

## Supply Chain Management Policy Review Report

### 1. STRATEGIC THRUST

The City identified eleven (11) Priority Areas that the SDBIP, IDP and budget aim to achieve. The applicable priority for this report is:

Priority 1: Good Governance

Priority 2: Financial Sustainability

### 2. OBJECTIVE

To submit to EMT, Mayco and Council the revised CoJ SCM Policy in accordance with section 111 of the Municipal Finance Management Act, 56 of 2003 ("MFMA").

#### SUMMARY

- 2.1. In terms of Section 111 of the MFMA, each municipality must have and implement a SCM policy and that policy should be reviewed annually to ensure it complies with all new legislative requirements and any policy intervention that Council wants to introduce in order to stimulate economic growth and greater participation in the City.
- 2.2. The City of Johannesburg (CoJ) has embarked on a process to amend its SCM Policy, which was last adopted in 2019.
- 2.3. This report outlines the amendments that have been made in the revised CoJ SCM Policy.

### 3. INPUTS AS SUBMITTED BY VARIOUS STAKEHOLDERS

- 3.1. The following input was received and included in the revised policy: -

**Group Finance Exco**  
**CoJ Executive Management Committee (EMT)**  
**CoJ Mayoral Committee (Maycom)**  
**CoJ Council.**

No.	Comment / Input	Amendment
1.	Include a section on "Advertisements, notices and Communications to Local Community"	Included as clause 17
2.	Include a section on "Community-Based suppliers	Included as clause 18
3.	Include a section on "Cancellation and re-invitation of bids"	Included as clause 22.33
4.	Include a section on "Emergency Dispensation"	Included as clause 22.31
5.	Include a section on "Expediting Orders"	Included as clause 26.5
6.	Include a section on "Vetting of SCM employees"	Included as clause 7.4
7.	Include definitions of "PPPFA, BEC and BSC"	Included in the table at clause 4.1
8.	In terms of clause 7.7 - It must be mentioned that all deviation report irrespective of the amount are also subjected to probity to check compliance with relevant legislations.	Included at clause 7.7.2
9.	<p>Include in Acquisition Management the following: "When procuring goods or services in terms of Section 110(2) of the Municipal Finance Management Act, the Accounting Officer must make public the fact that such goods or services are procured otherwise than through the Municipalities supply chain management system, including:</p> <ul style="list-style-type: none"> <li>1. the kind of goods or services; and</li> <li>2. the name of the supplier</li> </ul> <p>The way of make the procurement public must be clearly defined so that there is no ambiguity of what is expected to be done.</p>	This has been included in clause 13.2
10.	Clause 20.1 – bid documents, to include the following: "if the value of the transaction is expected to exceed R 10 million (VAT included) – it must be also mentioned whether it is applicable to transactions procured via deviation"	This has been included in the section on deviation at paragraph 22.30.3
11.	Page 39 and 45 clause 20.1.1.4 and clause 20.3.7 seem to be the same.	20.3.7 has been deleted accordingly

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No.	Comment / Input	Amendment
12.	Clause on-site inspections – to include “Site inspections /clarification meetings in respect of bids exceeding R 200 000.00 will in general not be compulsory”	This has been included at paragraph 22.4.1
13.	Section 20.21 on procurement of goods and services under contracts secured by other organs of state – the cross reference was incorrect	The cross reference has been amended
14.	Consistency to be used for GCFO and either Accounting Officer or City Manager	GCFO has been used throughout the policy.  City Manager has been used throughout the policy except for the relevant definitions
15.	Section 7.5: Roles and Responsibilities of User Departments - Hybrid approach (user and SCM) in the chairing of bid committees - currently only user departments are chairing	Paragraph 7.5.4 has been included
16.	Roles and Responsibility of Probity - “Develop the enquiry” – this is unclear as to what it means;	7.7.4.6 has been reworded to “development of the tender document”
17.	Minor punctuations to be corrected	8.2.1 – amended accordingly.  22.13.1 – amended accordingly.  22.13.7 – amended accordingly.  22.16.2 – amended accordingly

