



Exclusion System Summary South Africa

I. Government-Wide Legal and Institutional Framework:

Government-Wide Exclusion Framework? Yes.

- Exclusion decisions are made pursuant to two parallel mechanisms (one under criminal law and one under administrative/regulatory law) as governed by national legislation or centralized regulations. Certain exclusions have government-wide effect while others apply only to the procurement at issue.

Primary Legal Foundation: Criminal Law; Administrative/Regulatory Law.

- Sec. 217 of the Constitution of the Republic of South Africa.

Governing Policy:

- Criminal Law:
 - Sec. 28 of the Prevention and Combat of Corrupt Activities Act, 2004 ([Act No. 12 of 2004](#)) (“PCCA”).
 - Sec. 13P of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003, as amended by [Act No. 46 of 2013](#)) (“B-BBEEA”).
- Administrative Law:
 - Sec. 16A9 of the Treasury Regulations 2005 ([Gazette No. 27388 dated 15 March 2005](#)), as amended (“TR”).
 - Para. 14 of the Preferential Procurement Regulations 2017 ([Gazette No. 40553 dated 20 January 2017](#)) (“PPR”).

Related Laws and Regulations:

- Sec. 217 of the Constitution of the Republic of South Africa.
- Administrative Law:
 - Preferential Procurement Policy Framework Act, 2000 ([Act No. 5 of 2000](#)).
 - Public Finance Management Act, 1999 ([Act No. 1 of 1999](#)).
 - Municipal Finance Management Act, 2003 ([Act No. 56 of 2003](#)).
 - Promotion of Administrative Justice Act, 2000 ([Act No. 3 of 2000](#)) (“PAJA”).

Upcoming Laws:

- Ch. 3 of the [Draft Public Procurement Bill](#) (issued for public comment on 19 February 2020).

Decision-Maker:

Criminal Law: **Independent Judicial Authority** (under the PCCA and B-BBEEA).

Administrative Law: **National Treasury** (under the PPR) and **Individual Accounting Officers** (under the TR).

- *Qualification:* None stated in the legal framework, but typically a senior employee with a financial or legal background at post-graduate level.
- *Independence:* Not functionally independent from senior procurement officials.

II. Functioning and Enforcement of the Government-Wide Exclusion System:

General Provisions:

Type of Procedures: Criminal/Administrative.

Decision Deadline:

- Criminal Law: Subject to court deadlines and procedures.
- Administrative Law: Governed by PAJA.

Provisional Exclusions: None yet; provisional exclusions permitted in Draft Public Procurement Bill.

Commencement of Proceedings: Ability to Initiate an Exclusion Proceeding.

- Criminal Law:
 - Subject to standard judicial process (investigation, filing of charges, etc.).
 - Exclusion is a secondary penalty that may be imposed by the court following a supplier's conviction for certain corruption-related offences. (PCCA, art. 28)
- Administrative Law:
 - Grounds for exclusion based on sec. 16A9 of the TR are reviewed by the individual accounting officer as part of the procurement decision on a contract-by-contract basis. Violations are also referred to the National Treasury for further action, which may include government-wide exclusion. (TR, sec. 16A9.3)
 - For exclusions based on sec. 14 of the PPR, the National Treasury must first receive a referral from the relevant contracting authority.
- Non-governmental parties can submit complaints and/or evidence to the decision-maker.

Notice Requirements & Opportunity to be Heard: Yes & Yes.

- Criminal Law: Subject to standard judicial process (service of process, filings, trial, etc.).
 - If the court orders that a convicted supplier be excluded, the National Treasury must determine the exclusion's length and notify the supplier, relevant purchasing agencies, and all Government departments. (PCCA, sec. 28(5))
- Administrative Law: Administrative actions, including exclusions, are subject to PAJA's procedural requirements. (PAJA, sec. 3)
 - Adequate notice of the nature and purpose of proposed action;
 - A reasonable opportunity to make representations;
 - A clear statement of the action;
 - Adequate notice of any right of review or internal appeal;
 - Adequate notice of the right to request written reasoning, per sec. 5 of PAJA.

Appellate Review of Exclusion Decisions: Yes in both Criminal/Administrative Law.

