North West Province Appropriations Bill

2026

As Introduced by

The Member of Executive Council for Finance

IRR Legal NPC

222 Smit Street (Virtual Office)
Braamfontein, Johannesburg
2000 South Africa

t. 082 510 0360

Introduction

IRR Legal is an NGO formed in 2023 whose practical mission is to transform South Africa into a republic that works. Currently, South Africa has the world's worst unemployment rate for a peacetime, constitutional democracy. Is the Constitution of the Rainbow Republic irrelevant to this problem? Worse, is the Constitution part of the problem? No, the Constitution is the solution to mass unemployment. IRR Legal's primary practical mission is to vindicate the Constitution's growth framework to boost employment.

IRR Legal makes this written submission to the Portfolio Committee on Premier and Finance (the Committee), chaired by Hon. Nathan Oliphant, regarding the North West Appropriations Bill, 2026 (the Bill), pursuant to our core practical mission.

The single, focussed, fundamental recommendation that we make is that the Appropriations Bill be amended, or supplemented, so as to make BEE Premiums, and Other Preference Premiums, explicit.

BEE Premiums

BEE Premiums are, as the Committee is no doubt aware, provided for in section 2(1)(b) of the Preferential Procurement Policy Framework Act, (PPPFA) under the 90/10 and 80/20 points system. As Acting Chief Procurement Officer Willie Mathebula has repeatedly noted this system "caps" BEE "Preference Premiums" at 25% for contracts under the prescribed amount, and at 11.1% for contracts above the prescribed amount. Furthermore, as Mr Mathebula has noted, BEE Preference Premiums are provided for under Chapter 4 of the Public Procurement Act (PPA), through "set-asides", "prequalification", and subcontracting requirements.

The PPPFA is the operative legislation, as the PPA has been passed by Parliament, but is not in force, as the Committee is also no doubt aware.

Here are some clear definitions that will be revisited in the recommendations section below:

- **"Base Price"** means the price of the acceptable tender that scores the maximum 90 points for price in terms of section 2(1)(b)(i) of the Preferential Procurement Policy Framework Act, 2000 (Act. No. 5 of 2000), or the maximum 80 points for price in terms of section 2(1)(b)(ii) of that Act, as applicable.

- **"Preference Premium"** means the exact financial difference between the final contract price of the successful tender and the Base Price, which amount shall be zero where the successful tender scored the maximum points for price under the applicable section.
- **"BEE Premium"** means a Preference Premium pursuant "broad-based black economic empowerment" as defined specifically in 1(d) and 1(f) of the Broad-Based Black Economic Empowerment Act, 2004 (Act No. 25899 of 2004)
- **"Other Premium"** means a Preference Premium that is not a BEE Premium.

Constitutional Duty

All Preference Premiums, including BEE Premiums, must be made explicit. According to the first Constitutional provision governing the Bill [with added emphasis]:

> 226(2) Money may be withdrawn from a Provincial Revenue Fund only—
>
> (a) in terms of an appropriation by a provincial Act; or
>
> (b) as a direct charge against the Provincial Revenue Fund, when it is provided for in the Constitution or a provincial Act.

The Committee might ask: does this mean money that is withdrawn from the Provincial Revenue Fund to pay for BEE Premiums via 226(2)(a) must make BEE Premiums explicit, or can they remain implicit?

Schedule A of the Bill tabulates expenditure breakdowns over 12 pages. There is a certain level of granularity. However, BEE Premiums are not explicated.

It is trite that section 226(2)(a) of the Constitution must not be read in isolation. Rather, its meaning must be consistent with the Constitution as a whole. Section 215 provides clarity on what ***purpose*** bugets, and budgetary processes must serve [with added emphasis]:

> 215(1): "National, provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector.

The Bill is part of budgetary processes. Does keeping BEE Premiums in the Bill "promote transparency"?

No. Hiding BEE Premiums does the opposite of what is required.