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No.	Comment / Input	Amendment
18.	Oversight role of the Council of the City - The Municipal Entities have one shareholder, which is the Parent (COJ). "Or-shared" is inapplicable to MOEs as they have a sole-shareholder.	"Shared" has been removed
19.	Range of Procurement Processes - This should be aligned to the values outlined in the Local Government: MFMA Act 56 of 2003. Municipal Supply Chain Management Regulations 12(1)	This has been amended accordingly
20.	Formal written price quotations - Acceptable offers above R30 000 (thirty thousand rand) (including VAT) are subjected to the preference points system and must be awarded to the most <b>adhering or compliant responsive offer to the specifications</b>	This has been amended accordingly in paragraph 21.1.6
21.	Section 20.1.1.7: Bid Documents – to be deleted	This has been deleted
22.	Section 50: Commencement - This policy shall commence on the date that it <b>has adhered and served at all COJ governance structures and finally is approved</b> by Council	Paragraph 52.1 has been amended accordingly

3.2. The following input was received and noted; however, no amendments were made: -

No.	Comment / Input	Reason / response
1.	Clause 14.2 – range of procurement process - Petty Cash – request to revise it to from R nil to R 5000 inclusive of VAT – considering the rising cost of living and the cost of emergencies which the department normally had to address. A possible separation from general petty cash and ICT Petty Cash can also be considered	The amount of R2000.00 is in accordance with the MFMA Regulation 12(1). According to the regulations, the Accounting Officer can decrease the amount but not increase it.
2.	R 5 million Rand Limit on City of Johannesburg Supply Chain Management Policy. Request from Group Information Communication Technology and Information Management department is the	There is no limit imposed in the policy – not sure how to amend

No.	Comment / Input	Reason / response
	<p>R 5 million Rand limit on the Supply Chain Management Policy, when panels are setup to be reviewed. The review should be based on the following:</p> <ul style="list-style-type: none"> <li>• The limit might be applicable and practical to implement on Non-ICT Panels, however, it is not practical for information Communication Technology (ICT).</li> <li>• Information Communication Technology solutions cost more than R 5 million on a single transaction. Meaning that if the limit is enforced it renders the ICT Panel meaningless as it will require that every time one has a solution that will be over R 5 million an open tender route must be set in motion.</li> </ul> <p>The department request the limit for transaction for ICT Panels to be reviewed as follows:</p> <p>R 50 million to be set as limit per transaction on procurement of software-based ICT Solutions. This in some cases might include infrastructure.</p> <p>R 120 million to be set as a limit per transaction on procurement of ICT infrastructure.</p>	
3.	<p><b>Standardization of ICT Infrastructure</b></p> <p>To assist the City of Johannesburg to reduce the total cost of ownership of IT systems. That includes hardware, software, management and support, communication, user experience, training, as well as in cost downtime and other productivity losses. The best way to achieve that is through standardizing the ICT infrastructure.</p> <ul style="list-style-type: none"> <li>• Technology standardization is the process of positioning applications and</li> </ul>	<p>This comment relates more to processes and should be properly outlined in the IT Strategy in order to avoid the policy becoming too bulky and process orientated.</p>

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	<p>ICT infrastructure to a baseline of standards that fit the city's business strategy, security policies, and goals. Standardized technology reduces complexity and offers benefits such as cost savings through economies of scale, ease of integration, improved efficiency, and better ICT support. It also simplifies management of ICT environment.</p> <p>With the reason above the department suggest the inclusion on the Supply Management Policy a process to be followed when engaging Original Equipment Manufacturers (OEM) with the view of standardizing ICT infrastructure and solutions within the City of Johannesburg environment. Process must cover, Guidelines for invitations of Original Equipment Manufacturer (OEM) to do presentation of their equipment and provide equipment for testing purposes.</p>	
4.	<p><b>Procurement of services from municipal entities</b></p> <p>The department request the inclusion in the Supply Chain Management Policy the procurement of services from the Municipal Entities. The provision must be in line with the founding documents of the specific entity providing such service as well as the Service Delivery contract signed between the City core and the entities.</p>	<p>Paragraph 22.20.1 indicated that the services can be provide by entering into a service delivery agreement. Therefore, the service delivery agreement will be founding document which regulates the relationship</p>
5.	<p><b>Guidelines on methodology in use of Panels</b></p> <p>Guidelines or options of methodologies to use when panels are put in place. The department</p>	<p>Paragraph 22.29.1 states that the panel must be utilized on a rotational basis. Further guidelines</p>

