

# Procurement Watch Report on Procurement Risk Trends 2022

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## Abbreviations

BAC	Bid adjudication committee
B-BBEE	Broad-based black economic empowerment
BEC	Bid evaluation committee
CIDB	Construction Industry Development Board
CSD	National central supplier database
DBSA	Development Bank of South Africa
MFMA	Local Government: Municipal Finance Management Act, 56 of 2003
PFMA	Public Finance Management Act, 1 of 1999
POCA	Prevention of Organised Crime Act, 121 of 1998
PPPFA	Preferential Procurement Policy Framework Act, 5 of 2000
Prasa	Passenger Rail Agency of South Africa
PRECCA	Prevention and Combating of Corrupt Activities Act, 12 of 2004
SCM	Supply chain management
SOC	State-Owned Company

# 1 Introduction

This report presents an analysis of selected forms of procurement data between 2016 and 2021. It is the second Corruption Watch Report on Procurement Risk Trends, following the [first report](#) that was published in 2021, covering procurement between 2016 and 2020. This report provides an update on the previous report and identifies notable developments since the previous reporting period. These reports specifically focus on trends in requests to undertake deviations and expand contracts, accompanied by an analysis of restricted suppliers. The data is drawn from reports submitted to National Treasury by all procuring organs of state. The analysis is made possible by Corruption Watch's online tool, Procurement Watch, which aggregates data from the individually published reports.

Making use of deviations and contract expansions can raise red flags and indicate a lack of planning for procurement requirements. However, it is important to note that deviations and contract expansions do not necessarily indicate any abuse of the public procurement system. There may be perfectly valid reasons for deviating from a prescribed procurement procedure or for expanding an existing contract. For example, if an organ of state wishes to acquire a unique piece of scientific equipment that is manufactured by only one supplier, there is no point in inviting public tenders for the supply of such equipment even though the value of the envisaged acquisition may be far above the threshold for the mandatory use of open bidding methods of procurement. Using the open bidding procedure would in fact be a waste of public resources since it would not generate competition among suppliers. Instead, under such circumstances, procurement rules allow the relevant organ of state to deviate from the open bidding procedure and contract directly with the sole supplier of the equipment.

It is accordingly important to approach data on deviations and contract expansions within the context of the relevant rules governing public procurement generally and to keep in mind that these are accepted mechanisms within the procurement system. Each instance of deviation or contract expansion must consequently be carefully considered on its own merits within the regulatory framework to determine whether any abuse of the procurement system is evident.

One particularly useful tool in monitoring responses to abuse of the public procurement system is the restriction of bidders from conducting business with the state, generally called debarment. However, as with deviations and contract extensions, the mere debarment of a supplier does not immediately mean that the supplier abused the procurement system. Suppliers may also be debarred for performance failure, that is, for failing to adequately perform in terms of the procurement contract. Again, care should be taken to fully understand

the rules governing debarment of suppliers and to interrogate each debarment on its own terms.

In the following sections, the rules governing public procurement are briefly set out, starting with an overview of the statutory prescripts for public procurement in the ordinary course. Specific attention is consequently paid to the rules governing deviations from normal procurement procedures and expansion of contracts. The general mechanisms available to address abuse of the procurement systems are then briefly set out followed by specific discussion of the rules governing debarment in South African public procurement.

Against the backdrop of this exposition of the regulatory regime governing public procurement in South Africa, data regarding deviations from prescribed procurement procedures, contracts extensions and debarments is presented.

## 2 The statutory regime for procurement in the ordinary course

Public procurement is a highly regulated aspect of both public administration and economic activity in South Africa. That is, the invitation, adjudication, award and implementation of contracts for the acquisition of goods and services by South African organs of state are governed by detailed legal rules, collectively referred to as public procurement law.

### **Public procurement law**

Public procurement law in South Africa is notable for its explicit basis in the Constitution. Section 217(1) of the Constitution states that “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”. The legal principles upon which public procurement is based in South Africa are thus constitutionally guaranteed.

Despite the explicit set of principles contained in the Constitution, there is no coherent, single set of rules governing public procurement across all organs of state in South Africa. Instead, various statutory instruments apply to different (types of) organs of state.<sup>1</sup>

Procurement by entities at national and provincial government level are for the most part governed by the Public Finance Management Act, 1 of 1999 (PFMA) and the Treasury Regulations, 2005, made under the PFMA. The Treasury Regulations include a single, dedicated regulation (16A) on public procurement that sets out the basic framework for procurement regulation at this level of government. However, Treasury Regulation 16A does not apply to entities listed in Schedules 2, 3B or 3D of the PFMA. The regulation thus applies to national and provincial government departments, constitutional institutions, national public entities and provincial public entities, but not to major public entities, national government business enterprises or provincial government business enterprises. The

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<sup>1</sup> For a list of these, see Quinot, G. (2020) Reforming Procurement Law in South Africa. *African Public Procurement Law Journal* 7(1):1-15 at <https://aplj.journals.ac.za/pub/article/view/27>.

schedules to the PFMA contain exhaustive lists of all the entities falling within each of these categories.<sup>2</sup>

Below the level of regulation, the National Treasury has issued a large number of secondary legal instruments, variously termed Instruction Notes, Circulars, Frameworks and Standards, that prescribe further, detailed rules on specific aspects of public procurement.<sup>3</sup> Many of these, notably the Instruction Notes, are issued in terms of section 76 of the PFMA that grants National Treasury the power to issue binding instructions to entities covered by the PFMA relating to public procurement, among others.

At local government level, procurement is governed by the Local Government: Municipal Finance Management Act, 56 of 2003 (MFMA)<sup>4</sup> and the Municipal Supply Chain Management Regulations, 2005 (Municipal SCM Regulations)<sup>5</sup> made under it. In contrast to the Treasury Regulations under the PFMA, the Municipal SCM Regulations prescribe the legal framework governing public procurement at local government level in much more detail. Also, unlike the PFMA regime, National Treasury has no power to create additional legal instruments, such as instructions, to bind local government procurement. Any additional instruments National Treasury issues are only binding upon an individual municipality if that municipality's council formally adopts such instrument.<sup>6</sup>

Under both the PFMA and MFMA regimes, the basic premise of the regulatory scheme is that a particular organ of state designates its own public procurement system. This system must be set out in its SCM Policy that constitutes the immediate set of rules governing public procurement by that organ of state. The statutes and regulations thus only create the legal framework for an entity's own SCM Policy.

The only cross-cutting legislation governing public procurement specifically is the Preferential Procurement Policy Framework Act, 5 of 2000 (PPPFA),<sup>7</sup> and the Preferential Procurement

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<sup>2</sup> The PFMA can be found at [http://www.saflii.org/za/legis/consol\\_act/pfma1999206/](http://www.saflii.org/za/legis/consol_act/pfma1999206/).

<sup>3</sup> Lists of these instruments can be found at [http://ocpo.treasury.gov.za/Buyers\\_Area/Legislation/Pages/default.aspx](http://ocpo.treasury.gov.za/Buyers_Area/Legislation/Pages/default.aspx).

<sup>4</sup> The MFMA can be found at <http://www.lawsouthafrica.up.ac.za/index.php/current-legislation>.

