

22 November 2013

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Parliament of RSA
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Dear Ms Noluthando Skaka

COMMENTS ON THE INFRASTRUCTURE DEVELOPMENT BILL (“Bill”)

1. Introduction

- 1.1 The *Infrastructure Development Bill, 2013* (Bill) which was made available for public comments refers.
- 1.2 IDC welcomes the introduction of the Bill, and wishes to express its gratitude for the opportunity afforded to it to comment on this Bill. The development of infrastructure will play a large part in contributing to a competitive base for the South African economy and industrialisation.
- 1.3 In general, IDC supports the Bill but wishes to make comments on some specific sections of the *Infrastructure Development Bill, 2013*.

2. Background

- 2.1. The Bill is promoted by the Economic Development Department and in the headnote anticipates the facilitation and co-ordination of infrastructure development which is of

significant economic and social importance to the Republic. This is intended to be given effect to by ensuring priority in planning, approval and implementation of such infrastructure development to ensure the promotion of development goals contained in a national infrastructure plan (the current plan is seemingly the one adopted by the Cabinet in 2012).

- 2.2. The Bill provides for the setting up of structures that will coordinate and expedite the development of infrastructure in line with the National Infrastructure Plan.
- 2.3. The Bill is accordingly administrative in nature and does not allow for any independent decision making by any of the structures that stands to be created by the Bill. In essence it anticipates that certain infrastructure projects will be designated as strategic integrated (“**SIP**”) projects and as such will be afforded priority in facilitating implementation and execution from a permitting perspective.

3. **Comments**

Terms defined in the Bill and used herein shall have the meanings (subject to any applicable comment) ascribed to such terms in the Bill.

3.1. **Headnote**

The headnote now includes the following language: “; *to improve the management of such infrastructure during all life-cycle phase, including planning approval, implementation and operations; ...*” This is incongruent with the text of the Bill where none of the structures are unambiguously given the authority to control the actual implementation and management of a project. Refer in this regard to Sections 4 (*Functions of Commission*), 6 (*Management Committee*), 10 (*Functions of Secretariat*) and 14 (*Functions of steering committees*), each of which only anticipates, generally speaking, support and facilitation).

PART I OF THE BILL

3.2. Definitions

3.2.1. “**Applicant**” – The Bill is not clear on who exactly an applicant will be. The Bill is also largely silent on the content of an application or the methodology to bring an application to the attention of the Committee. Section 4 (i) seems to anticipate that a proposal may be considered, but “proposal” as a concept is not defined. One of the main purposes of the steering committees relates to the identification and determination of projects that may be designated a SIP, but Section 11 (a) only deals with the development of the mechanism and the approval of the mechanism by the Secretariat. Section 14 (1) (a) seems to support this by virtue of referring only to identification of a project and not the submission thereof. Incidentally, the functions of the Secretariat as set out in Section 10, does not include the ability or the power to do anything with a mechanism presented to it.

3.2.2. “**Infrastructure**” – an accurate description of the infrastructure that is the subject matter of the Bill is required. The Bill seems to make a distinction between public infrastructure and other infrastructure in the definition of “national infrastructure plan. Accordingly the definition appears to exclude (and the Bill is not applicable to) any infrastructure development that may be anticipated or taking place, but which is not included in the national infrastructure plan. The Bill should be clear in this regard.

In addition the Bill must make it clear (which it does not at the moment) that the introduction of the Commission does not represent an additional approval process. It should only be intended to allow for a project to benefit from the Commission’s facilitation and coordination of the Project if it is a designated SIP – to emphasize – there should be no implied intention to require registration or the approval of the Commission to undertake development of infrastructure by anyone (public and private).

We have assumed that the above is in fact the intent of the Bill.

