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DATE: **23 June 2025**

TO: The Standing Committee on Appropriations  
Chairperson Mmusi Aloysias Maimane, MP

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SUBJECT: **Response to Requests during Public Participation Process regarding 2025 Division of Revenue Bill**

Dear Committee,

IRR Legal

During the Q&A multiple questions were directed to IRR Legal specifically. In this letter we address only two questions of clarity touching on the following two points:

- An estimate of the cost of BEE premiums in public procurement.
- A clarification of **Section 9(2) of the Constitution**, specifically on its consistency with IRR Legal's twin proposals **to amend the Bill** in order introduce "conditions" that secure **transparency** regarding BEE premiums in terms of Section 214(1)(c) of the Constitution; as well as to amend the Bill in order to introduce 214(1)(c) "conditions" that secure **maximum value for money** by reducing BEE premiums to R0.

## Estimate of Cost

The estimated cost breakdown is as follows:

<b>BEE Premium Recorded Spend</b>	<b>R5.7 Billion per annum</b>
<b>BEE Premium Unrecorded Spend</b>	<b>R11.3 Billion per annum</b>
<b>BEE Premium Total Licit Spend</b>	<b>R17 Billion per annum</b>
<b>Total Corruption Cost</b>	<b>R240.6 Billion per annum</b>
<b>Zondo Dividend</b>	<b>R132.3 Billion per annum</b>
<b>BEE Premium Total Cost</b>	<b>R149.9 Billion per annum</b>

Source: *IRR Blueprint for Growth, Slash Waste & Cut Taxes, 2024.*

The breakdown for each estimate is available at the source, where further breakdowns are referenced. Here, for brevity, each line item is explained.

**BEE Premium recorded spend** refers to the amount recorded (but not published) every year. Whenever a contract is awarded on the basis of BEE "points", in terms of "special goals" in Section 2 of the Public Procurement Policy Framework Act (PPPFA), or in terms of "set-asides" and "prequalification" under Chapter 4 of the Public Procurement Act (PPA), a BEE premium is spent.

The BEE Premium recorded spend is equal to exactly the difference in cost between the winning bid (at the point of awarding the contract) and the cost of the contract that would have won if BEE "points" were not part of the tender process.

For an example, consider the City of Cape Town’s “Procurement Transparency Report”, where GEL batteries could have been bought from the manufacturer, which submitted a bid, but the same product was bought at a higher price from another company, because it scored higher in terms of BEE<sup>1</sup>.

The recorded spend of BEE premiums is very easy to calculate with only two data points per contract according to this formula for the winning bid:

**$BEE\ Premium\ (ZAR) = Contract\ value * (80 - Price\ Points) * 1.25$**

That formula assumes a contract on the 80/20 system. If it is on the 90/10 system:

**$BEE\ Premium\ (ZAR) = Contract\ value * (90 - Price\ Points) * 1.11$**

**BBE premium unrecorded spend** refers to the licit cost that is not calculable by simply looking at the record of bids and applying the formula above. This might occur because a company realizes that even though it can offer the same goods or services at the best price, it is likely to lose on BEE points, so it does not enter a bid. In that case the true best price option is not reflected in the points allocation. Alternatively, a company might be outright excluded on the basis of race, as was provided for by the Finance Minister’s regulations under the PPPFA issued in 2017 (later struck down at court). The latter form of paying unrecorded BEE premiums is set to be returned by the PPA.

**BBE premium total licit spend** refers to the sum of recorded and unrecorded BEE licit premiums.

**Total Corruption Cost** refers to the estimated loss of resources due to corruption in the procurement system that is funded by taxpayers and channelled through the Bill<sup>2</sup>.

**Zondo Dividend** refers to the reduction in waste due to corruption that is expected to be achieved if the Zondo Report advice is heeded to derive maximum value for money<sup>3</sup> in public procurement without ambiguity<sup>4</sup>. Notice that this is a fraction of total avoidable corruption costs.

**BEE Premium Total Cost** refers to the sum of the **Zondo Dividend** and the **BEE premium total licit spend**.

IRR Legal would be eager to provide more details on how the estimates were calculated, and how modest they are compared to publications referenced by the IMF, World Bank, Harvard Growth Lab, etc. Should the Committee request further details IRR Legal will eagerly supply them.