<sup>5</sup> The Regulations can be found at [http://www.saflii.org/za/legis/consol\\_reg/mscmr435/](http://www.saflii.org/za/legis/consol_reg/mscmr435/).

<sup>6</sup> MFMA section 168(3).

<sup>7</sup> The Act can be found at <http://www.lawsouthafrica.up.ac.za/index.php/current-legislation>.



Regulations, 2017,<sup>8</sup> made under it. These enactments provide for the adjudication method in formal quotation and open bidding procurement. Importantly, this includes the system of broad-based black economic empowerment (B-BBEE) in public procurement, which allows for preferential procurement from certain categories of bidders. The rules under the PPPFA apply alongside those under the PFMA and the MFMA. It must be noted that, following the Constitutional Court judgment in [Minister of Finance v Aribusiness NPC \[2022\] ZACC 4](#), the Preferential Procurement Regulations, 2017 will become invalid in January 2023 at the latest and are due to be replaced by revised regulations under the PPPFA, which will result in an adjustment in how procurement awards are made.

### **Sectoral procurement rules**

In addition to the general procurement rules set out in the abovementioned instruments, further rules govern particular types of procurement. The most important is the regulatory regime for construction procurement. While construction procurement is governed by general procurement law, it is additionally governed by rules created under the Construction Industry Development Board Act, 38 of 2000 (CIDB). Most recently, National Treasury has also adopted a set of rules specifically for construction procurement under the PFMA in the form of the Framework for Infrastructure Delivery and Procurement Management 2019. The latter, however, only applies to national and provincial entities and not local government construction procurement. Further sectoral procurement rules, which apply to procurement within the particular sector in addition to general procurement law, include procurement of land transport, governed under the National Land Transport Act, 5 of 2009 and the National Land Transport Regulations on Contracting for Public Transport Services, 2009,<sup>9</sup> and procurement of information technology, governed by the State Information Technology Agency Act, 88 of 1998 and the Regulations made under that Act.<sup>10</sup>

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<sup>8</sup> The Regulations can be accessed at <http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation>.

<sup>9</sup> Both the Act and the Regulations can be found at <http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation>.

<sup>10</sup> Both the Act and the Regulations can be found at <http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation>.

## Procurement methods

The procurement rules set out above allow for three basic procurement methods:

- petty cash purchases for low value transactions
- restricted bidding by way of quotations
- open bidding.

Use of these basic methods is largely determined by the value of the transaction based on set thresholds.<sup>11</sup> At present, the informal, petty cash method is prescribed for all transactions below R2 000 for local government entities and national and provincial entities covered by the PFMA Treasury Regulations. Restricted bidding by way of quotations must be used for all transactions above R2 000 and below R1m by national and provincial entities subject to the Treasury Regulations and below R200 000 by local government entities. National and provincial entities subject to the Treasury Regulations must use the open bidding procedure for transactions above R1m and local government entities must use open bidding for all transactions above R200 000.

The restricted bidding procedure requires entities to invite quotations from at least three suppliers that are registered on a supplier database, with the exact number of quotations that must be obtained set out in the entity's SCM Policy.<sup>12</sup> In the case of national and provincial entities, that list is the national central supplier database (CSD) maintained by National Treasury.<sup>13</sup> Local government entities may use the CSD or their own list of suppliers. While entities should endeavour to obtain as many quotations as possible for larger value procurements within this category, there are no legal prescripts regarding how suppliers should be invited to submit quotations. The method of selection must be set out in the entity's SCM Policy.

The most important procurement method is the open bidding procedure. In terms of this procedure, entities are obliged to publish an open invitation to submit bids in prescribed form by a prescribed closing date.<sup>14</sup> All bids received must be considered by a bid evaluation committee (BEC) to determine whether they are responsive, that is, compliant with all the bid

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<sup>11</sup> National Treasury PFMA SCM Instruction No. 02 of 2021/22; Municipal SCM Regulations 16–18.

<sup>12</sup> National Treasury PFMA SCM Instruction No. 02 of 2021/22; Municipal SCM Regulations 16–17.

<sup>13</sup> National Treasury PFMA SCM Instruction No. 02 of 2021/22; National Treasury SCM Instruction No. 4A of 2016/2017.

<sup>14</sup> Treasury Regulations 16A6; Municipal SCM Regulations 22.

requirements.<sup>15</sup> The BEC makes a recommendation to the bid adjudication committee (BAC) regarding which bids are responsive, including whether they meet the technical specifications of the particular tender (called the functionality criteria).<sup>16</sup> The BAC scores the qualifying bidders on the basis of the price offered and what is called preference points.<sup>17</sup>

All procurements above the value of R30 000, whether done by means of quotations or open bidding must be adjudicated in terms of the scoring method set out in the PPPFA and Preferential Procurement Regulations, 2017. The scoring is done on set formulae out of 100 points. For procurements below the value of R50m, 80 points are awarded for price and 20 points for preference. For procurements above R50m, 90 points are awarded for price and 10 for preference. The price points are determined by the following formulae (depending on whether the 80/20 or 90/10 ratio is used):

$$P_s = 80 \left( 1 - \frac{P_t - P_{min}}{P_{min}} \right)$$

Where –

- $P_s$  = Points scored for price of tender under consideration;
- $P_t$  = Price of tender under consideration; and
- $P_{min}$  = Price of lowest acceptable tender.

$$P_s = 90 \left( 1 - \frac{P_t - P_{min}}{P_{min}} \right)$$

Where –

- $P_s$  = Points scored for price of tender under consideration;
- $P_t$  = Price of tender under consideration; and
- $P_{min}$  = Price of lowest acceptable tender.

The preference points are added to the price points for each bidder. This is simply determined with reference to the bidder’s formal B-BBEE status level of contributor as certified in its

<sup>15</sup> Treasury Regulations 16A6; Municipal SCM Regulations 26, 28; read with the PPPFA section 1.

<sup>16</sup> Treasury Regulations 16A6; Municipal SCM Regulations 28; read with the Preferential Procurement Regulations 5.

<sup>17</sup> Preferential Procurement Regulations 6, 7.

B-BBEE certificate or sworn affidavit.<sup>18</sup> The following tables are used to determine the number of preference points for each bidder (again, depending on which points ratio is used):

**Table 1: Preference points added to the price points under the 80/20 ratio**

B-BBEE status level of contributor	Number of points
1	20
2	18
3	14
4	12
5	8
6	6
7	4
8	2
Non-compliant contributor	0

**Table 2: Preference points added to the price points under the 90/10 ratio**

B-BBEE Status Level of Contributor	Number of points
1	10
2	9
3	6
4	5
5	4
6	3
7	2
8	1
Non-compliant contributor	0

Once the BAC has determined the individual scores of all qualifying bidders, it is under a general legal duty to award the bid to the highest scoring bidder.<sup>19</sup> There are some exceptions

<sup>18</sup> This methodology for the determination of the preference points will fall away once the Preferential Procurement Regulations, 2017 are replaced. It will be replaced by such methodology as set out in each entity's own preferential procurement policy, which will form part of the entity's overall SCM Policy.

