**

3. Section 3 of the principal Act is hereby repealed.

### **Insertion of sections 3A, 3B, 3C and 3D**

4. The following sections are inserted in the principal Act after section 3:—

‘Probity advisory on bid specifications

3A(1) The accounting officer or accounting authority of a provincial department or provincial public entity, as the case may be, when contracting for goods or services exceeding the amount determined by the provincial treasury, must ensure that prior to publishing an invitation to bid—

- (a) the bid specification in relation to that invitation to bid is assessed by an auditor designated by the provincial treasury for accuracy, completeness and technical compliance; and
- (b) a report is issued by the auditor referred to in paragraph (a) to the effect that all prescribed requirements have been adhered to before the invitation to bid is published.

### **Probity auditing**

3B(1) The accounting officer or accounting authority of a provincial department or provincial public entity, as the case may be, when contracting for goods or services exceeding the amount determined by the provincial treasury, must ensure that—

- (a) meetings of the bid specification and bid evaluation committees are attended by an auditor designated by the provincial treasury;
- (b) the auditor referred to in paragraph (a) must probe the bid specification and bid evaluation process to ensure its compliance with legislation and relevant prescripts; and
- (c) the auditor contemplated in paragraph (b) must issue a report providing assurance of compliance with

paragraph (b) prior to the bid adjudication committee considering the recommendations of the bid evaluation committee.

(2) Compliance by an accounting officer or accounting authority of a provincial department or provincial public entity, as the case may be, with subsection (1) does not divest the accounting authority or accounting authority of the responsibility in terms of the Act to ensure that the process concerned is compliant with legislation and relevant prescripts.

### **Adjudication of tenders in public**

3C(1) The accounting officer or accounting authority of a provincial department or provincial public entity, as the case may be, when contracting for goods or services exceeding the amount determined by the provincial treasury, must ensure that—

- (a) the details of the closing date in respect of each public invitation to bid issued by that provincial department or provincial public entity, as the case may be, and the dates on which the bids submitted in response to such public invitation to bid will be evaluated and adjudicated are published in the manner and form determined by the provincial treasury;
- (b) the provincial department or provincial public entity, as the case may be, gives adequate public notice of meetings of its bid adjudication committees at which bids will be considered in the manner and form determined by the provincial treasury; and
- (c) meetings of the bid adjudication committees at which

reports of bid evaluation committees are presented for consideration are made open to members of the public.

(2) Members of the public who attend meetings of bid adjudication committees contemplated in paragraph (c) may observe the proceedings of those meetings, but must not participate in those proceedings.

### **Bid Appeals Tribunal**

3D(1) The MEC must by notice in the *Provincial Gazette* establish an independent and impartial tribunal in the Province to be known as the Bid Appeals Tribunal.

### **Appeals**

3F(1) Any bidder aggrieved by a decision of a department or public entity when contracting for goods or services may appeal against such decision to the Tribunal in the prescribed manner within 30 days of the decision published.

### **Regulations**

3G(1) The provincial treasury may make regulations or issue instructions applicable to provincial departments and provincial public entities concerning or relating to—

- (a) any matter which in terms of this Act is required to be prescribed or determined; and
- (b) generally, all matters which the provincial treasury considers necessary or expedient to prescribe or

determine in order that the purposes of this Act may be achieved, and the generality of this provision shall not be limited by the preceding paragraphs of this subsection.

(2) A treasury regulation or instruction in terms of this section may-

(a) differentiate between different categories of—

(i) provincial departments and provincial public entities, as the case may be;

(ii) accounting officers; or

(iii) accounting authorities; or

(b) be limited in its application to a specific category of —

(i) provincial departments and provincial public entities, as the case may be;

(ii) accounting officers; or

(iii) accounting authorities.”

### **Short title and commencement**

5. This Act is called the Gauteng Finance Management Supplementary Act Amendment Act, 2018, and comes into operation on a date determined by the Premier by proclamation in the *Provincial Gazette*.

## **MEMORANDUM ON THE OBJECTS OF THE GAUTENG FINANCE MANAGEMENT SUPPLEMENTARY ACT AMENDMENT BILL, 2017**

### **1. BACKGROUND**

All over the world, the tender system through which the state contracts for goods and services is known as an avenue through which corruption, and associated ills are facilitated, thus negating the original pro-competitive effects of the system.

One of the shortcomings with the current system of adjudication and award is insufficient transparency: a committee meets in a boardroom, concealed from the public, to deliberate and reach a decision. Information regarding how the decision in issue was made is not readily available: an interested party has to avail him/herself of the often-laborious process under PAIA in order to obtain insight into the factors that influenced the decision. This only fuels the perception of rampant nepotism, bribery and corruption in government contracts, something that any government can ill-afford.