- 3.2.3. Under objects of Act 2 (c) add “operations” after infrastructure build towards the end of the document.
- 3.2.4. Under Functions of the Commission, section 4(i), add “operations” after infrastructure development.
- 3.2.5. Under Part 3, 7.1 (iii) and point (iv) add “any other criteria which the Commission may consider”
- 3.2.6. Under Part 3, 11 replace “utilisation” with “operation”.
- 3.2.7. Under Part 4, 16.3 (a) add “or successor department” after Economic Development Department
- 3.2.8. Under Part 6, 21.1 (b) add point (vii) “Any other criteria that may become important from time to time.”
- 3.2.9. Under Schedule 1, add “Any other sector as may be determined from time to time”
- 3.2.10. Under Schedule 2, does it refer to calendar days of working days?

3.3. Object of Act

- 3.3.1. Section 2 (b) – As mentioned, none of the structures contemplated by the Bill has any authority to execute a project and largely contemplates facilitation.
- 3.3.2. There seems to be some disjuncture between development outcomes of infrastructure projects which the PICC needs to promote (section 4(l)) and the criteria that needs to be applied in implementation of a project (section 21(1)(b)). although these two areas do not necessarily address the same issue, there is a danger that two conflicting lists (or two incomplete lists) will result in the envisaged outcomes not being achieved.

- 3.3.3. It must at this point be noted that the Bill does not provide a budget or other provisions for the funding of the Commission's activities. It appears to anticipate that the budget support will come from the line ministries.
- 3.3.4. Funding for infrastructure projects will remain a significant issue and a lack of funding has the ability to derail implementation of many of the SIPs. The Bill, is however silent on this issue and in our view, it should highlighting the importance of the budgetary process and the role that National Treasury plays in this process. There is a potential that prioritisation needs to take place for implementation of SIPs due to budgetary constraints. The Bill could highlight the criteria that would be used in the process of prioritisation and provide for precedence of projects forming part of priority SIPs in the national budgetary process.

PART 2 OF THE BILL

3.4. Structures and composition of Presidential Infrastructure Coordinating Commission

- 3.4.1. To the extent that it is intended that the Commission should continue to exist in its current form the Bill should be clear in that regard.
- 3.4.2. The Committee is composed of very senior government officials. The practical implementation of the provisions of the Bill must be considered e.g. how often will it be possible for the Commission to give effect to its mandate set out in Section 4. The mandate is wide and will require significant administrative time from all involved. Consideration may need to be given to limiting the scope of the Commission to approvals only and broadening the scope of the Management Committee to place the heavy lifting on a smaller and more agile body.
- 3.4.3. Several SOE's have the responsibility for the development of many of the categories of infrastructure listed in the Bill. However, despite this, the Bill only

specifically provides for Ministers and government officials to form part of the structures. Although there is provision for the appointment of SOE employees, stronger emphasis on inclusion of SOE's in the structures can assist with coordination and implementation.

- 3.4.4. The ability of the Commission to regulate its own affairs (e.g. setting the quorum) may be acceptable, however Section 3 (5) requires that all decisions are made on a majority vote basis, but it does not set a quorum. Without the latter the default position would be that all the members be present to determine the majority. This may not be practically possible and the ability of the Commission to function may be severely affected. The Bill should be appropriately amended.
- 3.4.5. In any event the Bill should provide in Section 3 (6) that the Commission must (instead of "may") determine its own procedures.
- 3.4.6. Section 3 (7) is unclear on what is meant by "secure". If this is understood to mean or include the concept of "procure" then the PFMA will apply to the Commission and a supply chain policy will be required to be established by the Commission. In any event the Commission does not have a budget so the ability to "secure" such services is probably limited.

3.5. Functions of the Commission

- 3.5.1. As mentioned, the national infrastructure plan is not defined properly – it simply refers to one adopted by the Commission. It seems that the Bill intends to give legislative status to an existing position (i.e. the existence of the Commission continues) so one can then by extension also assume that the plan approved in 2012 by the Commission is the currently applicable national infrastructure plan. However, the constitutionality of retrospective regulation needs to be borne in mind. It may well be argued that, as at the date of the promulgation of the Bill, no Commission (despite the language in Section 3

(1)) and no national infrastructure plan will be in existence. The Bill does not provide for the adoption of a new plan, or the ratification of the existing plan.