<sup>19</sup> PPPFA section 2(1)(f).

to this rule, where the entity may, at the outset in the tender invitation, indicate that other objective criteria may also be used in combination with the scoring to determine the winning bidder.<sup>20</sup>

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<sup>20</sup> PPPFA section 2(1)(f) read with Preferential Procurement Regulations 11.

### 3 About deviations

Public entities are allowed to deviate from the procurement procedures set out above under limited circumstances. Under the PFMA Treasury Regulations, national and provincial entities covered by those regulations may deviate when “it is impractical to invite competitive bids”.<sup>21</sup> Entities must set out in their SCM Policies the circumstances under which such deviation would be allowed as well as the alternative procurement procedure that must be followed in such deviation.<sup>22</sup> In all cases, the accounting officer or accounting authority must approve the reasons for the deviation.<sup>23</sup> All deviations must be reported to the relevant treasury (the relevant provincial treasury in the case of provincial entities and National Treasury in the case of all other entities) and the Auditor-General within 14 days of finalisation of the procurement.<sup>24</sup>

In terms of the Municipal SCM Regulations, local government entities may deviate from prescribed procurement procedures in a number of specified circumstances, including emergencies and where there is only one supplier that can provide the required goods or services, as well as “any other exceptional case where it is impractical or impossible to follow the official procurement processes”.<sup>25</sup> Deviations must be reported to the local council.

When the conditions for a deviation are met, the entity may procure by way of any appropriate procedure, including direct contracting, as set out in its SCM Policy. A deviation is accordingly the only way public entities may contract directly with suppliers. When an entity deviates from the prescribed procurement procedures in terms of the rules set out above, it still complies with procurement law. In other words, an entity deviating from the prescribed procedures does not in itself mean something is wrong with the procurement. Deviations are, however, the exception. It follows that they should only be used in exceptional cases where it is truly unfeasible to adhere to normal procurement rules. An entity relying heavily on deviations in its procurement function may raise a red flag. It may signal abuse of the procurement system or that procurement planning is weak within the entity.

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<sup>21</sup> Treasury Regulations 16A6.4.

<sup>22</sup> National Treasury PFMA SCM Instruction No 03 of 2021/22.

<sup>23</sup> National Treasury PFMA SCM Instruction No 03 of 2021/22.

<sup>24</sup> National Treasury PFMA SCM Instruction No 03 of 2021/22.

<sup>25</sup> Municipal SCM Regulations 36(1)(a)(v).

## 4 About expansions

As a rule, the contract concluded and implemented following the tender process should in all material respects reflect the terms and conditions upon which bids were invited and adjudicated. That is, an entity should not invite bids, adjudicate them and award the tender to a supplier and subsequently conclude a contract with that supplier on materially different terms. Similarly, an entity should not, after the contract conclusion allow material changes to the contract terms as doing so would mean the procurement process is no longer fair.

It is, however, inevitable that contracts need to be adjusted from time-to-time. Unexpected conditions may emerge during contract execution that necessitate contract adjustment. For example, a department may procure bottles of water for an event it is planning and discover at the last minute (unexpectedly) that more attendees will be at the event than it planned for. Under such circumstances, the department may wish to adjust the quantity of bottles to be supplied.

The risks accompanying contract variations are paramount in the case of expansions of contracts. That is, instances where the value of the contract is increased. Such expansions may easily be abused to award a much bigger contract to the supplier than was originally tendered for. The expanded contract will thus not be the product of competitive bidding. It is for this reason that National Treasury has issued an instruction to all national and provincial entities (not only those covered by the Treasury Regulations) under the PFMA to monitor contract expansions.<sup>26</sup> In terms of this instruction, an entity must monthly report to the relevant treasury as well as the Auditor-General any contract variation beyond 20% or R20m (including VAT, whichever is the lesser) for construction-related procurement, and any variation beyond 15% or R15m (including VAT, whichever is the lesser) for all other procurements. The report must include the reasons for the expansion.

At local government level, amendments of contracts are procedurally more restricted. Under the MFMA, a municipality may only amend a contract after “the reasons for the proposed amendment have been table in the council” and “the local community has been given reasonable notice of the intention to amend ... and has been invited to submit representations” on such proposed amendment.<sup>27</sup>

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<sup>26</sup> National Treasury PFMA SCM Instruction No 03 of 2021/22.

<sup>27</sup> MFMA section 116.

## 5 Contraventions and remedies

Abuse of the procurement system amounts to offences under different statutes, under which a range of penalties may be imposed.

### Procurement-specific offences

The Prevention and Combating of Corrupt Activities Act, 12 of 2004 (PRECCA)<sup>28</sup> creates two procurement-specific offences.

- The first relates to “corrupt activities in relation to contracts” and in terms of section 12 includes situations where a person accepts or agrees to accept, offers or agrees to offer, or gives any gratification, for his/her benefit or the benefit of another person to influence in any way the promotion, execution or procurement of a contract with a public entity. This offence is primarily aimed at bribery.
- The second offence is “corrupt activities in the procuring and withdrawal of tenders”. In terms of section 13, this offence involves instances where a person offers, agrees to offer or to accept, or accepts any gratification as an inducement to or to influence another person to award a tender, make a tender or withdraw a tender for a contract.

The Act provides for the specific sanction of debarment in addition to the general sanctions of fines and imprisonment in cases of conviction for these offences. Debarment is considered in the following section.

### Collusion

Collusion between an official and supplier to ensure the award a contract to the supplier, whether it amounts to an offence under PRECCA or only more generally contravention of procurement laws, may also amount to an offence under the Prevention of Organised Crime Act 121 of 1998 (POCA).<sup>29</sup> Such collusion may, for example, amount to money laundering under section 4; to “assisting another to benefit from proceeds of unlawful activities”, which is an offence in terms of section 5, or “acquisition, possession or use of proceeds of unlawful activities”, an offence in terms of section 6. It is important to note that the unlawful activities that would trigger these offences do not have to be offences (i.e., crimes) themselves. POCA defines “unlawful activities” to include “any conduct...which contravenes any law”. It thus follows that procurement decisions that do not adhere to procurement laws may constitute

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<sup>28</sup> The Act can be found at <http://www.lawsouthafrica.up.ac.za/index.php/current-legislation>.

<sup>29</sup> The Act can be found at <http://www.lawsouthafrica.up.ac.za/index.php/current-legislation>.



such unlawful activities. POCA prescribes fines to a maximum of R100 million or imprisonment to a maximum of 30 years for these offences.

## Remedies

Procurement law itself also provides for remedies in case of abuse of the procurement system. The Preferential Procurement Regulations, 2017, under the PPPFA, provide for sanctions where a bidder has submitted false information to secure the tender or where a tenderer has failed to declare any subcontracting arrangements. The sanctions that may be imposed under these Regulations include disqualifying the bidder from the tender process, cancelling a contract, claiming damages, imposing penalties and/or imposing restrictions (as discussed below). Similar remedies are provided for under the Treasury Regulations and instructions issued under the PFMA. These provide for bids to be rejected or contracts to be cancelled where corruption or fraud in the procurement process occurred, as well as for bidders to be debarred (discussed below). The Municipal SCM Regulations provide that municipal SCM Policies must contain similar mechanisms.