Does keeping BEE Premiums in the Bill "promote accountability"?

No. Hiding BEE Premiums leaves the Committee in no position to account to the public as to whether it is spending to much, too little, or the right amount on BEE Premiums.

Does keeping BEE Premiums in the Bill "promote effective financial management of the public sector"?

No. Effective financial management is undermined by the lack of transparency about BEE Premiums, as is indicated by what is commonly known as the Zondo Report, revisited below.

The Constitution does not stop there. The Committee might ask whether BEE Premiums can be shielded from transparency, accountability, and considerations of financial management due to

the fact that they are provided for by national legislation? The Constitution is clear once again [with added emphasis]:

> 215(2): …"(c) that budgets in each sphere of government must show…the way in which proposed expenditure will comply with national legislation."

As such, IRR Legal submits that budgets must quantitatively show the way in which BEE premiums comply with national legislation, whether that be the PPPFA, or the PPA.

It is trite that 215(2)(c) refers to quantitative showings of the way in which proposed expenditure is compliant in those instances where 215(2)(c) has already been established to apply, a point that must carry over.

Finally, the Committee might ask whether BEE Premiums are somehow too trivial to warrant its attention, or the attention of the public, in terms of an explicit, transparent, and accountable showing in the Bill?

The Constitution leaves no doubt as to the importance of preferential procurement, since it explicitly distinguishes in section 217(1) between the requirements that a procurement system "must" be "fair, equitable, transparent, competitive and cost-effective", and the requirement in section 217(2)(b) for a framework that provides for "categories of preference in the allocation of contracts" in order to materially enhance "the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination". There is also no doubt that the PPPFA and PPA are, respectively, the national legislation earmarked in Section 217(3), and provide for BEE Premiums pursuant (in Parliament's understanding) to section 217(2).

This settles the question of whether BEE Premiums are so trivial as to be ignored regardless of sections 217(1), 215(1), 215(2)(c), and 226(2) of the Constitution. 217(2)(a) categories of preference are so important as to be distinctly mentioned in the Constitution. That must be at least important enough to be distinctly mentioned by the Committee.

Zondo Report

The Report of the Judicial Commission of Inquiry into State Capture: Part 1, Volume 1, (the Zondo Report), discussed "Problems in the legislative design" in Section G, noting:

> "One of the fundamental difficulties inherent in our procurement legislation is to reconcile the particular objectives separately addressed in sections 217(1) and 217(2) of the Constitution."

It stated further that the current legislative design, under the PPPFA, is "unco-ordinated":

> This unco-ordinated approach leaves a critical question unanswered: is it the primary intention of the Constitution to procure goods at least cost or is the procurement system to prioritise the transformative potential identified in section 217(2)? There is an inevitable tension when a single process is simultaneously to achieve different aspirational objectives.

The crucial point to note is that a lack of transparency facilitates corruption of such a dire magnitude that it is called "State Capture". The Zondo Report continues:

> In the view of the Commission the failure to identify the primary intention of the Constitution is unhelpful and it has negative repercussions when this delicate and complex choice has to be made, by default, by the procuring official.

The failure is predicated on a lack of transparency. Without transparently making the cost of BEE Premiums explicit, there is no official record of the extent to which BEE Premiums are prioritized above value for money procurement.

Notice the distinction, however, between the call for eliminating BEE Premiums, as the Zondo Report does, and as the IRR does and an aligned submission, and the call to make BEE Premiums explicit. It is the latter that IRR Legal makes with a narrow focus to the Committee.

Put another way, consider the Zondo Report's statement:

> Ultimately in the view of the Commission the primary national interest is best served when the government derives the maximum value-for-money in the procurement process and procurement officials should be so advised.

It would be a wonderful thing for the Committee to implement the spirit of this advice. However, if the Committee, or the Member of the Executive Council for Finance, fails to do that, it would still be possible to comply with the Constitutional duty enumerated above to make the cost of BEE Premiums explicit.