3.5.2. The Bill is in addition silent on the procedures and processes for the approval of updates (assuming a validly existing plan) (e.g. who will propose the update, justify the update etc?). Section 4 also does not give the Commission the power to develop, maintain, implement and monitor the national infrastructure plan, it is only empowered to coordinate.

3.5.3. The way in which the various duties and functions of the Commission is described is vague and reflective more of policy than legislative drafting. The fundamental flaw is that it describes those actions (as mentioned, largely facilitative) required of the Commission, but nowhere bestows any authority.

3.6. Expropriation of land by Commission

3.6.1. In our view, this provision (Section 5) should be revised in the Bill. Firstly, there is no reason to allow for expropriation by the Commission if there is no provision for a budget, nor any power to own land or to dispose of land.

3.6.2. Secondly, the provision runs contrary to the facilitative intent of the Bill. If this is included in the Bill at all it should be in the context of providing assistance to the relevant authority in control of any SIP to expropriate land. The Bill in any event anticipates that this is only possible subject to existing legislation. It should accordingly be left to the parties responsible for implementation (whom are seemingly not regulated by this Bill) to expropriate in accordance with the applicable rules.

3.7. Management Committee

3.7.1. It is suggested that the Management Committee be obliged to determine its own procedures and to publish the same.

- 3.7.2. The Management Committee may be intended to act as a filter and to make recommendations to the Commission. However, there is no clear delineation of the functions of the Management Committee and the Commission itself. There seems to be overlaps in functions. From a legislative drafting perspective these should be clarified and overlaps avoided enabling the effective functioning of the Commission and its structures.

PART 3 OF THE BILL

3.8. Requirements for strategic integrated projects and designation of SIP Chairpersons

- 3.8.1. Section 7 (1) should rather refer to infrastructure as defined in the definition clause once cognisance of the comment above has been taken.
- 3.8.2. As mentioned above and elsewhere, the Bill only deals with the possibility of some projects to be designated SIPs, but nowhere does it deal with or provide processes for the determination, establishment or development of the national infrastructure plan, which is fundamental to the ability of a project to be designated a SIP.

3.9. Designation of strategic integrated projects and conflicts in infrastructure or planning thereof

- 3.9.1. The heading does not read correctly. It is not clear what is meant by a “conflict in infrastructure”.
- 3.9.2. Section 8 ventures into the realm of procurement. The Commission does not have the authority to procure, merely to facilitate the approval processes. The actual development of projects (whether SIPs or not) will need to remain the function of the line ministries or the relevant SOE’s. The Commission should also not have the power to direct procurement methodology (see the obligation for a public tendering process in Section 8 (2). Public tendering may

not always be appropriate and the door should not be closed on procurement processes that may not require a public tender, but which still complies with Section 217 of the Constitution.

- 3.9.3. The above applies to Section 8 (3) as well. There is no reason to try and regulate procurement in the Bill if the relevant procuring parties remain subject to specific procurement laws (such as the PFMA, the MFMA, PPPFA, Treasury Regulation 16 (many of the SIPs may well be classified as public private partnerships and the application of Treasury Regulation 16 is mandatory)).

PART 4 OF THE BILL

3.10. Functions of Secretariat

Section 10 bestows on the Secretariat only the power to enable and facilitate, not to make determinations or exercise any executive authority. A line by line analysis also indicates that there is not clear distinction between the functions of the Secretariat when compared to the Management Committee – one of these can probably be left out entirely.

3.11. Main purposes of steering committees

- 3.11.1. None of the structures contemplated by the Bill has the authority or the ability to implement a project. Any project plan being developed for in terms of 11 (c) and referred to the Secretariat for approval cannot be approved by the Secretariat, because it does not have the authority to do so (see Section 10 and the functions set out therein). Also, and even if the Secretariat had this authority to approve, it does not have the authority to implement.
- 3.11.2. The drafting of the Bill in this regard is akin to policy drafting and not legislative drafting.

- 3.11.3. The type of colloquial language in Section 11 (g) (“one-stop-shop”) should be avoided, unless it is specifically defined.