Finally, various collusive practices among suppliers may also amount to violations of the Competition Act 89 of 1998,<sup>30</sup> especially where such practices have the effect of lessening competition in the public procurement market. This includes price fixing or dividing contract opportunities among competing bidders. Fines may be imposed on such colluding bidders.

## 6 Debarment of suppliers

There are two mechanisms in South African law for restricting suppliers from doing business with government. Generally, this is referred to as debarment.

### Register for Tender Defaulters

One mechanism is created in PRECCA and given further detail in regulations issued under the Act.<sup>31</sup> As part of the criminal sanction a court may impose following a finding of guilt in respect of procurement-specific offences under this Act, the court may order that the supplier and a host of related parties (as determined by the court) be listed on the Register for Tender Defaulters. When an entity has been endorsed on the Register, it will be debarred from winning state contracts for a period of between 5 and 10 years. The term of debarment is set

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<sup>30</sup> The Act can be found at <http://www.lawsouthafrica.up.ac.za/index.php/current-legislation>.

<sup>31</sup> The Regulations Regarding the Register for Tender Defaulters, 2005, made under PRECCA can be found at <http://www.lawsouthafrica.up.ac.za/index.php/current-legislation>.

by National Treasury once the court has ordered endorsement. The Register for Tender Defaulters is publicly available.<sup>32</sup> An organ of state is prohibited from awarding a contract to an entity endorsed on the Register.

### **Database of Restricted Suppliers maintained by National Treasury**

The second debarment mechanism in South Africa is the Database of Restricted Suppliers that is also maintained by National Treasury.<sup>33</sup> Listing on this database is done administratively, that is, without a court order. In terms of the PFMA, MFMA and PPPFA, organs of state may identify a supplier for inclusion on the database for a host of reasons. When a supplier is listed, it will be debarred from winning state contracts for the period of listing, which may not exceed 10 years, and organs of state are prohibited from awarding contracts to such suppliers.

The reasons for listing are varied. They include abuse of the SCM system, such as fraud in winning the bid, corruption more generally, failure to perform under a contract or a failure to declare a subcontracting arrangement. Listing of suppliers on the database is done either by the relevant procuring organ of state or National Treasury, depending on the basis for the listing. If the listing is done in terms of the PFMA or MFMA, the relevant organ of state takes the decision to debar. In such a case, the organ of state informs National Treasury of the decision it has taken, and National Treasury simply fulfils the administrative task of adding the supplier to the database. If the listing is done under the PPPFA, however, National Treasury takes the decision to debar. In such a case, the relevant procuring organ of state informs National Treasury of its findings of wrongdoing and National Treasury decides whether to list the supplier on the database.

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<sup>32</sup> See <http://www.treasury.gov.za/publications/other/Register%20for%20Tender%20Defaulters.pdf>.

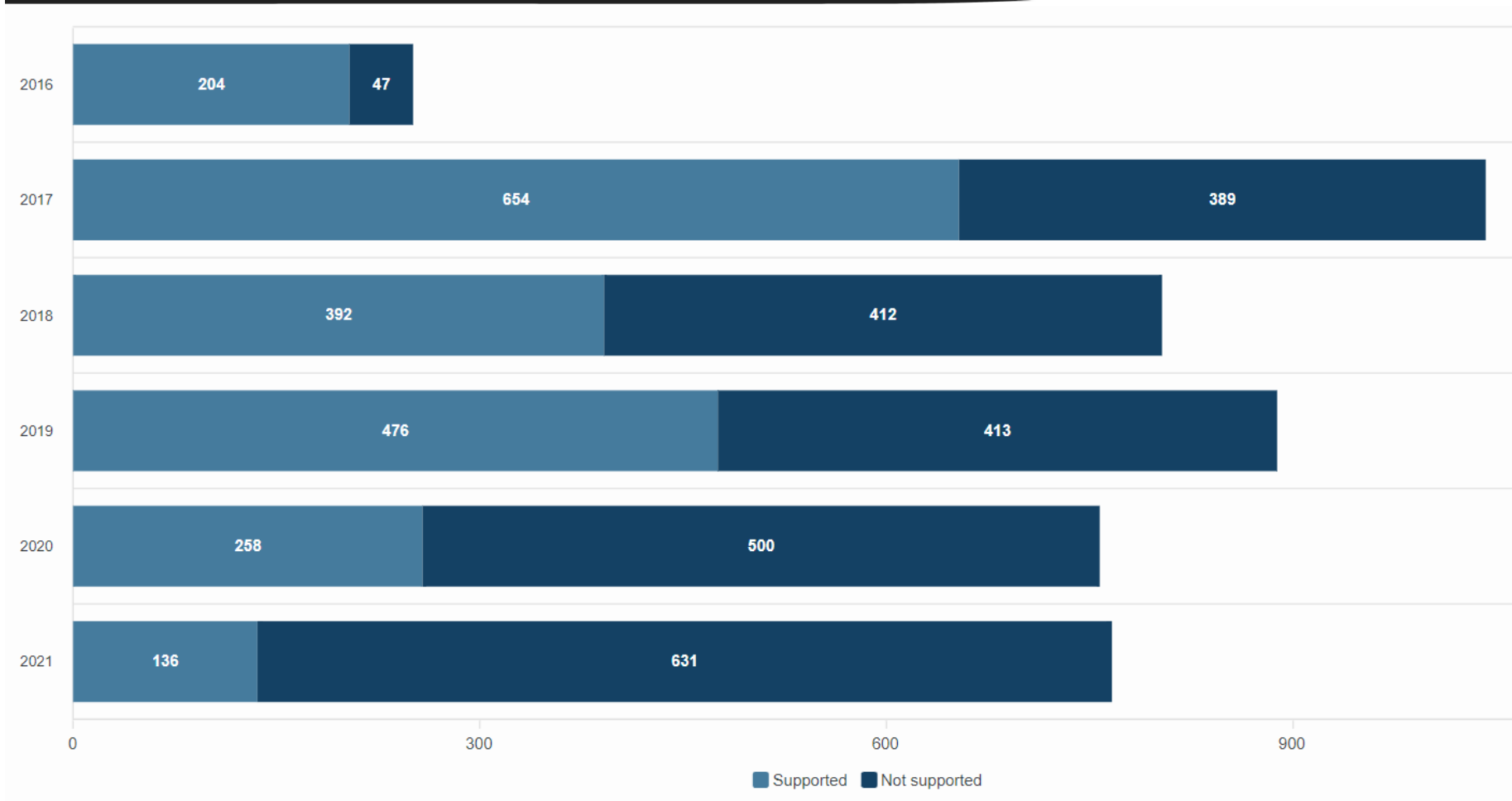
<sup>33</sup> See <http://www.treasury.gov.za/publications/other/Database%20of%20Restricted%20Suppliers.pdf>.

