



REPORT OF THE PORTFOLIO COMMITTEE ON PREMIER'S OFFICE; FINANCE; ECONOMIC DEVELOPMENT AND TOURISM ON THE PUBLIC PROCUREMENT BILL [B18B - 2023]

1. INTRODUCTION

The Speaker of the Legislature referred the Public Procurement Bill [B18B - 2023] (the Bill) to the Portfolio Committee on Premier's Office; Finance; Economic Development and Tourism (the Committee) for consideration and report back to the House in accordance with the legal prescripts and the Rules and Orders of the Mpumalanga Provincial Legislature (the Rules).

In terms of Section 118 (1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) the Mpumalanga Provincial Legislature (the Legislature) has a mandate to facilitate public involvement in the legislative and other processes of the Legislature and its Committees. Therefore, the Committee conducted a public hearing to solicit public inputs and views from members of the public on the above-mentioned Bill.

2. OBJECTIVES OF THE BILL

The aim of the Bill is to be that single framework regulating public procurement and to prescribe a framework within which preferential procurement must be implemented.

3. METHOD OF WORK

The Section 76 Bill was referred to the Committee immediately after being referred from the National Council of Provinces (NCOP) to the Legislature. Subsequently, the Committee interacted on the Bill as follows:

- a) The Committee received a briefing on the Bill from the Mpumalanga NCOP Permanent Delegate and officials from the National Treasury.

- b) Inputs were received from the Provincial Treasury.
- c) The Committee invited public inputs and comments on the Bill by publishing advertisements in the Legislature Social Media Platforms and Print media.
- d) The Committee determined that public input should be solicited on the Bill and public hearings were conducted in the third (03) districts in the province.
- e) The Committee received a briefing by the NCOP permanent delegate on 13 February 2024.
- f) The Committee met to consider the report and Negotiating Mandate on the Bill on the 15 March 2024.
- g) The Committee met to consider the Final Mandate on 16 April 2024.

4. INTERACTION BY THE COMMITTEE WITH THE MPUMALANGA NCOP PERMANENT DELEGATE ON THE BILL

The Mpumalanga NCOP Permanent Delegate appreciated the time afforded to her to present the Bill to the Committee. She reported that officials from the National Treasury have been delegated to assist with the briefing in the province. The following was noted from the Mpumalanga NCOP Permanent Delegates' overview:

- The public procurement regime in South Africa is currently fragmented as there are several laws which regulate procurement across the public administration (in the national, provincial and local sphere of government). This fragmentation results in confusion as different procurement rules apply for different organs of state. Some of these laws pre-date the constitutional order brought about in 1994.
- It is important and necessary, considering the history of South Africa and the developments after the Constitution took effect, to have legislation that creates a single framework regulating procurement, in line with all applicable stipulations of the Constitution and that effectively addresses the socio-economic challenges of South Africa.
- The aim of the Bill is to be that single framework regulating public procurement and to prescribe a framework within which preferential procurement must be implemented.
- The NCOP Select Committee on Appropriations has considered the Bill and all processes have been followed in referring the Bill to provinces as required by Section 76 of the Constitution.
- This means that provinces will have to consider the Bill and confer to their NCOP Permanent Delegates the mandate to vote on the Bill.

5. PRESENTATION BY NATIONAL TREASURY

After the overview made by the Mpumalanga NCOP Permanent Delegate, the National Treasury made a presentation to the Committee. The following was noted from the presentation:

5.1. ARRANGEMENT OF THE PUBLIC PROCUREMENT BILL AND ITS CHAPTERS

The Committee noted that the below enlisted chapters contain the most valuable clause of the bill.

5.1.1 CHAPTER 1

The Committee noted that this chapter contains the definitions, objects, application, and administration of the Act.

- Definitions: For purposes of interpretation of the Act, various terms are defined. In other words, where words are used in the Bill (or Act, when it becomes law) that are different to the way they are used in ordinary conversation, then they are defined so that the reader of the Bill / Act can understand the meaning of the word when it is used the Bill.
- The objects clause of the Bill outlines the underlying purposes of the Bill, which are to-
- introduce uniform treasury norms and standards for all procuring institutions to implement their procurement systems as envisaged in the Constitution; and
- determine a preferential procurement framework for all procuring institutions within which to implement their procurement policies as envisaged in the Constitution (cl 2(1))
- Clause 2(2) sets out the minimum requirements for uniform norms and standards such as ensuring efficient, effective and economic use of public resources, advancing ethical conduct and combatting corruption, stimulating economic development and advancing transformation, amongst others.
- Application clause tells us to whom the Bill applies:
- national and provincial departments and government components
- a constitutional institution listed in Schedule 1 to the Public Finance Management Act, e.g the Public Protector and the IEC, to name two.
- municipalities and municipal entities
- public entities listed in Schedule 2 and 3 to the Public Finance Management Act. (like Transnet, Eskom, PRASA, etc).
- Provision is also made for the application of Chapter 4 (preferential procurement) to Parliament and provincial legislatures.