Nature and Forum of Review:

- Criminal Law: A supplier can appeal its criminal conviction and any exclusion order. (PCCA, art. 28(3)(b))
- Administrative Law: PAJA provides for judicial review of administrative actions, including exclusions, after exhausting any administrative remedies. (PAJA, secs. 6-8)

Means Available to the Supplier: As part of appellate review, suppliers may:

- Obtain the evidentiary record.
- Make a written submission to the appellate body.
- Request an in-person hearing with the appellate body.
- Call witnesses to an in-person hearing to testify on the supplier's behalf.

Duration of Appeal Process: Appellate review of both convictions and administrative actions are court processes that vary on a case-to-case basis.

Legal Representation:

- A supplier **may** be represented by counsel in both the criminal and administrative law systems.

Subsequent Modification of Exclusion Decision: Depends on the exclusion's underlying basis:

- Criminal Law:
 - The PCCA provides that the National Treasury "may at any time vary or rescind any restriction imposed" under this Act. (PCCA, sec. 28(4))
 - The B-BBEEA provides for an automatic 10-year debarment with no possibility to deviate. (B-BBEEA, sec. 13P)
- Administrative Law:
 - Exclusions by individual accounting officers based on sec. 16A9 of the TR are made on a contract-by-contract basis.
 - The National Treasury does not have discretion to modify exclusions based on sec. 14 of the PPR or following a referral based on sec. 16A9 of the TR.

III. Substantive Grounds for Government-Wide Exclusion:

Automatic Exclusion: Yes.

Criminal Law:

- Fraud and other offenses under the black economic empowerment legislation. (B-BBEEA, sec. 13P)

Administrative Law:

- Per sec. 16A9.1 of the TR, individual accounting officers must reject a bid if the supplier engaged in:
 - Corruption;
 - Fraud;
 - Tax-related violations;
 - Collusion and/or infringing competition (*e.g.*, price fixing, bid rigging, market division).

- Per sec. 14 of the PPR, a contracting authority must reject a bid if the supplier engaged in:
 - Fraud: Submitting false information regarding its black economic empowerment status or other matters covered by the PPR.
 - Fraud: Failing to declare any subcontracting arrangements.

Discretionary Exclusion: Yes.

Criminal Law:

- Corruption: Following a conviction for corrupt acts relating to procurements or contracts, the court may, but is not required to, exclude the supplier as part of its sentence. (PCCA, sec. 28(1))

Administrative Law:

- Per sec. 16A9.2 of the TR, individual accounting officers **may** reject a bid if the supplier has engaged in:
 - Fraud;
 - Poor performance, non-performance, and/or failure to perform on public contracts;
 - Abusing the agency's supply chain management system; or
 - Any other improper conduct.
- Per sec. 14 of the PPR, the National Treasury **may** decide to impose an additional (government-wide) exclusion on a supplier that engaged in:
 - Fraud: Submitting false information regarding its black economic empowerment status or other matters covered by the PPR.
 - Fraud: Failing to declare any subcontracting arrangements.
- Decision-maker may not exclude the supplier when there are:
 - Remedial measures;
 - Settlement/agreement;
 - Government interest;
 - Other sanction.

Exclusion based on Bankruptcy and Cross-Debarment: Automatic & Discretionary.

- Bankruptcy: The Companies Act (2008) and the Insolvency Act (1936) limit the permissible business activities of a companies that have been liquidated or insolvent individuals whose estates have been "sequestered."

IV. Scope and Effect of Government-Wide Exclusion:

Types of Excluded Suppliers:

- Individuals and Corporations.

Scope of Exclusion:

Extension to Other Agencies and Organizations:

- Exclusions imposed by **the courts** and **the National Treasury** prohibit the supplier from contracting with any federal agency. (See PCCA, sec. 28; B-BBEEA, sec. 13P; PPR, sec. 14(3)) These exclusions automatically extend to subnational governments.

- Exclusions imposed by **individual accounting officers** are contract-by-contract and apply only to the procurement at issue. But violations may be referred to the National Treasury for further action, including government-wide exclusion. (See TR, sec. 16A9; PPR, sec. 14(1))
- No known countries or international organizations that automatically recognize and apply exclusions from South Africa.