## 7 Deviations data

### Reported deviations 2016–2021

The graph below illustrates the number of deviations from prescribed procurement procedures reported to National Treasury from 2016 to the end of 2021 with National Treasury’s response to the deviations. The proportion of deviations unsupported by National Treasury increased from 2018 and dramatically so since 2020. The 2021 data show that National Treasury did not support 82% of total reported deviations in 2021 compared to 66% not support in 2020. The similarity in total number of deviations between 2020 (758) and 2021 (767) is particularly noteworthy. In considering these numbers it must be kept in mind that due to the emergency rules governing procurement between March and September 2020 based on the declaration of a state of disaster in response to the Covid-19 pandemic, significant portions of procurement in 2020 that would otherwise have been noted as a deviation were not, since the emergency procurement rules explicitly mandated alternative methods during this time. This suggests that the total number of deviations reported in 2020 constitutes a smaller proportion of overall procurement compared to 2021 and which suggests that there was a net reduction in total number of deviations reported in 2021.

The total value of procurement via deviations in 2021 exceeded R34 119 386 006. This is based on the reported value of deviations, bearing in mind that in a significant number of instances (89) the value of the deviation was either not reported at all, or the total amount was not reported (e.g. a monthly rate or a rate per delivery was reported).



**Figure 1: Deviations reported per year (2016–2021), with indication of National Treasury response**

## 10 largest deviations by transaction value in 2021

Table 3 below sets out the 10 largest deviations from prescribed procurement procedures in transaction value in 2021 based on reported deviation amounts. The trend identified in the first Corruption Watch Report on Procurement Risk Trends (2021) regarding deviations involving inter-organ of state contracting, is even more evident in table 3. Three of the top ten deviations in 2021 involved an organ of state as supplier. This trend raises important questions about the suitability of general public procurement rules for inter-organ of state contracting.

**Table 3: 10 largest deviations per value of deviation requested (2021), with indication of National Treasury support**

Entity/ Department	Project description	Supplier	Value of deviation (R)	Reason for deviation	NT Support	Source (quarterly report)
Transnet SOC Ltd,	Disposal of Transnet Freight Rail 6 649 CR13/14 wagons to the existing Iron Ore Export customers	Kumba, Assmang, Sedibeng and Afrimat	R7 590 000 000,00	Urgent need for capital injection	Not Supported	Q4_2021
South African Revenue Service (SARS),	maintaining and development services of business process workflow covering SARS contact centres, tax registration, audits, bank detail changes and orchestration of processes necessary to ensure accurate	Budge Baron and Dominick (Pty) Ltd (BBD)	R2 326 160 000,00	Single source	Conditional Support	Q4_2021
Department of Military Veterans (DMV),	provision for the review of 2019 institutional option analyses for an independent Military Ombud and the development of an associated business case	GTAC	R1 800 000 000,00	Preferred service provider	Conditional Support	Q2_2021

Universal Service and Access Agency of South Africa (USAASA),	Broadcasting Digital Migration Programme and achieve Analogue Switch Off (ASO) by 31 January 2022	Various Suppliers	R1 073 000 000,00	single source	Conditional Support	Q3_2021
Government Technical Advisory Centre (GTAC),	Pathway Manager for the PYEI Fund	Harambee Youth Employment Accelerator	R934 400 000,00	Single source	Not Supported	Q3_2021
Government Technical Advisory Centre (GTAC),	Youth Employment Services	Harambee Youth Employment Accelerator	R934 400 000,00	single source	Conditional Support	Q3_2021
South African Broadcasting Corporation SOC Limited (SABC),	Recommissioning of various programmes	Various Production Houses	R858 672 177,20	Financial Sustainability and Competitive Survival	Conditional Support	Q2_2021
Road Traffic Management Corporation (RTMC),	Provision of bulk processing, printing and courier distribution of motor vehicle licences	South African Post Office	R837 769 714,00	SAPO is the only entity licensed to distribute reserved parcels by the regulator	Noting	Q3_2021
Department of Cooperative Governance (DCoG),	Community work programme	NYDA	R763 042 100,62	Preferred bidder	Not supported	Q1_2021
Government Printing Works (GPW),	Procurement of bulk Paper	Sappi and Mondi	R688 695 367,00	Cost Efficient	Conditional Support	Q4_2021

### Highest number of deviations by entity in 2021

The highest number of deviations reported in 2021 was by Eskom Holdings SOC Ltd, with a total of 31 reported deviations, as indicated in table 4. Somewhat concerning is the “reason for deviation” reported on 7 December 2021 as “Easy way out (making deviations normal way of procurement)”. Eskom is closely followed by the South African Revenue Service (SARS), at 28 deviations and the Department of Environment, Forestry and Fisheries (DEFF), at 26. Of some concern is the fact that National Treasury itself reported 21 deviations of which four are indicated as not supported by National Treasury itself and another six only conditionally supported. This suggests that only about half of the deviations reported by National Treasury, as the custodian of public procurement in South Africa, was fully supported by itself.

**Table 4: Deviations reported by Eskom Holdings SOC Ltd (2021), with indication of National Treasury support**

Entity/ Department	Project description	Supplier	Value of deviation (R)	Reason for deviation	NT Support	Source (quarterly report)
Eskom Holdings SOC Ltd,	For applying 80/20 PPPFA preference point system, for an enquiry for the transfer of ash (excavate, load, haul and transport to mine) from Camden power station ash dam to the nearest mine	Not applicable	Not applicable	Incorrect preference point system	Not Supported	Q3_2021
Eskom Holdings SOC Ltd,	Fuel oil	Six suppliers	Not applicable	Easy way out (making deviations normal way of procurement)	Not Supported	Q3_2021
Eskom Holdings SOC Ltd,	Meter Data Management System	Nextec	Not applicable	Feedback to NT's condition	Noting	Q3_2021
Eskom Holdings SOC Ltd,	Response Implementation and support of a Meter Data Management System	Nextec	Not applicable	Feedback to NT's condition	Noting	Q3_2021

Eskom Holdings SOC Ltd,	Supply of Coal to Duvha Power Station	South 32	Not applicable	Feedback to NT's condition	Noting	Q3_2021
Eskom Holdings SOC Ltd,	Supply, delivery and offloading of fuel oil	Various suppliers	Not applicable	Finalise the tender process	Not Supported	Q3_2021
Eskom Holdings SOC Ltd,	Feedback provision of Site Maintenance For Boiler Feed Pump and Condensate Extraction Pump with Auxilliary Equipment at Eskom's Coal Fired Power Stations	Sulzer Pumps South Africa (Pty) Ltd	Not applicable	Compliance with NT's conditions	Noting	Q4_2021
Eskom Holdings SOC Ltd,	Financial Risk Management Analytics software maintenance and support	FinCad Europe Ltd	Not applicable	Compliance with NT's conditions	Noting	Q4_2021
Eskom Holdings SOC Ltd,	Large Power Transformers	Actom Power Transformer (Pty) Ltd, Siemens Power Transmission (Pty) Ltd, ABB South Africa (Pty) Ltd, Hyundai Heavy Industries Co. Ltd, Fuji Electric Co. Ltd, Hyosung	R565 869 041,00	Preferred bidder	Conditional Support	Q4_2021
Eskom Holdings SOC Ltd,	Closed Tender Process (Limited Tendering) to place contracts from the newly established Stringing and Cabling Panel of Contractors for Transmission Projects Delivery	Various Service providers	R464 565 824,00	Preferred supplier	Not Supported	Q3_2021
Eskom Holdings SOC Ltd,	Clarity for the procurement distribution Substation Protection Schemes	Actom (Pty) Ltd, ABB South Africa (Pty) Ltd, Integrators of Systems Technologies (Pty)	R380 902 433,50	Negotiations with bidders	Noting	Q1_2021



