Advocate Helen Venter.

Prof Geo Quinot.

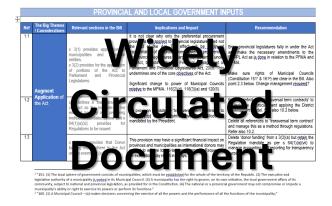
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AFRICAN PROCUREMENT LAW UNIT



1400 subscribers 120 participants





Ref	Sections in the Bill (06Dec2023)	Implications and Impact	Recommendation
1.	Application of the Act		
1.1.	Provincial Legislatures	It is not clear why only the preferential procurement provisions and the intervention of the provincial Legislatures and not the nut of the activities of the continued fragmentation of the procurement system is procurement by provincial legislatures is largely not governed under this Act, but still under the Financial Management of Parliament and Provincial Legislatures Act, 2009. This to dermines one of the core objectives of the Act. This provinces and municipalities as international donors may opt not to adhere to red-tape requirements. Requesting an exemption may	
1.3.	s 1 defines a 'transversal term contract as the mandate of the relevant treasury or a procuring institution mandated by law' and s 64(1)(a)(xi) provides for Regulations to be issued	No provision is made for 'transversal term contracts' to be procured via the District Development Model as mandated by the President.	Expand definition of 'transversal term contracts' to t inclusive of procurement applying the Distri Development Model. See also 10.2 below. OR Delete all references to 'transversal term contract' ar manage this as a method through regulations. Refer als 10.2.
1.4.	s 3(1) provides application to municipalities and municipal entities.	Significant change to power of Municipal Councils relative to the MFMA. 116(2)(d), 116(3)(a) and 120(6).	Make sure rights of Municipal Councils (Constitution 15 & 161 ¹) are clear in the Bill. Also point 2.3 below. Chang management required?







1. Application of the Act

- Must include Parliament & Provincial Legislators:
 - Continued fragmentation
- Donor funding significant financial and service delivery risk
- District Development Model ignored
 - Transversal contracts







2. Constitutionality and Definition of the Act

- Ignores the local and socio-economic CONSTITUTIONAL objectives of provinces and local government
- PPO and PT binding instructions **excludes CoGTA and/or SALGA**
- Conflicts original legislative and executive powers of provincial legislatures and local government:
 - Chap 3 of the Constitution,
 - Intergovernmental Relations Framework Act, and
 - s 5 of the MFMA.







2. Constitutionality and Definition of the Act

- Definition of 'This Act' includes Regulations, codes of conduct, instructions, and notices:
 - No insight on 36 matters in the Bill
 - Yet, if AO fails to take reasonable steps to implement the Act, they are liable for an **offence or imprisoned** for 3 years and/or a fine







3. Organisational implications of PPO, PTs and institutions

- Specialist office of the PPO national level:
 - Powers just assigned to PTs, no specialist office
- Procuring institution functions defined
 - NO original powers are allowed to municipalities
- No provision is made for the minimum organisational requirements and/or competencies and/or its positioning
 - No Regulations to be issued regarding the structuring of these units







4. Preferential Procurement (Chapter 4)

- **Prequalification limitation on one** will retard transformation at provincial and local government:
 - Impossible, for example, for a province or municipality to support black women-owned small businesses within their geography
- Local content and production ignore the local and socioeconomic objectives of provinces and local government
- 'complementary goals' and other definitions missing:
 - Material term No basis to comment







4. Preferential Procurement (Chapter 4)

- Procedural measures that do not belong at primary law:
 - Will be limiting
- Subcontracting condition of BID should be condition of CONTRACT
 - Empower construction mafia and radical business forums
 - Unreasonable community expectations (e.g. 30%)
 - Significant practical challenges
 - Condition of CONTRACT works







5. Industry/Sector Alignment

• Health – NHI alignment?







6. Dispute / Tribunal mechanism

- Risks paralysing public procurement single and no maximum
 - Multiple Tribunals likely needed
- 18-24 months to establish.
 - NO transitional arrangements
- Working mechanisms in **Gauteng and KZN to be abolished?**
- Ignores **MEDIATION** as a dispute resolution mechanism







7. Financial / budget impact

- "No significant financial implications for the State ..." **Cannot be**
 - "RECOGNISING the need to increase the capacity of organs of state"
 - Impact on **Donor funding** losses
 - Hidden costs to provinces & municipalities on organisations / ICT
 - Set-up costs and operational costs of the Tribunal(s)
 - Costs related to the **standstill provision**
 - PPO enter and search powers increased staffing costs and unintended consequences in institutions
 - Additional scope into procurement
 - Obligations relating to **debarment**







7. Financial / budget impact

- "No significant financial implications for the State ..." **Cannot be**
 - Implementation of systems at provinces and local government
 - **Premium** is critical to successful transformation must fund this







8. Trumping provision

- Must consider **ALL potential conflicts**:
 - Asset management and Municipal Asset Transfer Regulations and the Government Immovable Asset Management Act 2007
 - Investments and Municipal Investment Regulations
 - Donors and sponsorships and Cost Containment Regulations & GRAP standards
 - Regulations regarding competency requirements for officials involved in procurement and Municipal Regulations on Minimum Competency Levels







9. Cooperative Governance in the Bill

- Cooperative discussions, potential infringements:
 - 9 infringement areas identified
 - No provision is made to consult CoGTA or SALGA
 - CIDB must do ALL in consultation with the PPO. Is this the intention?







10. Operational scope, methods & technology

- Provinces and Municipalities Not create and maintain their own databases: hamper local & socio-economic development
- Definitions missing, including method
 - Take out **Transversal contracts** as an example of a method
- Scope of Contract management; risk management and asset management under procurement
- Remove the **obligation to create a single ICT system** Appropriate provision recommended







10 Themes, 35 Recommendations

Recommendation

Expand definition of 'transversal term contracts' to be

Delete all references to 'transversal term contract' and

applying

District

procurement

Development Model, See also 10.2 below.

inclusive.

OR

of.

Application of the Act

- Application and provincial Legislatures and not the 1
- res and not the Bring provincial legislatures fully in under the Act and Constitutionality and Definition of the Act to the FMPPL Act as is 2.
- Organisational / capacity implications 3.
- **Preferential Procurement** 4.
- Industry impact (Health (NHI), Energy, Water) 5. r transparency purposes.
- **Dispute / Tribunal mechanism** 6
- Financial / budget impact
- **Trumping provision** 8 mandated by the
- Cooperative Governance in the Billio.2. 9.

Operational scope, methods and technology Also point 2.3 below. Change 10