3.12. Appointment and composition of multidisciplinary steering committees

We have not analysed Section 12 in detail as it is administrative in nature and presumably binding on the Secretariat who is responsible for the appointment and to ensure compliance. However, the committees are bulky and may not ultimately perform as expected or intended.

3.13. Disqualification of membership of steering committees, disclosure and offences relating thereto

- 3.13.1. Section 13 of the Bill should be checked for consistency with the Prevention and Combating of Corrupt Activities Act No 12 of 2004 and aligned therewith for consistent treatment and application of the law.
- 3.13.2. Section 13 should (once aligned as above) not only be applicable to appointments to the steering committees, but should extend to all the structures comprising the Commission.

3.14. Functions of steering committees

- 3.14.1. Section 14(1) should for the sake of clarity and consistency refer to “infrastructure” as the defined term.
- 3.14.2. Section 14 (1)(a) should refer to projects “constituting” a SIP.
- 3.14.3. Section 14(1)(c) should be amended to refer to only the facilitation of the actions contemplated therein. The steering committees should have no authority to prescribe project plans. That is the function of the procurer as counterparty to the agreements regulating procurement.

- 3.14.4. Section 14(1)(d) begs the question of which laws and compliance by whom is being referred to? The steering committee has no separate and independent enforcement powers.
- 3.14.5. Section 14(1) does not make sense – the appointment of the members are made by the Secretariat, not by the steering committee itself.
- 3.14.6. **The role of steering committees**
- 3.14.6.1 The Bill states that the Secretariat must appoint members to a steering committee and further appoint a SIP coordinator to chair the steering committee. The Bill further states that the members of steering committees will be represented by relevant state entities, the Construction Industry Development Board (CIDB), as well as appropriate experts appointed by the PICC.
- 3.14.6.2 In addition, it appears that the steering committees should be staffed by technically competent persons to evaluate approvals, authorisations, licenses, permissions and exemptions.
- 3.14.6.3 Later on in the document under the Memorandum section, specifically clause 3.4.2 provides some clarity on the role of the steering committees. It states that the steering committee will develop specific plans for the SIP and manage their implementation, including helping address specific regulatory delays and other blockages, and securing developmental outcomes.
- 3.14.6.4 Currently, most of these functions are largely performed by the SIP Coordinators such as the IDC and staff appointed at the discretion of the SIP Coordinator. In other words, the function of steering committee envisaged in the Bill is now largely fulfilled by the SIP Coordinators and their staff.

3.14.6.5 Therefore, it is unclear if the steering committees envisaged in the Bill are complementary structures to the existing SIP coordinators and their teams, which would then imply a certain amount of duplication in effort, or

3.14.6.6 If the steering committees are meant to replace the current structures put in place by the SIP coordinators. If this is the case, it means that each SIP will have its own steering committee chaired by the SIP coordinator. The members of that steering committee will be appointed by the Secretariat and not by the SIP Coordinator.

3.14.7. **The functions of the SIP Coordinator**

3.14.6.7 The Bill further states that any SIP Coordinator, steering or technical committee appointed prior to the Infrastructure Act will continue to exist following the commencement of the Act, as if it was appointed in terms of the Act.

3.14.6.8 However, the Bill does not spell out in detail the functions of the SIP coordinator. As it stands, it appears that the SIP coordinator will largely play a chairing function in its capacity as chair of a steering committee appointed by the Secretariat.

3.14.8. **Approvals, authorisations, licenses, permissions and exemptions.**

3.14.6.9 Section 15 deals with the steps to be taken by the relevant steering committee to facilitate processes.

3.14.6.10 Most of the provisions of the Bill will rely on existing legislation and administrative processes to ensure that approvals, authorisations, licences etc are granted.

- 3.14.6.11 Although Schedule 2 of the Bill specifies timeline for certain steps in the process to be completed, it does not provide for any sanction if these timelines are not met.
- 3.14.6.12 In our view, it would be useful if the Bill could highlight departments responsible for typical authorisations (even in a schedule) to emphasize accountability.
- 3.14.6.13 The Bill envisages a situation where all necessary authorisations could be applied for simultaneously. Not sure if this is possible in practice given the different requirements of the various regulatory authorities.
- 3.14.6.14 Unless the intention of the Bill is to introduce strict time limits on the processing of applications for various licences and authorisations. Is this the intention of Schedule 2?

