



KWAZULU-NATAL LEGISLATURE

AN ACTIVIST PEOPLE-CENTRED LEGISLATURE

NEGOTIATING MANDATE

TO: HON Y CARRIM, MP
CHAIRPERSON: SELECT COMMITTEE ON FINANCE

NAME OF BILL: PUBLIC PROCUREMENT BILL

NUMBER OF BILL: B18B-2023

DATE OF DELIBERATION: 26 APRIL 2024

VOTE OF THE LEGISLATURE:

The Portfolio Committee on Finance met on Friday, the 26th April 2024, and agreed to mandate the KwaZulu-Natal delegation to **support** the **Public Procurement Bill [B18B-2023]** upon consideration of the following proposed amendments:

In view of the number of proposed amendments and the time at our disposal, our proposed amendments may not all be fashioned into clause-by-clause textual amendments of the Bill. Should the Select Committee agree with the proposed policy changes, then the textual amendments to the Bill can be fashioned thereafter. The following amendments are proposed: [Insertions in existing enactments indicated in underlined text, deletions in bold text within brackets]:

1.1.1. Preamble:

Add Local government to the Preamble as follows:

*“**WHEREAS** section 217(1) of the Constitution of the Republic of South Africa, 1996, stipulates that contracting of goods and services by organs of state in the national, provincial sphere and local sphere of government.”*

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Reason: This is more accurate in terms of S217(1) of the Constitution and local government has been omitted.

1.1.2. Definitions clause of Bill (Clause 1)

(a) Amendment to the definition of “Black People” to qualify it so that it does not just align with the definition in the BBBEE Act. It is proposed that the following be added to qualify the definition (perhaps in a substantive section) that “procuring institutions can use EAP targets to target within race groups to ensure mainstreaming of the majority of the previously disadvantaged population into the mainstream economy”.

Reason: Comments indicate that the categories listed under “black” (in the BBBEE Act) do not have the same inequality experience and transformation amongst the listed category should not be the same. The use of the Economically Active Population (EAP) targets will assist in ensuring the mainstreaming of the majority of the economically active population into the main economy and will allow for the advancement or transformation as the majority of the mass population will be targeted as envisaged in section 2 (2) (c).

(b) Addition of appropriate definitions for “set asides”, “prequalification” “functionality”, “Complementary goals”, “statement of requirements” to obviate interpretational challenges”.

1.1.3. Clause 3(4) Conflict of provisions

The trumping clause in the Bill must be reconciled with the trumping clause in the BBBEE Act. Clarify in the text of the Bill when the Public Procurement Act will prevail over the BBBEE Act so that it will allow for alignment between the 2 Acts and create an order of precedence.

Reason: Currently both these Acts trumping provisions are fashioned to prevail over any other legislation.

1.1.4. Clause 4(1):

(a) Amendments to provide for the independence of the Public Procurement Office (PPO) in clause 4(1) of the Bill.

Reason: The Independence of the PPO if housed within Treasury, which also houses the chief procurement officer (chief buyer) may need to be considered.

(b) Further amendments to clause 4(1) to establish PPO's at Provincial level with the same functions.

Reason: To handle matters at a provincial level as they are closer to the organs of state and there are existing units performing similar functions. If all matters are centralised, this can cause delays.

1.1.5. Clause 17 of the Bill

(a) Clause 17(1) of the Bill:

Insert the following as underlined:

"17(1) A procuring institution must set-aside a bid for a category of persons provided for in subsection (3) in accordance with the prescribed thresholds and conditions by advertising a bid with a specific bid condition that only one or more of the bidders specified in subsection (3) may respond."

Reason:

Similar to provision in clause 18(1). It provides clarity as to how set asides will be communicated to bidders.

(b) Clause 17(2)(d) of the Bill allows a procuring institution to set aside a bid for a category where no target for set aside is prescribed. This clause needs to be clarified further to prevent abuse of this provision by procuring institutions.

(c) Clause 17(3): insertion of the following categories:

"(k) military veterans

(l) persons in categories (a) to (k) who are registered on a developmental programme of the procuring entity".

Sections referring to prescribed percentages should take into account this insertion.

