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-BEEA”).
- Administrative Law:
  - Sec. 16A9 of the Treasury Regulations 2005 ([Gazette No. 27388 dated 15 March 2005](#)), as amended (“TR”).

**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).
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:
  o Fraud: Submitting false information regarding its black economic empowerment status or other matters covered by the PPR.
  o 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:
  o Fraud;
  o Poor performance, non-performance, and/or failure to perform on public contracts;
  o Abusing the agency’s supply chain management system; or
  o 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:
  o Fraud: Submitting false information regarding its black economic empowerment status or other matters covered by the PPR.
  o Fraud: Failing to declare any subcontracting arrangements.
• Decision-maker may not exclude the supplier when there are:
  o Remedial measures;
  o Settlement/agreement;
  o Government interest;
  o 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 “sequestrated.”

**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)(iii))
- 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.

*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.

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**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.