The lack of transparency (and therefore public accountability) in relation to the adjudication often leads to speculation about the actual motives for the eventual decision. This, coupled with the already contaminated public perception of rampant corruption in the public sector makes it all too easy for people to speculate that the motives behind a particular decision are less than honourable.

The probity auditing and adjudication in public is one of the ground-breaking policy initiatives pioneered by the fifth administration of the Gauteng Provincial Government (“GPG”). Through this initiative Gauteng will strengthen clean governance and enhance integrity across all provincial departments and provincial public entities.

The initiative was first announced by the Premier during his 2014 State of the Province Address as part of Transformation, Modernisation and Reindustrialisation Programme. The Gauteng Provincial Treasury (“GPT”) has piloted the process since the early days of the fifth administration, with encouraging results.

The fifth administration introduced this innovation to promote accountability, transparency, integrity and public observation regarding all decisions made when contracting for goods and services, in large part to demonstrate in practice our government’s commitment to eradicate corruption in the public sector, and in recognition of the fact that clean governance, integrity and transparency are vital elements in instilling greater public confidence in government and its processes, in particular contracting for goods and services.

It is for these reasons that the promulgation of Gauteng Finance Management Supplementary Act Amendment Bill, 2017 (“the Bill”) is proposed, intended to introduce provisions into the existing Gauteng Finance Management Supplementary Act, 2000 (“the principal Act”), designed to promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of provincial departments and provincial public entities when contracting for goods or services.

## **2. PURPOSE OF THE BILL**

The purpose of the Bill is to introduce provisions into the principal Act to increase transparency, public accountability, and integrity in public procurement processes by providing for probity advisory on bid specifications, adjudication of tenders in public, the auditing of certain procurement processes; the establishment of the Gauteng Bid Appeals Tribunal; and to provide for matters connected therewith.

### 3. DISCUSSION

The main object of the Bill is to address the following central problems in the process of contracting for goods and services:

- Nepotism, fraud, corruption and bribery, as well as unethical practices, in the process through which the state contracts for goods and services;
- The prevention of irregular expenditure through the improved internal control environment; and
- The lack of transparency (and therefore public accountability) in relation to the actual adjudication, leading to speculation about the actual motives for the eventual contracting decision.

Thus the objectives of the Bill are to institutionalise legally binding norms intended to:

- Open the adjudication process to public observation in order to re-build public confidence in the system through which provincial departments and provincial public entities contract for goods and services;
- Empower black owned businesses through access to business opportunities in the process of contracting for goods and services. As the Premier said during the 2014 State of the Province address, “[*]let us empower black people . . . unashamedly, transparently and ethically. I believe we can*”;
- Mitigate the risk of corruption and manipulation in the process through which the provincial department or provincial public entity contracts for goods and services;

- Re-institute core standards of behaviour, to promote ethical leadership and professionalism in the process through which the provincial department or provincial public entity contracts for goods and services; and
- Strengthen internal controls and environment by subjecting the process through which the provincial department or provincial public entity contracts for goods and services to probity audit.

The contracting for goods and services process which this Bill seeks to give the force of law comprises three main elements, being:

- Probity advisory on bid specifications prior to approval for publication;
- The public observation of meetings of the bid adjudication committees at which decisions are taken in relation to the process through which the provincial department or provincial public entity contracts for goods and services; and
- Probity auditing of the evaluation process.

These elements are discussed briefly in turn.

### **Probity advisory on bid specifications**

It is a truism that well-prepared bid documentation gives suppliers the opportunity to prepare good proposals, which in turn ensures a good contracting result. Bid specifications of poor quality often lead to significant problems further down the value chain.

It is for this reason that the Bill introduces a requirement that bid specifications be externally reviewed by an auditor designated by the GPT prior to publication to ensure that the bid specification is

technically compliant. In this regard, the auditor concerned considers the accuracy and completeness of the bid specification, identifies any areas of ambiguity or vagueness in the document, determines whether there is a proper link-up between the institutional contracting requirement and the evaluation criteria, and reviews whether the draft specification complies with the relevant Treasury instructions.

Where the external auditor identifies any concerns, these are brought to the attention of the relevant provincial department or provincial public entity and are addressed prior to the approval of the bid specifications for publication. In this way, a number of difficulties in the preparation of bid specifications (which may later have turned out to be material, even fatal) have been identified at a stage when they could still be rectified without derailing an already advanced process.