## Constitutionality of Transparency and Value for Money Measures in the Bill

The basic question this section will address is as follows:

- Do amendments to the Bill that produce transparency regarding BEE premiums and reduce BEE premiums to R0 violate Section 9(2) of the Constitution?

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<sup>1</sup> Pg. 19, *City of Cape Town Procurement Transparency Report 2022*.

<sup>2</sup> SCMR 2015, SCMR Update 2016, IMF Public Procurement in South Africa 2023.

<sup>3</sup> Para 532., *State Capture Commission Report, Volume 1*.

<sup>4</sup> *Ibid.* para 531.

The question was raised by a member of the Committee, MP Wesley Douglas, in an earlier round of considerations regarding the previous (withdrawn) Division of Revenue Bill, 2025. A transcription of the relevant statement is provided.

MP Douglas: “How does the presentation reconcile advocating the removal racial economic redress mechanisms with the historical economic disenfranchisement and dispossession faced by the Khoi and San and African Indigenous communities?”

We weren’t even part of BEE for the last thirty years. It has only been the elite.

The submission [by IRR Legal] fundamentally ignores Section 9.2 of the South African Constitution, which explicitly mandates measures for the advancement of historically disadvantaged groups, by calling for a reduction of the BEE premium to zero...”

Chairperson Maimane [interrupts]:

“Honourable Douglas...”

MP Douglas: “Oh sorry, I will then leave it there. He needs to come and explain some of these things and we need to have an opportunity Mr Chair to interrogate these lies and misconceptions that are put in front of the people...”

Chairperson Maimane [interrupts]:

“No, Honourable Dougals, Honourable Douglas, I am very cautious not to enter into political debate in this instance. We really are dealing specifically with the Division of Revenue Bill, and I think that’s where we should confine ourselves. Whilst I hear there are many other arguments and debates I think we’ve got to confine ourselves to the Bill. Otherwise, we could enter into a political debate backwards and forwards and I am not sure that is going to serve the Committee, or the work that we have got to do.”

[Is the Constitution relevant to drafting the Bill, or is reference to the Constitution just “political debate”?](#)

The transcript above creates the impression that the Chairperson of the Committee, MP Maimane, believes that Section 9(2) of the Constitution is irrelevant to the lawmakers in the Committee tasked with reviewing and, if need be, amending the Bill.

Naturally, in the course of a long day all kinds of accidents can happen. It is assumed that this impression is a pure accident. After all, MP Douglas correctly described IRR Legal as “calling for a reduction of BEE Premiums to zero” *by amending the Bill*. Hence, the Chairperson’s interruption and statement that “we should confine ourselves” to amendments to the Bill must be reflective of some kind of accident.

IRR Legal’s submission proceeds on the assumption that all members of the Committee agree that it is bound by *all* of the Constitution, including Section 9(2). That means if MP Douglas is correct that Section 9(2) prohibits maximum value for money in public procurement, and prohibits transparency

about BEE premiums, then IRR Legal's recommendations to amend the Bill cannot be implemented. That is what MP Douglas averred in the public participation process. Its relevance is beyond any doubt, and the Committee is kindly offered these comments to facilitate its task of amending the Bill to cure its lethal constitutional defects without any misapprehensions including about Section 9(2).

### Is Section 9(2) consistent with Transparency?

IRR Legal has drawn the concession from National Treasury's legal advisory team that the obligations for racial preference in terms of 217(2)&(3) in no way "qualify" or water down the requirements of "transparency" in terms of 216(1) of the Constitution. IRR Legal submits that this reading is correct.

Transparency can never be compromised for the sake of racial "transformation". It is precisely the fact that the current "legislative design" does this that systemically causes "state capture"<sup>5</sup>.

### Is Section 9(2) consistent with Maximum Value for Money?

IRR Legal notes again that black unemployment has more than doubled from around 5.5 million in the late 2000's to over 11 million on the expanded definition. This took place during the height of BEE premiums, and BEE more generally. This is the greatest affront to equality, and the equal realisation of rights, ongoing in the rainbow republic today. These facts are relevant to Section 9(2), which states:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

BEE Premiums clearly violate Section 9(2) of the Constitution. That is because BEE Premiums fail the "Van Heerden" test as set forth by the Constitutional Court. This test has three prongs for a policy like BEE premiums:

- (a) targets persons or categories of persons who have been disadvantaged by unfair discrimination;
- (b) is designed to protect or advance such persons or categories of persons; and
- (c) promotes the achievement of equality.