Similar insertions of these categories to be made in clause 18(1)- categories for pre-qualification criteria, and in clause 19(2) categories for subcontracting.

Reason: Military veterans are required to be included in the category for set-asides, as this group is a provincial priority. Provision should also be made for set-asides for contractors/service providers in departmental developmental programmes.

1.1.6. Clause 28 of the Bill

Amendments to clause 28(1) of the Bill to specify where the procurement function should be located in the procuring institution and the reporting lines. Consider changing the terminology to “units” rather than function.

Reason: This will align with the existing units in institutions. Comments have also proposed for direct reporting of the unit to the Accounting officer to be more effective and independent.

1.1.7. Clause 29(1)

Clause 29(1) to also exclude support staff to municipal office bearers as members of bid committees.

1.1.8. Clause 33(2)(b)

A time frame needs to be inserted.

Reason: The use of the phrase “as quickly as possible” is open to interpretation.

1.1.9. Clause 38(1)

Clause 38(1) to indicate where the Public Procurement Tribunal is to be located. Stakeholders recommended that it be decentralised to the provinces to be more effective and the aspects of panels (CI 47(1)) constituted provincially to be accordingly amended.

Reason:

This will assist to avoid delays in decision-making and to fast track reviews. KZN currently has a bid appeal tribunal which handles a number of matters. Concerns were raised by the public as to how a centralised tribunal will be able to handle the number of matters that will arise from procuring institutions in the whole country, leading to delays in finalising appeals.

1.1.10. Restoration in the text of the Bill of the power of the PPO and Provincial Treasury to review procurement policies of procuring institutions and to propose changes.

1.1.11. The need for the strengthening of the debarment provisions in the Bill by aligning the debarment provisions in public procurement regulation with the tender defaulter (e.g. debarment) provision in anti-corruption law.

1.1.12. The addition of incentivised whistleblowing provisions in the Bill aligned and fitted to public procurement and not left entirely to the Protected Disclosures Act 26 of 2000.

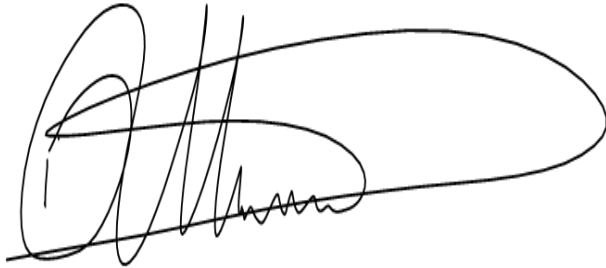
1.1.13. Inclusion of transparency standards (e.g. open contracting system) which requires disclosure across the full procurement cycle.

1.2. In addition, public comments raised the following constitutional and legal challenges which require consideration and reply:

- (a) Constitutional invalidity of the Bill due to overreaching and usurping of municipality's procurement powers;
- (b) Fragmentation of procurement laws due to numerous regulations and binding instructions in terms of the Bill;
- (c) The issue of the removal of price from the Bill and radical departures from S217 principles which may be grounds for unconstitutionality;
- (d) The vesting of enormous discretion to the Minister in regulations with no guiding principles, and that Parliament is best placed to provide the main framework;
- (e) With regard to the PPO, its independence is questioned and its intrusive powers in respect of investigations;
- (f) The Bill does not consolidate the procurement landscape as it creates 2 separate frameworks;
- (g) New chapter 4 raises issues and confusion of terminology;
- (h) Marginalisation of the BBBEE Act by Bill;
- (i) Prescribed criteria are too open-ended for a constitutionally required framework;
- (j) Concerns around transparency and integrity; and

1.3. The following aspects are in the nature of comments and require clarity from the Department:

- (a) Public comments also raised challenges experienced by subcontractors in public procurement. The Department must indicate how the Bill seeks to deal with such subcontracting challenges.
- (b) Clause 25(3)(c)- clarity as to why "demand management " in clause 25(c) is separate from "procurement planning and budgeting" in Clause 25(d) as the separation of these functions may have an impact on job descriptions in each institution.
- (a) Comments also indicate that there is misalignment with the BBBEE Act and the Bill and that the Bill must create alignment so that the transformation agenda can be achieved. How does the Department intend to address any misalignment?



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DATE