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No.	Comment / Input	Reason / response
	suggests that guidelines in terms of rotation and equitable share of business in the City be explicitly clear.	are contained and referenced in the procedure manual as were asked to limit processes in the policy
6.	Range of the procurement process and page (35) Written and verbal quotations – the two sections seem to be in conflict with one another, written quotations are stated as being within R2 000 to R200 000, however in section 18 reference is still made to written quotations of below R30 000.	The reference to R30 000 is in accordance with the Treasury Note SCM INSTRUCTION NO. 02 OF 2021/22 as well as the PPPFA
7.	Reporting by the City to Department of Trade and Industry - The Local Government: MFMA Act 56 of 2003 (updated on the 20th of January 2017) does not give legal authority to discriminate	Regulation 8(1) of the PPPFA Regulations: empowers the DTI to designate specific industries/sectors, where only locally manufactured products that meet the stipulated minimum threshold for local content will be considered.  Regulation 8(2): states that organs of state must include local content in their bid invites
8.	Reporting by the City to Department of Trade and Industry - What informs these values? Have we paid attention to the information protection guidelines	The amounts are part of the current CoJ SCM Policy, they are also contained in the Treasury Guidelines in particular NATIONAL TREASURY PRACTICE NOTE NO 9 OF 2007/2008  The protection of personal information act has been considered and the reporting

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No.	Comment / Input	Reason / response
		requirements still need to be complied with
9.	Publication of reports on the official website of the city - As stated by in the MFMA s.125	S125 of the MFMA deals with disclosures in the annual financial statement – not sure how this is to be included in the publication of reports section
10.	Bid documents - Increase as guided by the Construction Guideline and reference the guideline	The percentage is in accordance with the STANDARD FOR UNIFORMITY IN ENGINEERING AND CONSTRUCTION WORKS CONTRACTS as obtained from the CIDB website
11.	Bid Documents - The City Manager may determine a closing date for the submission of bids which is less than the <b>30- or 14 -days</b> requirement, but only if such shorter period can be justified on the grounds of urgency or emergency or any exceptional case where it is impractical to adhere to the official advert period or closing period thereof.	This is as contained in the policy
12.	Annexure C - <b>Local Government: MFMA Act 56 of 2003</b> <b>Municipal Supply Chain Management Regulation</b>	The comment has been noted; however, it is not advisable to annex the regulations to the policy. Section 5 of the policy states that "the policy must be read at all times with all pieces of legislation as stipulated below. The MFMA Regulations are included

**4. CASE LAW USED FOR LESSONS LEARNT AND THE IMPACT ON THE POLICY**

4.1. The following cases were considered when revising the CoJ SCM Policy: -

No.	Case	Section implicated	Revision
1.	Minister of Finance v Afribusines NPC [2022] ZACC 4 (Constitutional Court	PPPFA Regulations - According to the judgment handed down	This has been catered for in the amendment clause of

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No.	Case	Section implicated	Revision
	Judgement, decided on 16 February 2022 Minister of Finance v Sakeliga NPC (previously known as Afribusiness NPC) and Others [2022] ZACC 17 (Constitutional Court Judgement, decided on 30 May 2022)	by the Constitutional Court, the 2017 PPPFA Regulations will remain in place until 26 January 2023 unless new regulations are promulgated before that date	the proposed revised policy under clause 5.5
2.	Joubert Galpin Searle and Others v Road Accident Fund and Others [2014]	Validity Period - For an extension of the validity period to be valid, it must have been sent out and accepted by the bidder before the expiry of the validity of the period and any extension issued after the expiration of the validity period is invalid	The bid validity period has therefore been included in clause 20.6
3.	<i>Telkom SA Limited v Merid Training (Pty) Ltd &amp; others; Bihati Solutions (Pty) Ltd v Telkom SA Limited &amp; others</i> [2011] ZAGPPHC 1		

