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TO: **National Council of Provinces**
(NCOP) Finance Committee

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Submission to the

Finance Committee of

The National Council of Provinces,

regarding the

Public Procurement Bill of 2023 [B18B-2023]

Cape Town,

22 February 2024

1 Introduction

The Finance Committee of the NCOP (the Committee) has invited public comment, by 22 February 2024, on the Public Procurement Bill of 2023 [B18-2023] (the Bill), as attached.

This submission is made by IRR Legal NPC, a non-profit organization formed in 2023 to defend and uphold fundamental constitutional values and norms through litigation and in the public square; to defend and uphold non-racialism specifically, in contrast with multiracialism and race nationalism, through litigation and in the public square; and to promote the transformation of the Republic of South Africa from being the location of one of the world's highest rates of unemployment to one of the lowest through litigation and in the public square, as well as through research and communication with key stakeholders.

A request is hereby made to make oral representations on February 23, and if no time is available on that day, then it is requested that further time is afforded for public engagement on the Bill.

The South African Institute of Race Relations (SAIRR) is a member of IRR Legal. While the SAIRR covered a wide range of public concerns in its submission on the Bill that may be read in concert with this submission, IRR Legal is an active litigator, and so has a more pointed focus. All previous submissions that remain pertinent are reserved. For convenience the most up to date points, one technical, two constitutional, and one empirical are made up front.

2 BEE Premiums

On February 6 senior Treasury Official Willie Mathebula explained to the Committee that 'premiums' are paid by the state to private entities through the procurement system that the Bill aims to replace. It is trite to note that these 'premiums' serve the policy known as 'BEE'. These are BEE premiums.

Said Mathebula, "the maximum premium paid in that 90/10 preference point system is 11.1%. So that's a premium that the state is prepared to pay to advance transformation. In terms of 80/20, of course it is 25%."

It is further trite to note that the payment of BEE premiums has, to date, directly or indirectly been the primary fiscally sponsored financial incentive to gain BEE points for private employers.

We submit to the Committee that the only proper way to read the Zondo Report is as explaining that the national interest is best served by reducing the 'premiums' Mr Mathebula referred to to R0 per contract, and that as long these 'premiums' are not well accounted for then 'State Capture' is a major danger[1].

3 Constitution 216

Section 216 (1) of the Constitution states that "National **legislation must** establish a national treasury and **prescribe measures to ensure both transparency and expenditure control** in each sphere of government, by introducing— (a) generally recognised accounting practice; (b) uniform expenditure classifications; and (c) uniform treasury norms and standards" [emphasis added].

Transparency and expenditure control on the payment of BEE premiums is only possible where Treasury is aware of the maximum value-for-money option that could have been taken in procurement and the option actually taken when the difference is the payment of a BEE premium. Furthermore, transparency and expenditure control require regular reporting on the value of BEE premiums paid.

However, Treasury has to date failed to report on the value of BEE premiums paid. The Bill, if it becomes national legislation, will directly violate Section 216 of the constitution insofar as it prescribes measures that impair transparency and expenditure control. This occurs whenever the Bill blocks Treasury from knowing what the maximum value-for-money option is in the tender process for any contract. Alternatively, this occurs whenever the Bill blocks Treasury from same without implementing a compensatory measure that *ensures* an accurate, transparent evaluation of BEE premiums per contract, and which is consistent with other constitutional requirements, specifically in Section 217.

If the Committee intends to pass national legislation that complies with 216 of the Constitution then it will amend every part of the Bill that fails to ensure both transparency and expenditure control of BEE premiums, and to add prescriptive measures to ensure both transparency and expenditure control of BEE premiums where those are lacking.

[1] State Capture Commission Report, Vol 1, pg 795 – 797, para 528 – 533.

4 Constitution 217

Section 217 of the constitution has three subsections. Following the Zondo Report Section (1) is here said to require "maximum value-for-money". Section (3) requires that the policy referred to in Section (2) be implemented within a legal framework provided for by national legislation, and the policy in Section (2) provides for "(a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination."