		Ltd and CONCO Energy Solutions (Pty) Ltd				
Eskom Holdings SOC Ltd,	Eskom's Research Testing & Development (RT&D) Professional Services	South African Public Tertiary Academic Institutions	R260 000 000,00	Expansion of scope	Not Supported	Q4_2021
Eskom Holdings SOC Ltd,	critical technical resources to run the ERI training academy	Trans Africa Projects (PTY) LTD	R165 000 000,00	Additional need	Not supported	Q1_2021
Eskom Holdings SOC Ltd,	Licensing, maintenance and support of the Bentley suite of applications	Bentley Systems International Limited	R131 219 832,30	Cost effective option in terms of subscription cost	Conditional supported	Q1_2021
Eskom Holdings SOC Ltd,	Provision of legal services to assist Eskom in the planning phase (Phase 1)	White and Case (W&C)	R42 382 720,00	Business continuity	Conditional supported	Q1_2021
Eskom Holdings SOC Ltd,	Installation of SEC Rubber Lined Replacedment Piping at Koeberg PS Reference FY21/22-KOEBE6	NECSA	R36 389 388,00	Preferred service provider	Conditional Support	Q2_2021
Eskom Holdings SOC Ltd,	Manufacturer of the new pipe sections for Replacement of Piping Corrosion Protection (Mod 10018 SEC)	Sulzer Pumps South Africa (Pty) Ltd	R36 389 388,00	Finalise tender process	Not Supported	Q3_2021
Eskom Holdings SOC Ltd,	Provision of Application Support and License Maintenance for Feeder Balancing and Data Validation Modules	GenusSoft (Pty) Ltd	R27 752 197,51	Business continuity	Conditional supported	Q1_2021
Eskom Holdings SOC Ltd,	Civil structural repairs of Unit 2 CFI/SEC Pump Station Filtration Pits and CDI Fore Bay Area in Outage 225 at Koeberg Nuclear Power Station	ERI (Eskom ROTEK INDUSTRIES)	R11 000 000,00	Preferred supplier	Conditional Support	Q3_2021

Eskom Holdings SOC Ltd,	Response for the procurement of Electronic Signature Solution	LawTrusted Third Party Services (Pty) Ltd	R9 554 128,14	Preferred bidder	Not supported	Q2_2021
Eskom Holdings SOC Ltd,	Supplier Development Programme	KSB Pumps and Valves (Pty) Ltd	R9 203 018,78	Preferred supplier	Conditional Support	Q3_2021
Eskom Holdings SOC Ltd,	The manufacturing and supply of the Twin Enamel Epoxy (TEE) and Continuous Transposed Copper (CTC) conductor wires	ASTA Energy Transmission Components	R9 203 018,78	There is no company that has this manufacturing capability.	Not Supported	Q3_2021
Eskom Holdings SOC Ltd,	Provision of Software End-User Usage and Maintenance and Support	Omni Africa (Pty) Ltd	R1 865 241,81	Business continuity	Not supported	Q1_2021
Eskom Holdings SOC Ltd,	Programming and Configuration of Thermofisher Sample Manager Laboratory Management System (LIMS)	LimsTricS cc	R1 200 000,00	Compliance with the accreditation requirements	Conditional Support	Q4_2021
Eskom Holdings SOC Ltd,	Reman Repair of 6 Casspir Engines for the SANDF	Norman F Hall	R1 095 166,28	Continuation of work	Conditional Support	Q4_2021
Eskom Holdings SOC Ltd,	Site Preparation and Pre-Works, to comply with a Ministerial & Intergovernmental Delegation to Komati Power Station	Eskom Rotek Industries (ERI)	R849 293,06	Preferred service provider	Not Supported	Q2_2021
Eskom Holdings SOC Ltd,	Financial Risk Management Analytics software, maintenance and support	FinCad Europe Ltd	R595 539,28	Feedback to NT's condition	Noting	Q3_2021
Eskom Holdings SOC Ltd,	Design, manufacture & supply of end support centrifugal pump, Q3, NSF for Nuclear Application at Koeberg Nuclear Power Station	APE Pumps	R230 000,00	Preferred supplier	Conditional Support	Q3_2021
Eskom Holdings SOC Ltd,	The design, manufacture & supply of 1â,2 class of 600 globe stop valve, Q3, NSF for Nuclear Application at Koeberg Power Station	Mitech Control Valves (Pty) Ltd	R118 450,00	Concludes one of the final phases of the supplier	Conditional Support	Q3_2021



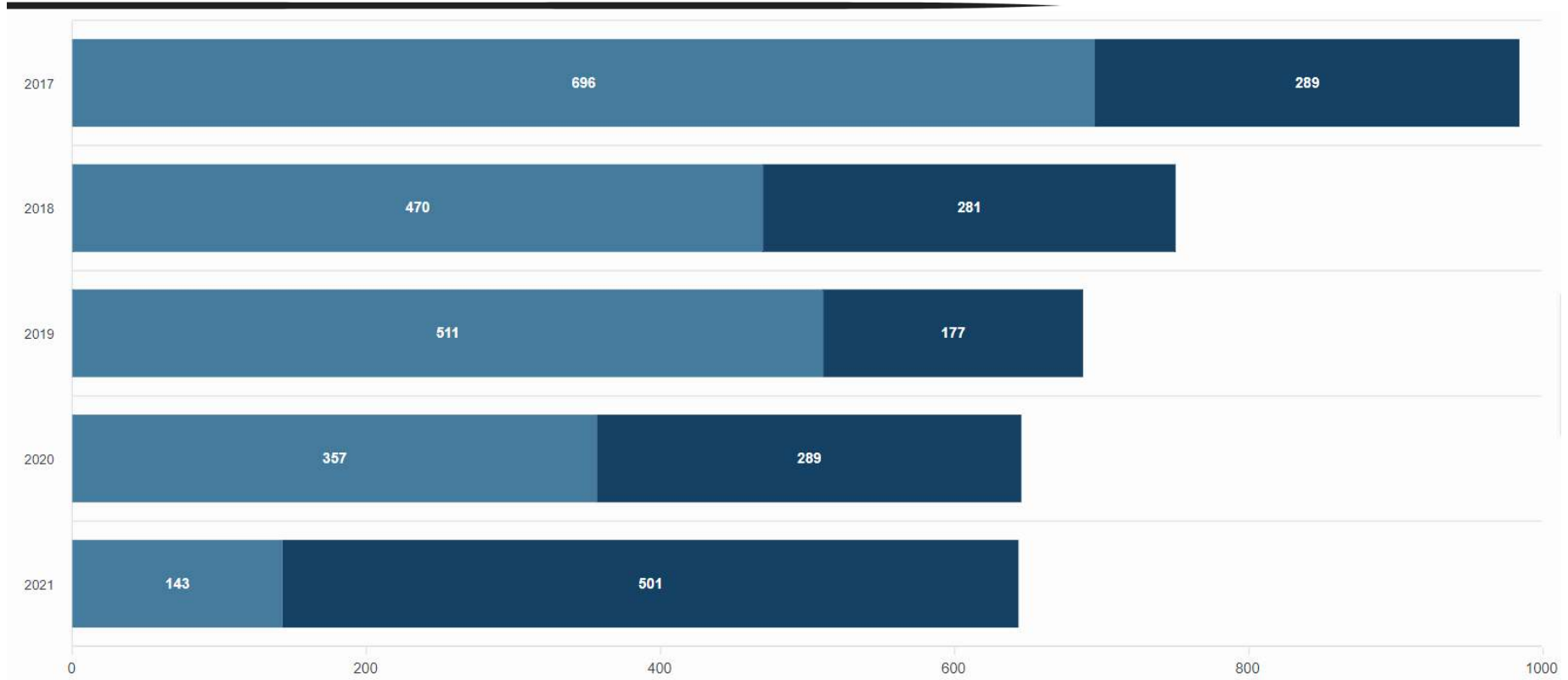
				development process		
Eskom Holdings SOC Ltd,	Supplier Development Programme	Paltech Valve Maintenance (Pty) Ltd	R18 489,79	Preferred supplier	Conditional Support	Q3_2021