**5. A LIST OF ALL NATIONAL TREASURY CIRCULARS ISSUED SINCE 2019**

5.1. The following National Treasury Circulars were considered during the revision of the CoJ SCM Policy: -

No.	Circular & Date	Title	Description
1.	MFMA Circular No 96 – 24 July 2019	SCM Regulation 32: procurement of goods or services under contracts secured by other organs of state.	Provides further elaboration to municipalities and municipal entities on the principles captured in regulation 32 of the Municipal Supply Chain Management Regulations 2005 (SCM Regulations) when procuring goods or

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No.	Circular & Date	Title	Description
			services from contracts secured by other organs of state.
2.	MFMA Circular No.97 – 31 July 2019	Municipal Cost Containment Measures	This circular confirms and clarifies the process followed to promulgate the Municipal Cost Containment Regulations and provides more information to municipalities and municipal entities to assist with implementation.
3.	MFMA Circular No 110 – 31 May 2021	Unfair Criteria used in the bidding process relating to infrastructure procurement and the charging of excessive fees for tender documents.	Purpose of the circular is to notify municipalities and municipal entities that using membership of voluntary associations as a measure for eliminating bidders from an infrastructure procurement process, as well as charging excessive fees for tender documents, goes against the spirit and letter of the SCM regulatory framework.
4.	PPPFA Circular 1 of 2021/22 – 23 July 2021	Application of formulae in regulations 6(1) and 7(1) of the Preferential Procurement Regulations, 2017 on disposal, leasing and other income generating procurement	Minister of Finance has exempted organs of state to which the PPPFA and the 2017 Regulations apply from complying with the formulae prescribed in regulations 6(1) and 7(1) of the 2017 Regulations in respect of the disposal and leasing of state assets and other income generating tenders.
5.	National Treasury Designated Sectors Circular Number 1 of 2020/2021 – 21 February 2022	Invitation and Evaluation of Bids with a stipulated minimum threshold for local production and content for: - <ul style="list-style-type: none"> <li>• Steel Power Pylons</li> <li>• Monopole Pylons</li> <li>• Steel Substation Structures</li> <li>• Powerline Hardware</li> <li>• Street Lighting Steel Poles</li> </ul>	This circular introduces amendments to Instruction Note Number 9 of 2016/2017, that designated steel power pylons, monopole pylons, steel substation structures, powerline hardware, steel lattice towers & masts and street lighting steel poles for 100% local procurement.

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No.	Circular & Date	Title	Description
		• Steel Lattice Towers and Masts	The amendments contained in the new Circular seek to clarify the list of products and components included in the Instruction Note Number 9 of 2016/2017.
6.	PPPFA Circular 01 of 2022/23 – 22 June 2022	Communication on constitutional court judgment regarding Preferential Procurement Regulations, 2017	Inform organs of state of the judgment of the Constitutional Court handed down on 30 May 2022 on the application of the Minister of Finance seeking clarity on its judgement of 16 February 2022; and to advise organs of state of the impact of the judgment by the Constitutional Court. The regulations will remain valid until 26 January 2023 unless new regulations are promulgated before that date.