Capacity to Perform Duty

The North West Provincial Treasury (PT), over which the Committee has direct oversight, has the capacity to perform the relevant constitutional duty to make BEE Premiums explicit. As a legal matter, the PT is empowered by the Constitution, as noted above, and section 18 of the Public Finances Management Act (PFMA), which states:

> (1) A provincial treasury must—
>
> (a) prepare the provincial budget;
>
> (b) exercise control over the implementation of the provincial budget;
>
> (c) promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of provincial departments and provincial public entities;
>
> (2) A provincial treasury—
>
> (a) must issue provincial treasury instructions not inconsistent with this Act;

The capacity to make BEE Premiums explicit is also established by the fact that these costs are recorded, separate from Base Price, at the point of contract. National Treasury's Instruction No. 1 of 2015/2016, Section 4.2 stated:

> [Procurers] must submit the following information on successful bids to the relevant treasury's eTender Publication Administrator within seven (7) working days of awarding the bids:
>
> (b) ...preference points claims;
>
> (c) Contract price(s), if possible;"

All that is necessary to calculate Base Price, and Preference Premiums, is the contract price, and price points, of the winning bid.

Instruction No. 9 of 2022/2023 repealed and replaced the above Instruction, but preserved the relevant provision in substance in section 3.3, which requires the recording of "bid information" for all contract awards, which includes contract price and price points of the winning bid.

Furthermore, the website of the South African Revenue Service records procurement awards and clearly publishes the contract price, and price points, which is the necessary information to showcase Preference Premiums.

Finally, the City of Cape Town issued a "Value for Money" report, which further illustrated the clear feasibility of reporting BEE Premiums.

Recommendations

Since there is a duty to make BEE Premiums explicit, and since practical and legal feasibility is clearly established, what remains is for IRR Legal to illustrate how this can be done in a cooperative spirit. Our recommendations are as follows:

> 1) The Bill should be amended to include the definitions of Base Price, Preference Premiums, BEE Premiums, and Other Premiums noted above.
>
> 2) The Bill should explicitly forecast expenditure on BEE Premiums as a separate item under "Transfers and Subsidies" for each line item in Schedule A.
>
> 3) The Member of the Executive Council for Finance, as representative of the PT, should issue an instruction under section 18(1)(c) of the PFMA, that includes the definitions directly mentioned above.
>
> 4) Furthermore, an Instruction should be issued to facilitate financial management in particular with regards to establishing a mechanism that will allow BEE Premiums to be paid within a relevant category as provided for in the Bill, and then to anticipate the approach to the ceiling on BEE Premiums in the specific appropriation, and then to facilitate exemption from paying BEE Premiums once that ceiling is reached. Annexure A below provides a template for doing this under the PPPFA, while Annexure B, also below, provides a template under the PPA.
>
> 5) In the alternative to 1) and 2) the Committee is expected to ask PT to issue an instruction that has the same effect pursuant to the Constitution's requirements of transparency, and related explication, in 215(1); 215(2)(c); 217(1); and 226(2); as well as relevant legislation.

Annexure A: **National Treasury Regulations: Norms and Standards for Budgeting, Accounting, Reporting, and Cost Managing Preferential Premiums in Public Procurement**

Issued in terms of Section 76 of the Public Finance Management Act, 1999 (Act No. 1 of 1999), read with the Preferential Procurement Policy Framework Act, the Broad-Based Economic Empowerment Act, and the Constitution of the Republic of South Africa, 1996.