The Constitutional Court emphasised that evaluating the third prong is an empirical exercise, since "the word 'achievement' implies some effect or impact. This could hardly be tested without contemplating some action taken in terms of the measure."

The measure of the failure of BEE Premiums in public procurement is given by the table in IRR Legal's slides showing that South Africa has suffered the worst value for money decline in state spending in any open democracy in the world, according to data from Worldwide Governance Indicators, published by the World Bank. Further measures of this failure were published by the IMF, and Harvard's Growth Lab.

Another measure of the failure of BEE Premiums in public procurement is the doubling of black unemployment.

Lest there be any doubt that BEE Premiums fail the *Van Heerden* test, MP Douglas himself stated:

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<sup>5</sup> *Ibid.* para 528 – 533.

**“We weren’t even part of BEE for the last thirty years. It has only been the elite.”**

That is precisely why BEE premiums fail to comply with Section 9(2) of the Constitution. BEE premiums amount to unfair discrimination against most black people.

[Is the Committee duty bound by the Constitution to make BEE Premiums Transparent?](#)

The Committee is clearly enjoined by the Constitution to make amendments to realize transparency regarding BEE Premiums by establishing “conditions” in terms of Section 214(1)(c) of the Constitution pursuant to those ends.

214(2) provides clear instructions to the Committee in its role as a drafter of the relevant Act, which “must take into account – (a) the national interest;...(c) the needs and interests of the national government, determined by objective criteria;”

IRR Legal has already shown, by reference to the Zondo Report and economic data, that it is “in the national interest” to achieve transparency on BEE premiums.

Furthermore, the payment of BEE premiums presumes a “need” to do so among different spheres of government, and Section 214(2)(c) is explicit in its instruction that such need must be “determined by objective criteria”. The determination of what the objective criteria are depends on transparency on how much is actually spent in different spheres of government on BEE premiums.

There are very few instances where Parliamentary bodies are as tightly instructed by the Constitution as Section 214(2) is in its instructions to the Committee.

But that is not where it ends.

Section 215(1) of the Constitution requires that “budgetary processes must promote transparency”.

Section 215(2)(c) of the Constitution requires that “budgets in each sphere of government must show...the way in which proposed expenditure will comply with national legislation.”

One item of national legislation is the PPPFA, which provides for BBBEE premiums. It is a constitutional duty for budgets to show “the way in which proposed expenditure will comply” with the PPPFA’s legal order to pay BBE premiums.

IRR Legal has provided the Committee with the amendments necessary to secure such budgeting practices at provinces and among municipalities through “conditions” in terms of 214(1)(c), which refers specifically to the Bill.

Furthermore, the PPA is another item of national legislation. The Committee’s failure to set “conditions” in terms of 214(1)(c) as to “the way in which proposed expenditure will comply” with the PPA’s set-aside and prequalification system means that the PPA will be inoperable as long as the Bill is in force.

Furthermore, Section 216(1) of the Constitution states that “National legislation must...prescribe measures to ensure both transparency and expenditure control in each sphere of government”.

This Committee is considering the passage of “national legislation”. This must ensure transparency and expenditure control over BEE premiums.

These duties are clearly relevant to the Committee’s work on this Bill.

Is the Committee duty bound by the Constitution to secure Value for Money?

Finally, Section 217(1) of the Constitution provides that the “system” of public procurement “must” be “cost-effective”.

That means reducing BEE premiums to R0. Again, race could still be used as a tiebreaker as has occurred in other jurisdictions. Or race could be removed entirely, since this would best advance the cause of equality and poverty relief through non-racialism. IRR Legal advocates for the latter.

“Lies and misconceptions”

MP Douglas stated that IRR Legal produced “lies and misconceptions”. Chairperson Maimane said nothing to correct that. For the record, IRR Legal produced no lies or misconceptions.