The clear meaning of this is that categories of preference in terms of 217(2)(a) may serve as a tiebreaker between contract bids that are alike in terms of their ability to maximize value-for-money where this does not violate any particular requirement of 217(1).

As a matter of commonsense BEE Premiums could be reduced to R0 in open bids without removing BEE, if BEE points served as a tiebreaker mechanism. If the Committee believes that BEE is constitutional and wishes to incentivize BEE by using its point system as part of the category determinations in terms of 217(2)(a) then the Committee ought to amend the Bill to make BEE a tiebreaker form of 'preference in the allocation of contracts'. Insofar as this does not undermine fairness, equitability, transparency, competitiveness, and cost-effectiveness, it is consistent with 217(1).

Furthermore, there are alternative, non-racial, categories of preference available to the Committee as the current procurement legislation stipulates.

Fresh Facts

As a result of a call by the Committee, through Chairperson Yunus Carrim, Treasury has provided limited, but crucial, information on the functioning of BEE in procurement.

In Annexure A of that dossier Treasury reveals that in the last surveilled R1.22 trillion in procurement expenditure R140.06 billion was spent on companies that are 'not black owned', R47.24 billion on companies where race was 'not provided', R128.37 billion on companies that are partially black owned, and R587.66 on 'black owned' companies. Another R289.25 billion was spent on 'State Owned Enterprises'. Excluding the latter 'black owned' business was paid 63% of private business procurement expenditure. Assuming these graphs are representative, an assumption that seems safe given the request made to Treasury for general statistics to show the general functioning of BEE in procurement, and the absence of any caveats to the contrary in what Treasury provided, the implication is that black owned businesses have received a majority of procurement payments out of the last 7 years. Procurement for the last 7 years on SARB records is R6.6859 trillion. The implication is that black owned businesses have received trillions of rands in only the last few years.

This must come as extremely welcome news to the Committee. As the Bill reduces the competitive environment for thriving black businesses, rather than boosting competition, which could only be understood under the pretext that black businesses are languishing, these facts must bring a deliberate, and explicit reconsideration to the Bill.

Clause by Clause

Definitions

"'transformation' in relation to public procurement, means the process of change that seeks to…(b) achieve representation of the economically active population of the Republic…"

This phrase is unclear. Representation of who by whom? Insofar as the object of the Bill is to enhance clarity this definition does the opposite. Subsection (b) of the definition ought to be deleted.

Objectives

In light of the awesome costs of "State Capture", and the import of the Zondo Report,
Add:
"2(1)(c) implement the advice of the Zondo Report to prioritize the maximization of value for money in public procurement;"
and "2(1)(d) reflect the discovery that categories of preference in the allocation of contracts in terms of Section 217(2)(a) of the Constitution that are non-racial and value-add oriented, such as proven reliability, financial health, and proven flexibility, are best placed to protect and advance persons and categories of persons disadvantaged by unfair discrimination under the constraints of limited resources and in the context of the most impoverished and undereducated people depending most heavily on state effectiveness to satisfy basic needs, as such disadvantaged people are harmed when state resources are spent in a manner that deviates from maximizing value for money in public procurement."

Further Clauses:

8 (1) "A procuring institution must—"

The list that follows includes no requirement to report on the amount deviated from a value for money basis in order to pay BEE premiums or any other 'premiums' as referred to by Mr Mathebula above. Should the Committee fail to prohibit the payment of such premiums in accordance with Section 217 of the Constitution it must require transparency and cost control of such premiums in accordance with Section 216 of the Constitution.