PREAMBLE RECOGNISING that section 215(1) of the Constitution requires national, provincial, and municipal budgets and budgetary processes to promote transparency, accountability, and the effective financial management of the economy, debt, and the public sector;

AND RECOGNISING that section 215(2)(c) mandates that budgets must show the way in which proposed expenditure will comply with national legislation;

AND RECOGNISING that section 216(1) requires measures to be prescribed to ensure both transparency and expenditure control in each sphere of government by introducing uniform expenditure classifications, and uniform treasury norms and standards;

AND RECOGNISING that section 217(1) requires a procurement system that is transparent, and that this transparency must extend to the cost of implementing legislatively provided for categories of preference pursuant to section 217(2)(a);

NOW THEREFORE, to ensure that the unrequited subsidies paid to achieve constitutional transformation goals are visibly budgeted for, accurately accounted for, transparent, and subject to democratic expenditure controls, the following Regulations are issued:

1. Definitions In these Regulations, unless the context indicates otherwise:

- **"Base Price"** means the price of the acceptable tender that scores the maximum 90 points for price in terms of section 2(1)(b)(i) of the Preferential Procurement Policy Framework Act, 2000 (Act. No. 5 of 2000), or the maximum 80 points for price in terms of section 2(1)(b)(ii) of that Act, as applicable.
- **"BEE Premium"** means a Preference Premium pursuant “broad-based black economic empowerment” as defined specifically in 1(d) and 1(f) of the Broad-Based Black Economic Empowerment Act, 2004 (Act No. 25899 of 2004).
- **"Other Preference Premium"** means a Preference Premium other than a BEE Premium.
- **"Preference Premium"** means the exact financial difference between the final contract price of the successful tender and the Base Price, which amount shall be zero where the successful tender scored the maximum points for price under the applicable section.
- **"Requited Expenditure"** means the economic value of the Base Price, classified purely as a transactional payment for goods, services, or capital assets.
- **"Unrequited Subsidy"** means the economic value of the Preference Premium, classified as a targeted subsidy paid to the preferred bidder.

2. Application These regulations apply to all “organs of state” as defined by the Preferential Procurement Policy Framework Act, (Act. No. 5 of 2000).

3. Records of Base Price and Preference Premiums

- **(1)** Upon the award of any contract the accounting officer must record the Base Price, and the Preference Premium, separately.
- **(2)** The accounting officer must further record the Preference Premium as either a BEE Premium or an Other Premium.
- **(3)** The Base Price must be recorded and accounted for under the relevant "Goods and Services" or "Capital Assets" Standard Chart of Accounts (SCOA) classification.
- **(4)** The Preference Premium must be recorded and accounted for against the appropriated "Transfers and Subsidies: Preferential Procurement" SCOA classification as either a BEE Premium or Other Premium.

4. Annual Reporting

- **(1)** The Annual Financial Statements must disclose the aggregate total of Preference Premiums paid during the financial year as a distinct note as a necessary condition of compliance with the transparency imperatives of both sections 216(1) and 217(1) of the Constitution.
- **(2)** The accounting officer must reconcile these aggregate unrequited subsidies against the prospective budget initially allocated in terms of Regulation 5 to demonstrate the way in which the expenditure complied with national legislation.

5. Estimates of National Expenditure and Budget Review

- **(1)** All annual budgets and Medium-Term Expenditure Framework (MTEF) submissions must, pursuant to section 215(1)(c) of the Constitution, explicitly report the anticipated future cost of Preference Premiums.
- **(2)** Where applicable Preference Premiums must be reported as a component in every separate Vote to quantitatively show the way in which such expenditure complies with legislation that establishes Preference Premiums.
- **(3)** Accounting officers must establish a dedicated sub-programme or line item designated as "Transfers and Subsidies: Preferential Procurement" within each applicable Vote.
- **(4)** The appropriated amount must be forecasted using historical procurement data, sector-specific transformation targets, and the authorized budget ceiling of the procuring entity.

6. Budget Depletion and Procurement Restrictions

- **(1)** The aggregate payment of Preference Premiums in any financial year may not exceed the quantum specifically appropriated for that purpose under Regulation 5.

- **(2)** When the expenditure against the "Transfers and Subsidies: Preferential Procurement" line item reaches 90% of the appropriated limit, the accounting officer must formally review all pending and upcoming procurements to prevent unauthorized expenditure.
- **(3)** The accounting officer may formally review pending and upcoming procurements at an earlier stage in order to mitigate against the risk of exceeding the appropriated limit referred to in (2).