## 8 Contract expansions data

### **Contact expansions reported to National Treasury 2017–2021**

Figure 2 below shows the number of contract expansions reported to the National Treasury between 2017 and 2021, and whether National Treasury supported the expansion, with no new data being reported since the first Corruption Watch Report on Procurement Risk Trends (2021). The data show a consistent reduction in the number of reported contract expansions year-on-year between 2017 and 2021, but a significant increase in the 2021/22 financial year.

The total value of contract expansions in 2021 exceeded R88 870 997 286. This is based on the reported value of expansions, bearing in mind that in a notable number of instances (59) the value of the expansion was not reported.



**Figure 2: Number of contract expansions reported per year (2017–2021), with indication of National Treasury response**

### 10 largest contract expansions (2021)

Table 5 shows the 10 largest contract expansions, by value, reported to National Treasury in 2021 with National Treasury’s response. The dominance of Eskom on this list is (again) self-evident. It is also again notable that three of these ten instances involved an organ of state as the supplier.

**Table 5: 10 largest contract expansions by value of expansion (2021), with indication of National Treasury response**

Entity/ Department	Project description	Supplier	Reason for extension	Percent extension increase	Value of contract extension	Supported	Source (quarterly report)
Passenger Rail Agency of South Africa (PRASA),	Design, Construction and Implementation of a New Railway Signaling System 74 stations and Design, Construction and Implement Civil, Overhead Traction Equipment (OHTE) and Track	Siemens Limited	Increased scope of work and extension of time	0.0 %	R 24 112 885 335,00	Not Supported	Q3_2021
Eskom Holdings SOC Ltd,		Petroleum Gas Corporation South Africa (SOC) Limited (herein referred to as PetroSA), Astron Energy (Pty)	Spike in the electricity demand	90.0 %	R 23 525 888 247,00	Conditional Support	Q4_2021
Eskom Holdings SOC Ltd,	Coal supply from SOUTH32 SA Coal Holding Pty Ltd to Eskom's Duvha Power Station	South 32	Business continuity		R 9 666 900 000,00	Conditional Support	Q1_2021
Dept of Home Affairs (DHA),	To align and extend the definitive agreement	Gijima	Continuation of service		R 3 148 500 000,00	Conditional Support	Q2_2021
Eskom Holdings SOC Ltd,	Provision of management, maintenance and operational service for the	Eskom Rotek Industries	Failed negotiations	2.0 %	R 2 214 294 124,00	Not Supported	Q3_2021

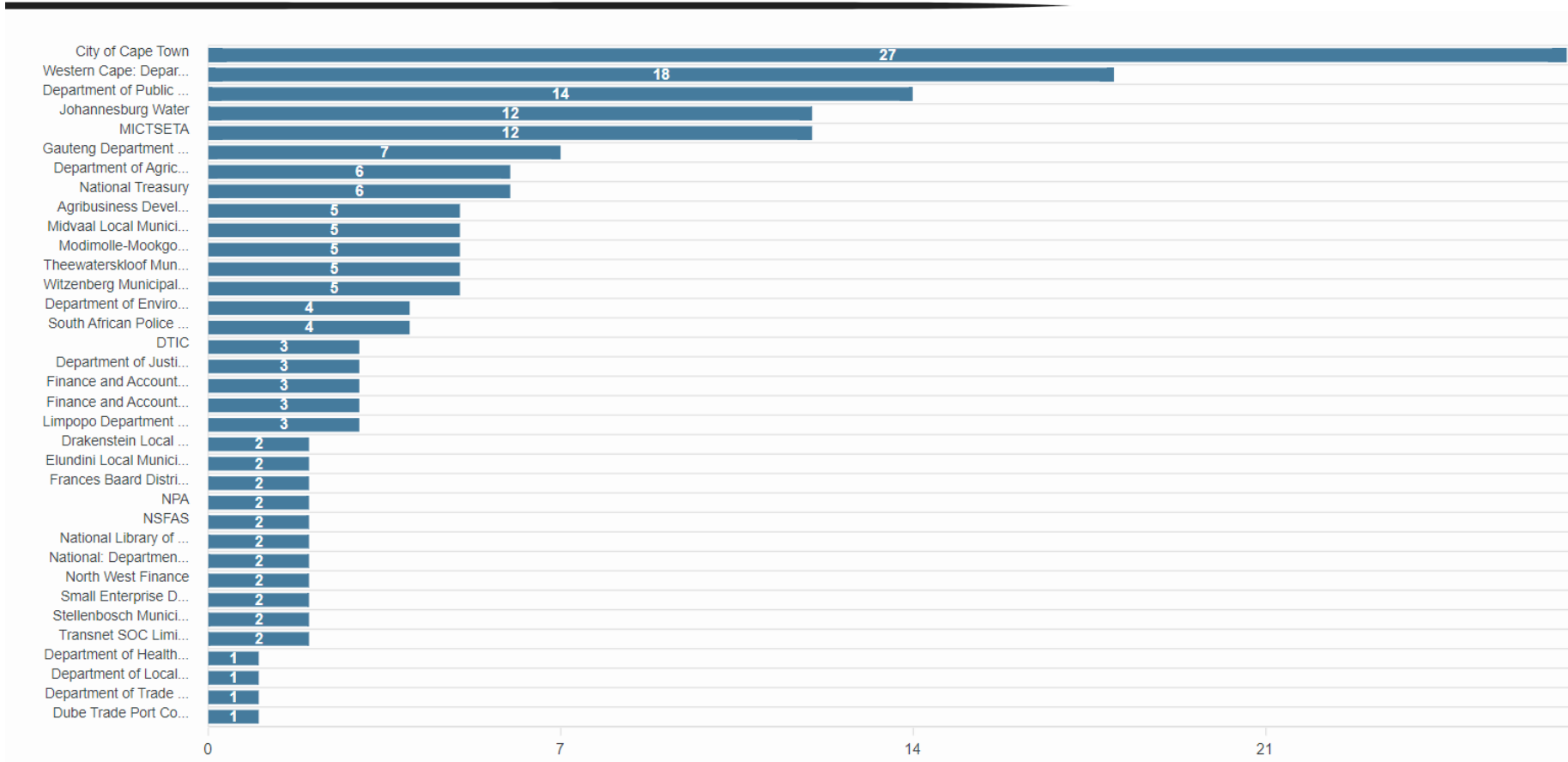
	power station coal supply, coal and ash handling						
Eskom Holdings SOC Ltd,		Petroleum and Gas Corporation of South Africa (SOC) Limited (PetroSA)	Expansion of scope	127.0 %	R 1 639 106 571,00	Conditional Support	Q4_2021
Eskom Holdings SOC Ltd,	Provision of logistics and safety management services	Eskom Rotek Industries SOC Ltd (ERI)	Depletion of funds	256.0 %	R 1 599 777 921,76	Conditional Support	Q1_2021
Eskom Holdings SOC Ltd,	Supply, delivery and off-loading of fuel oil to all Eskom's coal fired power stations on an as when required basis	Sasol Energy (Pty) Ltd, BP Southern Africa (Pty) Ltd, FFS Refiners (Pty) Ltd, Eco Energy and Trading (Pty) Ltd and Refinex (Pty) Ltd	Complete the tender process	41.0 %	R 1 519 812 828,00	Conditional Support	Q3_2021
Eskom Holdings SOC Ltd,		Sasol Energy (Pty) Ltd (Sasol), BP Southern Africa (Pty) Ltd (BP), FFS Refiners (Pty) Ltd (FFS), Eco Energy	Finalise tender process	96.0 %	R 1 471 382 250,00	Conditional Support	Q4_2021
Eskom Holdings SOC Ltd,	Supply of coal from Goedgevonden Complex to Majuba Power Station and/or any other designated Eskom power stations	Glencore	Depletion of funds	16.0 %	R 1 319 137 813,00	Conditional Support	Q3_2021