3.14.9. **Steering committees and procedures**

The budgeting and the responsibility for costs are set out in Section 16. One would assume that the budget allocation is dealt with by government internally, without any external or public effect.

PART 6 OF THE BILL

- 3.15. Part 6 deal with, amongst other things, the delegation of authority. Section 20 however needs to be revised to make it clear that the Commission itself has no authority to grant any approvals or licenses in terms of this Bill. Section 20(4)(c) is accordingly superfluous.

3.16. National development goals

- 3.16.1. The Bill specifically highlights local industrialisation, skills development, job creation, youth employment, small business and cooperatives development,

broad-based black economic empowerment and regional economic integration as national developmental objectives.

- 3.16.2. However, in addition to the project or programme management functions the Bill assigns to the steering committees, it also tasks the steering committees with identifying opportunities to maximise national development goals associated with strategic integrated projects.
- 3.16.3. This may lead to a dilution in the focus on steering committees on national development goals, as they are likely to concentrate their effort on the planning and implementation of the strategic integrated projects.
- 3.16.4. It is therefore proposed that the Bill provides for the establishment of separate project structures at the discretion of the Secretariat specifically focused on achieving national developmental objectives.
- 3.16.5. These could be referred to as Development Impact Projects.
- 3.16.6. For example, the IDC has been appointed to coordinate local industrialisation efforts through its PICC Localisation Office, whilst the DHET has been appointed to coordinate skills development efforts associated with the SIPs. This could be an example of a Development Impact Project.
- 3.16.7. The main purposes of the Development Impact Projects are:
 - 3.16.7.1. To identify opportunities that will maximise the developmental impacts associated with the implementation of the SIPs;
 - 3.16.7.2. To develop strategies and plans, where necessary in conjunction with other agencies and experts to exploit these opportunities;
 - 3.16.7.3. To develop its own administrative procedures and coordinate the work of its members;

- 3.16.7.4. To report regularly to the Secretariat and PICC on progress with regard to the implementation of developmental impact opportunities;
- 3.16.7.5. In addition, Development Impact Projects should work together with relevant government departments and state-owned enterprises to formulate appropriate strategies and policies that will maximise the developmental impacts associated with strategic integrated projects;
- 3.16.7.6. The Bill lists several criteria that must be applied in the implementation of a project (section 21(1)(b)). However, localisation of inputs into the project is not included in this list. In our view, if localisation is ignored in the implementation of projects, the country will lose a major opportunity for industrialisation and increased levels of employment; and
- 3.16.7.7. We therefore, propose that the Bill should define the term “localisation.”

3.17. Access to information

- 3.17.1. In our experience with the SIPs, access to information and the disclosure of sensitive information are two contentious issues that need to be resolved.
- 3.17.2. It is proposed that the Bill includes some mechanism that gives the PICC and its relevant structures access to information pertaining to strategic integrated projects.
- 3.17.3. In addition, if a project is deemed a strategic integrated project, there should be some kind of disclosure mechanism between the PICC and the implementing agency/project developer provided for in the Bill.
- 3.17.4. Perhaps, one of the functions of the Secretariat should be to develop a standardised reporting template with specific disclosure requirements applicable to all strategic integrated projects, which can be incorporated early on into the project planning and later in the project implementation phase.

3.18. Feedback mechanism

- 3.18.1. The feedback mechanisms between the PICC and the SIP coordinators are inadequate.
- 3.18.2. Currently, very little if any feedback is provided to the SIP Coordinators on problems and issues reported into the PICC for resolution.
- 3.18.3. The Bill should perhaps make provision that the Secretariat keeps a log of problems and issues raised by the SIP coordinators and provide regular feedback on progress with the resolution thereof.
- 3.18.4. The Bill provides no clarity on the role of the SIP coordinators and the Localisation Project Office.

Yours faithfully

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