7. Mandatory Exemption Application

- **(1)** If the appropriated budget for Preference Premiums is definitively exhausted, the procuring institution is prohibited from incurring further unrequited expenditure for the remainder of the financial cycle.
- **(2)** Upon expenditure against the "Transfers and Subsidies: Preferential Procurement" line item reaching 90% of the appropriated limit, the accounting officer must proactively apply to the Minister for exemptions in terms of section 3 of the Preferential Procurement Policy Framework Act, 2000 (No. 4 of 2000) to avoid exceeding the budget for Preference Premiums.
- **(3)** The exhaustion of democratically appropriated transformative funds shall serve as the mandatory "public interest" justification for granting said exemption.

8. Withholding Funds to Enforce Compliance

- **(1)** If an organ of state fails to comply with section 3 for more than 4% of its annual expenditure amount, then the Minister of Finance shall initiate a review to determine the cause of failure.
- **(2)** If an organ of state fails to comply with section 3 in terms of the 4% threshold for two financial years in a row, then the Minister of Finance may withhold funds from that organ of state in terms of section 216(2) of the Constitution.

Annexure B: **National Treasury Regulations: Norms and Standards for Budgeting, Accounting, Reporting, and Cost Managing Preferential Premiums in Public Procurement**

Issued in terms of Section 63 of the Public Procurement Act, 2024 (Act No. 59967 of 2024), read with the Public Procurement Policy Framework Act, the Broad-Based Economic Empowerment Act, and the Constitution of the Republic of South Africa, 1996.

PREAMBLE RECOGNISING that section 215(1) of the Constitution requires national, provincial, and municipal budgets and budgetary processes to promote transparency, accountability, and the effective financial management of the economy, debt, and the public sector;

AND RECOGNISING that section 215(2)(c) mandates that budgets must show the way in which proposed expenditure will comply with national legislation;

AND RECOGNISING that section 216(1) requires measures to be prescribed to ensure both transparency and expenditure control in each sphere of government by introducing uniform expenditure classifications, and uniform treasury norms and standards;

AND RECOGNISING that section 217(1) requires a procurement system that is transparent, and that this transparency must extend to the cost of implementing the categories of preference authorized by section 217(2)(a);

NOW THEREFORE, to ensure that the unrequited subsidies paid to achieve constitutional transformation goals are visibly budgeted for, accurately accounted for, transparent, and subject to democratic expenditure controls, the following Regulations are issued:

Part 1: Definitions and Application

1. Definitions In these Regulations, unless the context indicates otherwise:

- **"the Act"** means the Public Procurement Act 2024, (Act No. 59967 of 2024).
- **"Base Price"** means the price of the directly requited good or service on the open market absent unrequited subsidies imposed by set-asides, prequalification, and sub-contracting requirements in terms of Sections 18, 19, and 20 of the Act.
- **"BEE Premium"** means a Preference Premium pursuant “broad-based black economic empowerment” as defined specifically in 1(d) and 1(f) of the Broad-Based Black Economic Empowerment Act, 2004 (Act No. 25899 of 2004).
- **"Preference Premium"** means the exact financial difference between the Base Price and the final contract price awarded to a preferred bidder pursuant to set-asides, prequalification, and sub-contracting requirements in terms of Sections 18, 19, and 20 of the Act.
- **"Requited Expenditure"** means the economic value of the Base Price, classified purely as a transactional payment for goods, services, or capital assets.
- **"Unrequited Subsidy"** means the economic value of the Preference Premium, classified as a targeted, transformative subsidy paid to the preferred bidder.

2. Application These regulations apply to all organs of state as defined in the Act.

3. Records of Base Price and Preference Premiums

- **(1)** Upon the award of any contract the accounting officer must record the Base Price, and the Preference Premium, separately.