### **Public observation of bid adjudication**

In the normal course, the actual adjudication of a tender is conducted by a Bid Adjudication Committee (“BAC”) behind closed doors. Neither the competing bidders nor interested members of the community (which the goods and or services are supposed to benefit) have insight into what considerations influenced the contract award in issue.

Thus the second element of the transparency measures introduced by this Bill is about demonstrating a commitment to fight fraud and corruption in the contracting value chain by opening the process of contracting for goods and services to public scrutiny so that citizens can see how government complies with the constitutional principles of fairness, equity, transparency, competitiveness and cost-effectiveness in the award of each contract. It is about demystifying public sector corruption by sharing information related to all steps

of the process to contract for goods and services and seeking feedback on how to enhance the process.

The Bill achieves this by obliging provincial departments and provincial public entities to ensure that meetings of their bid adjudication committees, where the majority of contracting decisions are taken, are open to the public in order to create the necessary space and environment for the populace to observe firsthand proceedings of the BAC.

### **Probity auditing**

The Bill also introduces a requirement for probity auditing of all bid evaluations above a certain threshold (currently intended to be pegged at R2 million) by external auditors appointed by the GPT who observe the process for total compliance with the laws and regulations and ensure that there is no maladministration and collusion.

Probity auditing contemplates two concurrent processes. The *first* is that an external auditor is required to be present at all stages of the process, commencing with the public opening of bids and the evaluation of bid submissions by the BEC. The object of this is to close down the space for any possible malfeasance, such as collusion among bid committee members or the coercion of some of them to go along with unlawful or unethical conduct.

The *second* leg of probity auditing is the actual auditing of the process followed and the documentation generated in the process for compliance with the prescripts set out in the relevant legislation and Treasury instructions. The entire value chain is subjected to an audit to *inter alia* eliminate the possibility of criteria being invented during the evaluation process.

In this sense, probity auditing provides a level of assurance that a

particular contracting process was conducted in a manner that is fair, equitable and defensible. Through probity auditing of tenders, deficiencies in the internal control environment are identified and corrective measures implemented to prevent repetitive errors.

#### **4. Gauteng Bid Appeals Tribunal**

Disputes and complaints regarding public procurement decisions are commonplace. Litigation comes at a significant cost for both the aggrieved tenderer who challenges a procurement decision and the GPG which has to defend that decision.

In order to ameliorate this difficulty, the Bill introduces provisions to establish a provincial tribunal to deal with all complaints and adjudicate disputes arising from procurement decisions.

#### **5. CONSTITUTIONAL IMPLICATIONS**

Section 104 read with section 114 of the Constitution of the Republic of South Africa, 1996 gives a provincial legislature the authority to pass legislation for its province.

The existing Gauteng Finance Management Supplementary Act, 2000, is legislative precedent for the enactment of provincial legislation regarding financial matters.

The Bill is intended to be complementary to the provisions of the Public Finance Management Act, 1999, as regards public promoting and enforcing transparency and effective management in respect of expenditure of provincial departments and provincial public entities when contracting for goods or services by provincial departments and provincial public entities.

#### **6. LEGAL IMPLICATIONS**

The bedrock of the process is section 217 the Constitution, which requires that when an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

The regulatory framework that is in place to give effect to this constitutional injunction in the national and provincial spheres of government comprises an interconnected and intricate web of original and delegated legislation and policy pronouncements. Primary among these is the Public Finance Management Act, 1999 (“PFMA”), and Item 16A of the Treasury Regulations, 2005 which regulate *inter alia* the contracting by organs of state for goods and services.

The GPT has also issued its own practice notes for the Province, which are supplementary to the legislative framework and National Treasury guidelines and practice notes already referred to.

Thus the Bill is intended to complement (rather than contradict) the existing provisions of this legislative scheme in order to improve public confidence in the process by which provincial departments and provincial public entities contract for goods and services and public accountability in relation thereto.

It is therefore unlikely that the provisions of this Bill will be in conflict with the existing scheme. Section 3(3) of the PFMA is a specific trumping clause which ensures that the PFMA prevails over any other legislation in the event of conflict.

## **7. SOCIAL IMPLICATIONS**

Without deliberate and focussed strategic and ethical

implementation of the public contracting process, leakages of public resources intended for the millions of economically disadvantaged South Africans will continue, redounding to the ultimate disadvantage of these intended beneficiaries. Corruption bears a large measure of responsibility for poor service delivery of social services and basic public goods and has resulted in escalating social unrest in an increasing number of low-income communities.

The implementation of the provisions of this Bill will demonstrate in practice government's commitment to eradicate corruption from the processes through which the state contracts for goods and services, thus improving public confidence in process and public accountability in relation thereto.