**6. A LIST OF PRACTICE NOTES ISSUED SINCE 2019**

6.1. The following National Treasury Practice Notes / Instruction Notes were considered during the revision of the CoJ SCM Policy: -

No.	Practice Note / Instruction Note & Date	Title	Description
1.	National Treasury SCM Instruction No. 1 of 2019/2020 – 11 April 2019	Repeal of National Treasury SCM Instruction No. 5 of 2016/2017 dealing with payment due to suppliers / creditors within 30 days	Repeal of Instruction no. 5 of 2016/2017 that dealt with non-payment of suppliers within the prescribed period of 30 days and to communicate the new process that suppliers must

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No.	Practice Note / Instruction Note & Date	Title	Description
			follow to lodge complaints pertaining to late payments
2.	National Treasury Instruction No. 3 of 2019/2020 – 26 April 2019	Framework for Infrastructure Delivery and Procurement Management	The purpose of the notice is to prescribe minimum requirements for the implementation of the Infrastructure Delivery Management System (IDMS) through the Framework for Infrastructure Delivery and Procurement Management.
3.	National Treasury Instruction No. 08 of 2019/2020 – 19 March 2020	Emergency procurement in response to the National State of Disaster	Facilitate emergency procurement to deal with the Covid 19 pandemic which was declared a national state of disaster and to avoid the abuse of the SCM System to deal with the disaster.
4.	National Treasury Instruction No. 05 of 2020/21 – 28 April 2020	Emergency Procurement in response to the National State of Disaster	Prescribes emergency procurement procedures to deal with Covid-19 pandemic and to avoid the abuse of the SCM system and deal with the disaster
5.	National Treasury Instruction No. 11 of 2020/2021	Procurement in response to the National State of Disaster regarding the COVID-19 pandemic and repeal of instruction note 5 of 2020/2021	Repeal of Instruction no. 5 of 2020/21; prescribe maximum prices for identified PPE items including masks and prescribe conditions service providers

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No.	Practice Note / Instruction Note & Date	Title	Description
			must comply with in order to provide PPE items
6.	National Treasury Instruction No. 3A of 2019/2020 – 12 December 2019	Amendment of National Treasury Instruction No. 3 of 2019/2020	Replacement of paragraph 5 with paragraph 5.1 as indicated in the notice
7.	National Treasury Instruction No. 03 of 2020/21 – 15 April 2020	COVID-19 Disaster management central emergency procurement strategy for PFMA Organs of state	Instruction provides for a disaster management central emergency procurement process for PPE that may be implemented by accounting officers of public entities
8.	National Treasury Instruction No. 12 of 2020/2021 – 24 February 2021	Departure from publication of bids and bid awards in the government tender bulletin	Directive to all public entities of Government Printing Works' (GPW) inability to publish bids and bid awards in the Government Tender Bulletins (GTB) and the interim measure to be followed until such time that they are able to publish
9.	Amendment to 05 of 2020/21 – 20 May 2020	Amendment to National Treasury Instruction No. 05 of 2020/2021	Replacement of paragraphs 4.6 and 4.7 of instruction no. 05 of 2020/2021
10.	Erratum 05 of 2020/21 – 20 May 2020	Erratum: National Treasury Instruction No. 05 of 2020/2021 as amended on 20 May 2020	Above is corrected by replacing subparagraph (a) of paragraph 4.6
11.	2 <sup>nd</sup> Amendment 05 of 2020/21 – 2 July 2020	2 <sup>nd</sup> Amendment to National Treasury Instruction No. 05 of 2020/2021 – update of price list and suppliers list	Substitution of Annexures A, D1, D2 and D3