Effect on Ongoing Contracts:

- Ongoing contracts are **not** typically cancelled (except to undo an improperly awarded contract), but termination or imposition of other restrictions are allowed. (PCCA, sec. 28(3)(a); TR, sec. 16A9.1(f); PPR, sec. 14(1)(b)(i))
- Subsequent modifications to ongoing contracts **may be permitted**. (PCCA, sec. 28(3)(a))

Effect on Subcontracting:

- An excluded supplier **cannot** be a beneficiary of the public purse and thus **cannot** serve as a subcontractor. However, enforcement and monitoring may be limited.

Effect on Excluded Individuals:

- Excluded individuals **must** not be employed by a corporate supplier as a senior manager or corporate director. (TR, sec. 16A9.1(c)) Excluded individuals, however, **may** be employed in a role that is not directly related to the supplier's ongoing contracts.
- Exclusion **may** extend to companies controlled by the excluded individual. (PCCA, sec. 28(3)(c)(i))

Tailoring Exclusion:

- No. Exclusions cannot be limited to certain divisions, operating units, or business lines within the company. However, exclusions based on the B-BBEEA may be limited to the corporate supplier's members, directors, or shareholders who committed the offense. (B-BBEEA, sec. 13P(2))

Effect on Affiliates (under the PCCA only):

Corporate Affiliates:

- Exclusion **may** apply to affiliated companies (controlling, controlled, under common control). (PCCA, sec. 28(1)(c))
- The National Treasury **must** notify affiliated companies that they have been added to the Register of Tender Defaulters. PCCA, sec. 28(5))

Extension to Affiliated Individuals:

- Exclusion of a corporate supplier **may** extend to executive officers and individuals that own or control the supplier. (PCCA, sec. 28(1)(b)(ii))
- The National Treasury **must** notify affiliated individuals that they have been added to the Register of Tender Defaulters. (PCCA, sec. 28(5))

Duration of Exclusions:

Duration Specified in Legal Framework:

- Criminal Law:
 - PCCA: Between five and ten years.
 - B-BBEEA: Ten years.
- Administrative Law:
 - PPR: Up to ten years.
 - TR: Contract-by-contract.

Duration Depends on Applicable Exclusion Ground? Yes.

Discretion to Deviate?

- No. The decision-makers do not have discretion to deviate from the limits specified in the legal framework.

Exceptions/Waivers to Exclusions:

- Criminal Law: No. There is not a legal mechanism whereby a contract might still be awarded to an excluded supplier during the period of exclusion.
- Administrative Law: Generally no, although an exclusion decision could be set-aside by a court. Also, exclusions imposed by individual accounting officers under sec. 16A9 are contract-by-contract and do not prohibit suppliers from competing for future contracts.

Other Sanctions:

- Contract termination, monetary fines, and damages.

V. Government-Wide Transparency and Exclusion List:

Official List of Excluded Suppliers? Yes. They are publicly available, and they provide information on the grounds for each listed exclusion.

- [Register for Tender Defaulters](#): Exclusions based on the PCCA.
- [Database of Restricted Suppliers](#): Exclusions imposed by the National Treasury in all other instances.

Procurement Checks:

- Yes. Procuring entities must check both lists of excluded suppliers before awarding a contract. (TR, sec. 16A9(c), See PPR, sec. 14(1)(b)(iii))

Reporting on Exclusions:

Number of Exclusions: Figures discernable from exclusion lists. As of December 2020:

- Register for Tender Defaulters: zero excluded suppliers.
- Database of Restricted Suppliers: 138 excluded suppliers.

Regular Reporting: No requirement for regular reporting on exclusions.

Other Transparency Mechanisms: None.

VI. Limited Scope Exclusion Systems:

Entity-Wide (e.g., Single-Agency) Exclusion? No.

Contract-By-Contract (e.g., Single-Tender) Exclusion? Yes.

Subnational Exclusions:

- Exclusion mechanisms exist at the Provincial/State and Municipal/Local Levels, and within State-owned Enterprises.
- Exclusion decisions of one subnational body are recognized by all other Provincial/State and Municipal/Local Levels.