## 9 Debarred supplier data

Of the two restricted suppliers lists, the Register for Tender Defaulters and the Database of Restricted Suppliers, there are only currently listings on the latter. The Register for Tender Defaulters contains no current listings.

Figure 3 shows the organs of state that have submitted names of suppliers to be included on the Database for Restricted Suppliers and that are currently still restricted. It also includes the number of names submitted by each entity.





**Figure 3: Number of suppliers currently restricted per organ of state on the Database of Restricted Suppliers**

Of particular interest is the small number of entities (34) that have submitted names to this list, bearing in mind that there are around 40 national departments, 103 provincial departments, 278 municipalities, 9 constitutional institutions and 154 other public entities listed in schedule 3 of the PFMA – that is at least 584 entities procuring under rules that include debarment on this list (not counting subsidiaries and

municipal entities). Only 24 suppliers have been restricted since the start of 2021 by only 5 entities. The average period of debarment of those currently on the list is just over 8 years.

The analysis in Table 6 shows the reasons for restricting suppliers from doing business with the state, grouped under broad categories.

**Table 6: Reasons for restricting suppliers**

Reason category	Reason listed by debarring entity	Percentage of total debarments
<b>Fraud and misrepresentation</b>		<b>60.23</b>
	Misrepresentation of information	9.09
	Fraudulent B-BBEE Certificate	9.09
	Fraud and Corruption	7.96
	Fraud and conflict of interest	5.11
	Submission of fraudulent Tax Clearance Certificate	4.55
	Collusive bidding and fronting	3.98
	Fraudulent Misrepresentation	2.84
	Non - Declaration of Interest	2.27
	Fraud and improper conduct	2.27
	Collusive bidding	2.27
	Submission of Fraudulent Competency Certificate and Sales of Vehicles	1.71
	Supplier submitted a falsified Tax Clearance Certificate	1.7
	Malperformance and theft (failure to deposit the proceeds of auction into the Provincial Government Revenue Account.	1.7
	Collusion and fraud	1.7
	Tampering with the Local Content letter from DTI	1.14
	Submission of Fraudulent Invoices for good never received by the department	1.14
	Submission of Fraudulent Health Certificate	1.14

	Claimed VAT whilst not a VAT vendor	0.57
<b>Performance problems</b>		<b>25.56</b>
	Non-performance	8.52
	Poor performance	5.11
	Non- and Poor performance	5.11
	Failed to deliver as per the contractual obligations	4.54
	Poor performance overcharging and taking assets of the SEDA: Limpopo.	1.14
	Non-delivery	1.14
<b>Other general (unspecified)</b>		<b>11.36</b>
	Impropriety	3.41
	Failure to return undue payment	3.41
	Non-performance and Fraud	1.7
	Failure to deposit proceeds of the auction	1.7
	Breach of Contract	0.57
	Abuse in the Supply Chain Management System	0.57

The reasons given are as indicated by the relevant listing entity. As is evident from the list, there is a fair level of overlap among different listings, e.g., “Non-performance” (8.53%), “Poor performance” (5.11%), “Failed to deliver as per contractual obligations” (4.54%), “Non- and Poor performance” (2.27%); “Non-delivery” (1.14%); “Non and Poor Performance” (1.71%), “Failure to perform” (1.14%). The same applies to various forms of fraud. The reasons for listing also clearly indicate that not all listings on the Database relate to fraud or corruption; some relate purely to performance.

## 10 Methodology

All data was extracted from quarterly procurement reports submitted to National Treasury. These can be accessed at the following links.

The deviations and expansions reports can be obtained here:

[http://ocpo.treasury.gov.za/Suppliers\\_Area/Pages/Deviations-and-Expsansions.aspx](http://ocpo.treasury.gov.za/Suppliers_Area/Pages/Deviations-and-Expsansions.aspx). The data reported here were abstracted from these submitted reports.

The Database on Restricted Suppliers can be accessed here:

<http://www.treasury.gov.za/publications/other/Database%20of%20Restricted%20Suppliers.pdf>

The Register for Tender Defaulters can be accessed here:

<http://www.treasury.gov.za/publications/other/Register%20for%20Tender%20Defaulters.pdf>.

Data is reported in terms of the financial year under the PFMA, which runs from 1 April to 31 March. Quarterly data thus refers to the quarters of that financial year.

## 11 Conclusion

Corruption Watch's online tool, Procurement Watch, enables one to identify patterns and trends in public procurement practice in South Africa. It focuses on the high-risk areas of deviations from prescribed procurement procedures and variations of contracts during implementation. Data on these two features of procurement can serve as red flags of failures in supply chain management. Neither of these, however, necessarily imply abuse of the supply chain management system. There may be valid reasons for deviating from the prescribed procurement procedure (e.g. in the case of emergency) or for varying a contract during implementation (e.g. when conditions unexpectedly change). Data on these features thus serve as points of departure for further analysis. Such analysis is greatly enhanced by the aggregation of data in the Procurement Watch tool and its functionality to access the data along different variables, such as value, procuring entity and time.