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No.	Practice Note / Instruction Note & Date	Title	Description
12.	SCM Instruction No. 01 of 2021/2022 – 12 May 2021	Departure from publication of bids, bid awards and related notifications in the government tender bulletin and the e-tender portal.	Directive to all public entities of Government Printing Works' (GPW) inability to publish bids and bid awards in the Government Tender Bulletins (GTB) and the interim measure to be followed until such time that they are able to publish, and e-Tender portal is fully functional
13.	02 of 2021/2022 – 29 June 2021	Amendment to PFMA SCM Instruction no. 02 of 2021/22 on threshold values for the procurement of goods and services by means of petty cash, written price quotations or competitive bids	The effective date of the instruction was included, it was confirmed that it does not apply retrospectively.
14.	PFMA SCM Instruction No. 03 of 2021/2022 – 31 March 2022	Enhancing compliance, transparency, and accountability in Supply Chain Management	Provision of measures to improve compliance and transparency in the procurement of goods and services, reduce the abuse of SCM system and ensure value for money
15.	PFMA SCM Instruction No. 04 of 2022/2023 – 4 May 2022	Reporting on procurement in response to National State of Disaster as a result of severe weather events	Prescribe reporting requirements in relation to procurement in response to the national state of disaster as a result of the severe weather events
16.	PFMA SCM Instruction No. 05 of 2022/2023 – 7 July 2022	Repeal of instruction 11 of 2020/2021: procurement in response to National State of Disaster regarding COVID-19 pandemic	The purpose of this Instruction is to repeal National Treasury Instruction No. 11 of 2020/2021 (dated 25 August 2020) and its amendment of 6 May 2021 that dealt with the procurement processes in response to the National State of Disaster regarding the COVID-19 pandemic.

No.	Practice Note / Instruction Note & Date	Title	Description
17.	PFMA SCM Instruction No. 06 of 2022/2023 – 8 July 2022	National Travel Framework	Prescribes a National Travel Framework (NTF) as contained in Annexure A of this Treasury Instruction for implementation by all accounting officers and accounting authorities.
18.	PFMA SCM Instruction No. 07 of 2022/2023 – 7 July 2022	Cost Containment Measures related to travel and subsistence.	Prescribes cost containment measures related to travel and subsistence to be implemented by accounting officers. Must be read in conjunction with National Treasury Instruction 06 of 2022/2023 which prescribes the National Travel Framework (NTF) for further understanding and definitions.

## 7. PROPOSAL REGARDING THE PREFERENTIAL PROCUREMENT REGULATIONS, 2017

7.1. With regards to the litigation relating to the Preferential Procurement Regulations, there were four court judgments handed down, these being: -

- 7.1.1. Afribusines NPC v Minister of Finance, unreported judgment of the High Court of South Africa<sup>1</sup>;
- 7.1.2. Afribusines NPC v Minister of Finance [2020] ZASCA 140<sup>2</sup> (Supreme Court of Appeal judgment);
- 7.1.3. Minister of Finance v Afribusines NPC<sup>3</sup> [2022] ZACC 4 (Constitutional Court Judgement, decided on 16 February 2022); and
- 7.1.4. Minister of Finance v Sakeliga NPC (previously known as Afribusines NPC) and Others [2022] ZACC 17<sup>4</sup> (Constitutional Court Judgement, decided on 30 May 2022).

<sup>1</sup> Afribusines NPC v Minister of Finance, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 34523/2017 (28 November 2018) (High Court judgment);

<sup>2</sup> Afribusines NPC v Minister of Finance [2020] ZASCA 140; 2021 (1) SA 325 (SCA) (Supreme Court of Appeal judgment)

<sup>3</sup> Minister of Finance v Afribusines NPC [2022] ZACC 4 (Constitutional Court Judgement, decided on 16 February 2022)

<sup>4</sup> Minister of Finance v Sakeliga NPC (previously known as Afribusines NPC) and Others [2022] ZACC 17

## 7.2. High Court Litigation

7.2.1. Afribusiness launched an application in the High Court on the basis that the Minister acted beyond the scope of the powers conferred on him by the Preferential Procurement Policy Framework Act 5 of 2000 ("**Procurement Act**") read together with Section 217 of the Constitution.

7.2.2. It sought an order that the Preferential Procurement Policy Framework Act, 2000: Preferential Procurement Regulations, 2017 ("**2017 Procurement Regulations**") be reviewed and that their adoption be declared invalid and set aside.

7.2.3. The High Court held that the 2017 Procurement Regulations were carefully considered and aimed at facilitating preferential procurement in line with the Constitution and the Procurement Act. It, therefore, held that the promulgation of the 2017 Procurement Regulations was rational, reasonable, and fair. In the result, the application was dismissed with costs.

