



7 May 2020

**Molefe Fani**  
Chief Director: Transversal Contracting  
[Molefe.Fani@treasury.gov.za](mailto:Molefe.Fani@treasury.gov.za)

**Estelle Setan**  
Acting Chief Procurement Officer  
[cpo@treasury.gov.za](mailto:cpo@treasury.gov.za)

**RE: CLARITY REGARDING NATIONAL TREASURY INSTRUCTION NO. 05 OF 2020/2021 AND CIRCULAR 102 – EMERGENCY PROCUREMENT**

**Introduction**

1. Corruption Watch is a registered non-profit company in terms of the Companies Act 71 of 2008 and an independent civil society organisation with no political or business alignment. We support the fight against corruption and the abuse of public funds and envision a South Africa where citizens are able to report corruption without fear of reprisal, and the offences are investigated without favour or prejudice.
2. As an accredited Transparency International chapter, Corruption Watch places specific emphasis on the promotion of transparency and accountability within the private sector and state institutions. This transparency and accountability – alongside the promotion and protection of the rule of law and good governance – is essential to protect the beneficiaries of public goods and services, and ensuring the public service operates with efficacy and integrity.
3. We are implementing a multi-country project, with Transparency International, titled ‘Open Contracting for Health’ (OC4H). The purpose of the project is to strengthen transparency in health procurement. Our overall aim is to boost the integrity, fairness and efficiency of public contracting to ensure the better use of scarce public funds in health.
4. We note the release of National Treasury Instruction no. 05 of 2020/2021 (Instruction 05) and Circular 102.

5. We have concerns regarding the lack of certainty created by the release and repeal of different instructions regulating emergency procurement, and wish to note the corruption risk posed by the lack of transparency and consequent inability to monitor emergency procurement under Instruction 05 and MFMA Circular No 102.

### **The Regulatory Framework**

6. Due to our interest in ensuring accountability and the integrity of public finances, we have been closely monitoring National Treasury's response to emergency procurement during COVID-19. Though we welcome the proactive steps you have taken in the context of this global pandemic, we have concerns around the process.
7. Instruction 05 is the third iteration of the regulation of emergency procurement under COVID-19.<sup>1</sup> Though we are alive to the need to respond to changing circumstances during a pandemic, we are concerned by the corruption risk posed by this lack of legal certainty. Accordingly, please confirm the following:
  - 7.1. What is the process for procurements which were instituted under Instruction No. 08 and Instruction No.03? Specifically, will they subsist?
  - 7.2. We are concerned by the lack of transparency in the previous Instruction Notes, and the consequent inability to monitor these procurements. If they are to subsist, kindly advise on the reporting and publication requirements that will apply to these procurements, specifically what information will be made publically available?
8. We urge National Treasury to take steps to ensure that any further iterations are well publicised.

### **Concerns Regarding Instruction 05 and Circular 102**

9. We note that Instruction 05 and Circular 102 are identical in substance, and in order to avoid duplication, we have dealt with them together. We will refer to them collectively as 'The Instructions' and differentiate when necessary.
10. We welcome the inclusion of additional accountability mechanisms as outlined in paragraph 3.1 of The Instructions. However, we note that no additional reporting or publication requirements

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<sup>1</sup> It was preceded by Instruction No. 08 and Instruction No. 03 which were repealed with effect from 15 April and 28 April respectively.

were included. Please advise whether any oversight mechanisms have been put in place to ensure compliance with these measures?

11. Paragraph 3.1(d) requires that accounting officers and accounting authorities *generate frequent expenditure reports (at least weekly)*. Please advise whether this information will be made publically available, and what processes are in place to curb identified risks.
  
12. Paragraph 3.2 notes that in terms of National Treasury SCM Instruction Note 3 of 2016/17, deviations from the competitive bid process may only occur in cases of emergency. Paragraph 3.3 states that the Covid-19 pandemic is a situation that justifies the use of emergency procurement provisions. Importantly, it does not explicitly note that emergency procurement provisions may **only** be used for the procurement of items necessary in the mitigation of the pandemic. Can you confirm whether emergency procurement provisions may be used to procure items unrelated to a Covid-19 response, during the subsistence of the pandemic?
  
13. We note the requirement in paragraph 3.5 of Instruction 05 that procurements conducted in terms of Treasury Regulation 16A6.4 above R 1 million (including vat) must be reported to National Treasury. Please confirm:
  - 13.1. Whether there are any monitoring and accountability mechanisms in place for procurements under R 1 million, and if so, what they include.
  
  - 13.2. Whether this reported information will be made publically available, and if so where and for how long? In the event that the information is not publically available kindly advise on the reasons therefore, noting the constitutional requirement for a transparency procurement process.
  
14. We note the maximum prices set for PPE items and cloth masks, as well as the allowed price variance of 10%. Please advise what measures have been put in place to monitor the procurement of these items in order to ensure they conform to these price limits. The lack of reporting requirements is concerning in this context, particularly in light of the allegations in this regard. We draw your attention to the allegations that Chris Hani District Municipality

procured hand sanitizers at R 175 per 500ml, where Annexure A sets the price limit at R 183.60 per litre.<sup>2</sup>

15. Paragraph 5.1 of The Instructions state that institutions who are already participants in transversal contracts may continue to place orders and “*may opt to use any other supplier*”. Our understanding of transversal contracts is that while they subsist, participants are prohibited from procuring the same goods or services outside of the contract. Please explain how this is reconciled with the requirement in paragraph 4.8 that existing contracts are to be honoured.
16. We are generally concerned by the lack of reporting and publication requirements in The Instructions. The absence of transparency in this process poses a significant corruption risk, and undermines the constitutional requirement that procurement be done in accordance with a system which is transparent.<sup>3</sup> The lack of accessible information makes it impossible for third parties to monitor procurement. What is the National Treasury’s response to improving transparency to facilitate civil society monitoring of emergency procurement?

## **Conclusion**

17. We request a response to this correspondence by **Wednesday 20 May 2020**.
18. Please note that in the interests of transparency, we may publish this correspondence and any responses hereto.

Best

David Lewis

**Executive Director**

**Corruption Watch**

*[Unsigned due to electronic transmission]*

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<sup>2</sup> Dispatch, ‘Outcry over price of sanitizer for EC municipality’ accessed: <https://www.dispatchlive.co.za/news/2020-05-04-outcry-over-price-of-sanitiser-for-ec-municipality/>

<sup>3</sup> Section 217 of The Constitution of the Republic of South Africa, 1996.