  (a) The tender bid process must include calculating the Base Price as part of the evaluation criterion of "cost-effectiveness" pursuant to section 24(1)(d) of the Act, as prescribed.

  (b) If the tender bid process has not produced a reported Base Price, then the accounting officer is prohibited from authorising payment.

  (c) Exemptions from the requirement in (b) may be requested from the Minister of Finance. Such exemption requests may only be granted where they are in the public interest, and where the request is accompanied by a written explanation of the failure to comply and a written explanation of what steps will be taken to ensure transparency and cost management going forward through Base Price evaluation of all tender bids managed by the relevant accounting officer with particular and practical emphasis on the kind of contract in question.

- **(2)** The accounting officer must further record the Preference Premium as either a BEE Premium or an Other Premium.

- **(3)** The Base Price must be recorded and accounted for under the relevant "Goods and Services" or "Capital Assets" Standard Chart of Accounts (SCOA) classification.

- **(4)** The Preference Premium must be recorded and accounted for against the appropriated "Transfers and Subsidies: Preferential Procurement" SCOA classification as either a BEE Premium or Other Premium.

4. Annual Reporting

- **(1)** The Annual Financial Statements must disclose the aggregate total of Preference Premiums paid during the financial year as a distinct note as a necessary condition of compliance with the transparency imperatives of both sections 216(1) and 217(1) of the Constitution.

- **(2)** The accounting officer must reconcile these aggregate unrequited subsidies against the prospective budget initially allocated in terms of Regulation 5 to demonstrate the way in which the expenditure complied with national legislation.

5. Estimates of National Expenditure and Budget Review

- **(1)** All annual budgets and Medium-Term Expenditure Framework (MTEF) submissions must, pursuant to section 215(1)(c) of the Constitution, explicitly report the anticipated future cost of Preference Premiums.

- **(2)** Where applicable Preference Premiums must be reported as a component in every separate Vote to quantitatively show the way in which such expenditure complies with legislation that establishes Preference Premiums.

- **(3)** Accounting officers must establish a dedicated sub-programme or line item designated as "Transfers and Subsidies: Preferential Procurement" within each applicable Vote.

- **(4)** The appropriated amount must be forecasted using historical procurement data, sector-specific transformation targets, and the authorized budget ceiling of the procuring entity.

6. Budget Depletion and Procurement Restrictions

- **(1)** The aggregate payment of Preference Premiums in any financial year may not exceed the quantum specifically appropriated for that purpose under Regulation 5.
- **(2)** When the expenditure against the "Transfers and Subsidies: Preferential Procurement" line item reaches 90% of the appropriated limit, the accounting officer must formally review all pending and upcoming procurements to prevent unauthorized expenditure.
- **(3)** The accounting officer may formally review pending and upcoming procurements at an earlier stage in order to mitigate against the risk of exceeding the appropriated limit referred to in (2).

7. Mandatory Exemption Application

- **(1)** If the appropriated budget for Preference Premiums is definitively exhausted, the procuring institution is statutorily prohibited from incurring further unrequited expenditure for the remainder of the financial cycle.
- **(2)** "(2) Upon expenditure against the "Transfers and Subsidies: Preferential Procurement" line item reaching 90% of the appropriated limit, the accounting officer must proactively apply to the Minister for an exemption in terms of section 61 of the Public Procurement Act, 2024 (Act No. 28 of 2024)."
- **(3)** The exhaustion of democratically appropriated transformative funds shall serve as the mandatory "public interest" justification for granting said exemption.

8. Withholding Funds to Enforce Compliance

- **(1)** If an organ of state fails to comply with section 3 for more than 4% of its annual expenditure amount, then the Minister of Finance shall initiate a review to determine the cause of failure.
- **(2)** If an organ of state fails to comply with section 3 in terms of the 4% threshold for two financial years in a row, then the Minister of Finance may withhold funds from that organ of state in terms of section 216(2) of the Constitution.