## 7.3. Supreme Court of Appeal

7.3.1. Aggrieved by the High Court's decision, Afribusiness appealed to the Supreme Court of Appeal ("**SCA**").

7.3.2. The SCA held that section 5 of the Procurement Act constrains the Minister's powers, in that he may only make regulations regarding any matter that may be necessary or expedient in order to achieve the objects of the Procurement Act. The SCA held that the Minister's promulgation of regulations 3(b), 4 and 9 was unlawful, because he acted outside his powers, under section 5 of the Procurement Act, by promulgating regulations which contradicted the requirements of the Procurement Act.

7.3.3. This is because the framework set out in the Constitution and the Procurement Act requires that, when evaluating tenders: first, the highest point scorer must be determined; and second, then the objective criteria which justify the award of the tender to a lower scorer may be considered. The framework does not allow for the preliminary disqualification of tenderers without any consideration of a tender. The SCA added that this unlawfulness was not cured by the fact that the application of pre-qualification was discretionary and that, in any event, the 2017 Procurement Regulations do not provide organs of state with a framework to guide the exercise of that discretion, which may lend itself to abuse.

7.3.4. This, it explained, is inimical to the provisions of section 2 of the Procurement Act and section 217(1) of the Constitution, which require organs of state to contract in accordance with a system that is fair, equitable, transparent, competitive, and cost-effective. The SCA held that the Minister could not, by way of regulations, create a framework that is contradictory to the framework mandated in the Procurement Act. This is because the 2017 Procurement Regulations may prescribe an antecedent step that section 217 of the Constitution and the Procurement Act do not authorise. The authorising legislation does not authorise organs of state to incorporate conditions in tender documents that are inconsistent with the Procurement Act.

7.3.5. In the result, the appeal was upheld and the SCA issued an order that the 2017 Procurement Regulations were inconsistent with the Procurement Act and section 217 of the Constitution. The declaration of invalidity was suspended for a period of 12 months to enable the Minister to take corrective action.

#### 7.4. Constitutional Court

7.4.1. The Minister lodged an application for leave to appeal against the judgment and order of the SCA, which concerned the validity of the 2017 Procurement Regulations, promulgated by the Minister on 20 January 2017 in terms of section 5 of the Procurement Act.

- 7.4.2. In determining the above issues, the Constitutional Court (CC) in its first judgment ("**minority judgment**") penned by *Mhlantla J (Khampepe ADCJ, Jafta J and Tshiqi J concurring)* held that section 5(1) of the Procurement Act gives the Minister a discretionary power to make regulations regarding any matter that is necessary or expedient to achieve the objects of the Act. It must be accepted, on a plain reading of the section, that this is a wide-ranging power as it does not specifically prescribe the nature and extent of the regulations that can be promulgated.
- 7.4.3. The minority judgment held that the Regulations were aimed at achieving the purpose of the Procurement Act and section 217 of the Constitution, and that a proper reading of the Procurement Regulations would demonstrate that an organ of state has a discretion to implement the pre-qualification criteria. Thus, the minority would have upheld the appeal.
- 7.4.4. The second judgment ("**majority judgment**") penned by *Madlanga J (Majiedt J, Pillay AJ, Tlaletsi AJ and Theron J concurring)* disagreed with the minority judgment on whether the Minister had the power to make the impugned regulations. This divergence arose from the reading of the words "*necessary or expedient*" as contained in section 5 of the Procurement Act. The majority judgment interpreted the words "*necessary or expedient*" to be the limiting factor to the power of the Minister to make regulations, rather than the factor that allows the Minister to make regulations to achieve the objects of the Procurement Act.
- 7.4.5. The majority judgment came to this conclusion by reading the words "*necessary or expedient*" with section 2(1) of the Procurement Act, which provides that an organ of state must determine its Preferential Procurement Policy. Since each organ of state is empowered to determine its own Preferential Procurement Policy, it cannot also lie with the Minister to make regulations that cover the same field. Ultimately, the majority judgment holds that it can neither be necessary nor expedient for the Minister to make regulations that seek to achieve that which can already be achieved in terms of section 2(1). The appeal was dismissed with costs.