Not only will the implementation of the Bill open the process to public scrutiny in order to re-build public confidence therein, but it will empower black owned businesses through access to business opportunities in the open tender process. As the premier said during the 2014 State of the Province address, "*[[ ]let us empower black people . . . unashamedly, transparently and ethically. I believe we can*".

## **8. ENVIRONMENTAL IMPLICATIONS**

None.

## **9. FINANCIAL IMPLICATIONS**

The costs associated with the public observation of bid adjudication meetings are unlikely to be significant. Generating the required publicity to make members of the public aware of a forthcoming meeting of the BAC is expected to have minimal financial

implications as electronic media is predominantly used and, to the extent that the public media is used to communicate, the GPG has good relations with community radio stations, where it has complimentary advertising.

The two elements, i.e., probity advisory on bid specifications and probity audits that have fiscal implications of some degree.

It is envisaged that in the short to medium term, while the GPT builds the necessary internal auditing capacity, external auditors will be employed to conduct probity advisory on bid specifications and probity audits, and they charge on a time basis. By way of illustration, during the 2016/17 financial year, 75 probity audits were conducted at an average cost of R200 000, 00 per audit.

When one considers the value of these transparency and accountability measures the average cost per audit is justified. The singular advantage of external review of bid specifications and probity audits is that irregularities are detected at a time when they can still be cured or, in the extreme cases, when the process of contracting for goods and services can still be cancelled and reissued without exposing the relevant provincial department or provincial public entity to legal action founded on an irregular process. The advantage of this both in terms of saved legal costs and in terms of avoidable interruptions to service delivery outweigh the cost.

However, it would appear that extending the probity advisory on bid specifications and probity audit pillars to all projects for which contracting of goods and services will be required in the province is not cost-effective. Thus the Bill contemplates the external review of bid specifications and probity auditing for contracts with a minimum value of R2 000 000, 00. This is expected to cost an estimated R35 000 000.00 *per annum*, which can be

accommodated within the projected appropriations to the GPT over the current MTEF period.

As the GPT will completely fund the external review of bid specifications and probity audits, the issue of the ability of provincial departments and provincial public entities to afford the cost of the probity audits does not arise.

## **10. ORGANISATIONAL AND PERSONNEL IMPLICATIONS**

None.

## **11. COMMUNICATION IMPLICATIONS**

The decision to introduce provincial legislation to institutionalise the these transparency and accountability measures was presented in the medium term budget policy statement for 2016 and the provincial adjustment appropriation for 2016/17.

Accounting Officers have been informed about the decision to introduce such provincial legislation.

The draft bill will be published for a 30 day period in which community roadshows will be conducted to allow members of the public to participate on the draft Bill.

Once the draft Bill is introduced in the provincial legislature, further and wider consultation of stakeholders will be conducted by the provincial legislature in terms of its rules.

## **12. CONSULTATION**

The GPT will be consulting:

- The National Treasury;

- All provincial departments and public entities;
- Organised labour; and
- Organised business.

### 13. **CLAUSE BY CLAUSE EXPLANATION OF THE BILL**

**Clause 1** amends the long title of the principal Act in order to reflect the object of promoting and enforcing transparency and effective management in respect of revenue, expenditure, assets and liabilities of provincial departments and provincial public entities when contracting for goods or services;

**Clause 2** amends section 1 of the principal Act in order to insert new definitions, none of which are novel.

**Clause 3** repeals section 3 of the principal Act, which has served its purpose and has thus become obsolete.

**Clause 4** inserts a new sections 3A, 3B, 3C and 3D into the principal Act:

- section **3A** which provides for probity advisory on bid specifications prior to the invitation of bids in respect of the process to contract for goods and services above a monetary threshold to be prescribed by regulation;
- section **3B** provides for the compulsory probity auditing of the bidding processes in respect of the process to contract for goods and services above a prescribed threshold initiated by provincial departments and provincial public entities by auditors designated by the Provincial Treasury;
- section **3C** provides for the compulsory public observation of meetings of the bid adjudication committees of provincial

departments and provincial public entities at which contracting decisions are made;

- **Clause 3D** seeks to establish the Gauteng Bid Appeals Tribunal (“Tribunal”).
- **Clause 3E** provides for the composition and functioning of the Tribunal;
- **Clause 3F** provides for the powers of the Tribunal to consider appeals by bidders aggrieved by procurement decisions of provincial departments and provincial public entities and, in appropriate cases, to recommend to the MEC the setting aside of those decisions and remitting them to the institutions concerned for reconsideration, with or without directions; and
- section **3G** provides for the power of the Provincial Treasury to make regulations or issue instructions applicable to all provincial departments and provincial public entities.

**Clause 5** contains the short title of the Act.