Add: 8(1)(f) "actively acquire and provide information on any deviation from value for money as a result of conflicting policy demands placed on the procurement office by this Act or regulations pursuant thereto;"

17 "Set-asides"

This section allows for pre-disqualification of bidders that might offer the best value for money, including the pre-disqualification of black bidders that might offer the best value for money. The inevitable result is that the procurement office that implements the set aside will not know what the best value for money offer would be. Therefore, the procurement office will not be able to calculate the 'premium', BEE or otherwise, paid to the winning bidder. Therefore, the procurement office will not be able to report the 'premium' value. This directly undermines Section 216(1) of the constitution.

Recommendation: delete section 17.

18 "Prequalification criteria"

Mutatis mutandis the above on section 17.

Recommendation: delete section 18.

19 "Subcontracting"

Insofar as this section undermines transparency and cost control it has the same effect, which is to violate Section 216(1) of the Constitution, as sections 17 and 18 of the Bill above.

Recommendation: delete section 19.

32 "Access to procurement process"

This section includes no direct reference to reporting of 'premiums' paid that deviate from a value for money basis. This violates the requirement of Section 216(1) that national legislation not only make it possible, but actively 'ensure both transparency and expenditure control'.

Add 32(d): "must include reports on payments of premiums that deviate from maximum value for money'.

33 "Disclosure of procurement information"

As per comments on section 32 above, the value of 'premiums' paid must be disclosed.

Add 33(2)(vi): "the amount by which the contract exceeded value for money, meaning the value of the preferential 'premium' paid, if such a 'premium' was paid, by comparison of the winning bid to the best value for money bid or, where applicable, by comparison of the winning bid to the best value for money option available on the open market"

Section 62 "Exemptions"

Section 62 (1) of the Bill reads: "The Minister **may**, with or without conditions, by notice in the *Gazette* exempt a procuring institution from any provision of this Act if— (a) it is impossible, impractical or uneconomical to comply with the regulation or instruction; (b) market conditions or behaviour do not allow effective application of the regulation or instruction;…"

This means that if an organ of state seeks a deviation from a provision with which it would be 'impossible' or 'uneconomical' to comply, then the Minister 'may', or may not, grant that deviation. This, even if the Minister has applied her, or his, mind and come to the conclusion that refusing the exemption will nevertheless perpetuate an 'impossible' or 'uneconomical' contract.

However, Section 217(1) of the Constitution requires that every time an organ of state procures goods and services "it must do so **in accordance with a system** which is fair, equitable, transparent, competitive and cost-effective." [emphasis added] The Bill will become the primary legislative part of that "system" under, inter alia, Section 217(1). The Bill cannot conflict with 217(1). However, the Bill, in its current form, does conflict with 217(1) by allowing the PPO to block economical procurement.

There is an additional problem with 62(1). The only interpretation on which 62(1)(a) could pass a rationality test is if it meant that exemptions come into play if the alternative is a risk to national security. In other words, if (a) is taken to mean: "national security could reasonably be expected to be compromised **absent such exemption**". This should be made clear, not obscured by the current twisted wording.

Recommendation: "62. (1) The Minister **must without conditions,** by notice in the Gazette, exempt a procuring institution from any provision of this Act, if— (a) national security could reasonably be expected to be compromised **absent such exemption**; (b) **cost effectiveness could reasonably be expected to be compromised absent such exemption**."

Section 63 "Departures"

Section 63 (1) of the Bill reads: "The Public Procurement Office [PPO] **may**, with or without conditions, authorise a deviation from a provision of a regulation or an instruction if— (a) it is impossible, impractical or uneconomical to comply with the regulation or instruction; (b) market conditions or behaviour do not allow effective application of the regulation or instruction;…" [emphasis added].

This means that if an organ of state seeks a deviation from a provision with which it would be "impossible" or "uneconomical" to comply, then the PPO may, or may not, grant that deviation. For the same reasons, *mutatis mutandis*, as provided above this cannot stand.

Amended: "The Public Procurement Office [PPO] **must, without conditions,** authorise deviations from any provision of a regulation or an instruction if— (a) it is impossible, impractical, or less than cost effective to comply with the regulation or instruction…"