7.4.6. The Minister lodged a further application to the CC seeking clarity on its judgement of 16 February 2022. The clarity judgement was handed down by the CC on 30 May 2022; with the following order: -

- *"Section 18(1) of the Superior Courts Act suspended the operation of the SCA's 12-month suspension of the invalidity of the 2017 Regulations as a result of the application for leave to appeal in the Constitutional Court, therefore, the countdown resumed on 16 February 2022, when the Constitutional Court dismissed the Minister's appeal against the SCA order.*
- *In essence, the Constitutional Court confirmed the suspension of the declaration of the order of invalidity of the 2017 Regulations therefore, the regulations are still valid for the remainder of the 12-month period".*

7.5. The implication of the above court cases is that the 2017 Regulations will remain in place until 26 January 2023 unless new regulations are promulgated before that date.

7.6. This has been catered for in the revised CoJ SCM Policy under the amendment clause under clause 5.5.

## **8. IMPACT OF REPEAT FINDINGS (INTERNAL AND AUDITOR GENERAL) ON THE POLICY**

8.1. Previous Internal Audit and Auditor General findings were considered during the review of the policy. The major findings were included in the policy as follows: -

No.	Finding	Amendment in the policy
1.	SCM Policy was not reviewed and approved timeously	Clause 6 deals with the amendment and review of the policy to ensure that this is done timeously. Page 2 also indicates the next review date.
2.	Bids were awarded to service providers whose municipal accounts were in arrears	This has been catered for in clause 33

**Group Finance Exco  
CoJ Executive Management Committee (EMT)  
CoJ Mayoral Committee (Maycom)  
CoJ Council.**

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3.	Bid results not published on City's website	This has been catered for in clause 22.12.1.1
4.	No evidence of contract monitoring and performance	This has been catered for in clause 30.6

8.2. We have noted that there are a number of findings, from both internal audit and the Auditor General, which are catered for in the policy document and it is just not being adhered to.

8.3. The SCM Department will undertake a training process to ensure that all relevant officials are properly trained on the policy in order for there to be proper implementation of same.

**9. POLICY IMPLICATIONS**

The CoJ SCM policy has been prepared in line with the requirements of section 111 of the MFMA

**10. LEGAL AND CONSTITUTIONAL IMPLICATIONS**

This report is in line with the requirements of section 111 of the MFMA

**11. FINANCIAL IMPLICATIONS**

None

**12. ATTACHMENTS**

- 12.1. Presentation on the amendments made to the CoJ SCM policy; and
- 12.2. The revised and updated CoJ SCM Policy

**13. RECOMMENDATION**

It is recommended that:

- 13.1. The reviewed CoJ SCM Policy be approved by EMT and forwarded to Mayco and Council for further approval.


**Group Finance Exco**  
**CoJ Executive Management Committee (EMT)**  
**CoJ Mayoral Committee (Maycom)**  
**CoJ Council.**

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- 13.2. Training on SCM Policy Training, National Treasury Circulars and City's Practice Notes be implemented throughout the City
- 13.3. No staff member to participate in SCM Bid Committees without undergoing the above training
- 13.4. A database of all trained staff members be compiled and
- 13.5. The approved SCM Policy be implemented immediately after approval.


Author:  
Bongani Mntambo  
Group Head: Group Strategic Supply Chain Management  
Bonganmn@joburg.org.za  
(011- 407 6342)

Recommended /  Not recommended

  
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Tebogo Moraka  
Group Chief Financial Officer

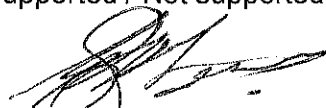
23/08/2023  
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Date

Approved /  Not approved

  
\_\_\_\_\_  
Floyd Brink  
City Manager  
City of Joburg

23/08/2023  
\_\_\_\_\_  
Date

Supported /  Not supported

  
\_\_\_\_\_  
Councillor Sello Morero  
MMC: Finance

25/08/2023  
\_\_\_\_\_  
Date