5.1.2 CHAPTER 2

This chapter speaks to matters relating to the Public Procurement Office, Provincial Treasuries and Procuring Institutions.

- Public Procurement Office: In terms of the Bill, a Public Procurement Office will be established in National Treasury, and it will have a range of functions, including:
 - issuing instructions and promoting compliance by procuring institutions
 - promoting and taking measures to maintain the integrity of procurement system.
 - guiding and supporting officials and procuring institutions to ensure compliance.
 - implementing measures to ensure transparency in procurement.
- Provincial Treasuries: The functions of Provincial Treasuries are outlined (clause 6)
- Procuring Institutions (the institutions buying or disposing of goods / services): these provisions set out the duties of the procuring institutions and who makes decisions on behalf of the procuring institution.

5.1.3 CHAPTER 3

This chapter speaks to matters relating to Procurement Integrity and Debarment.

The Committee noted that Procurement Integrity is when the procurement process is conducted with integrity and those stakeholders involved in the process act with integrity, it produces confidence in public procurement.

Provision is made in this chapter for codes of conduct for officials, bidders, suppliers, members of the Tribunal and other persons involved in a procurement process.

Clause 12 provides that no person may exert undue influence and interfere in a procurement process.

Provision is made for automatic exclusion of specified persons from submitting bids, e.g. public officer bearers, employees in public administration (clause 13)

Clause 14 stipulates what a person involved in procurement can do if that person is given directions inconsistent with the Act, including that the person must not comply with that instruction.

Debarment is when provision is made for bidders or suppliers to be debarred from doing business with government if they engage in certain behavior, such as if the bidder or supplier provided false information in a bid or any other document submitted to a procuring institution in connection with a

procurement process or contract. The process that must be followed before a bidder or supplier is debarred (prevented) from doing business with the government is also set out in the Bill.

5.1.4 CHAPTER 4

This chapter is about Preferential Procurement, and it seeks to address the fundamental Constitutional provisions in section 217(2) and (3) and provides for regulations to be prescribed that will provide more details on the principles set out in this chapter.

The approach that was used in developing this chapter was to focus on the principles that needed to be addressed, but not to provide for percentages or threshold amounts in the Act (known as primary legislation) but to leave that to regulations (known as subordinate legislation) so that if circumstances change and those percentages need to be changed, that can happen sooner than if it were to be in the Act. But in developing regulations, the necessary public consultation would still take place, however, the process would be shorter than when an Act is changed.

5.1.4.1 CHAPTER 4: PREFERENTIAL PROCUREMENT

(i) PROVISIONS IN BILL AS PASSED BY NATIONAL ASSEMBLY

- **Preferential framework and procurement policies (clause 16)**

This clause makes it clear that the framework set out in the chapter is giving effect to section 217(2) and (3) of the Constitution. It also makes it mandatory for procuring institutions to implement preferential procurement in a manner envisaged in the framework.

- **Set asides for preferential procurement (clause 17)**

Setting aside (ringfencing) for certain categories of persons to provide for protection and advancement of persons historically disadvantaged by unfair discrimination. This provides for regulations to set targets for set-asides. Provision is made for instances if not possible to find suppliers within those categories of persons - the provision for empowerment will however not be lost but provided for in terms of clause dealing with pre-qualification criteria.

Procuring institutions must record the analysis that informed its inability to procure using a set aside, and then report to the PPO and provincial treasuries. Application of this clause will be limited to the thresholds and conditions as prescribed by regulation.

- **Prequalification criteria for preferential procurement (clause 18)**

Prequalification will apply to procurement with a higher threshold than set asides.

The list of persons to be reached by this clause is broader than the list provided for in the Set Aside clause.

This provision also compels the private sector to contribute to transformation and supplier development by recognizing the B-BBEE levels of contribution and making provision for subcontracting.

- **Subcontracting as condition of bid (clause 19)**

The Committee noted that for contracts above a prescribed amount, a procuring institution must provide for subcontracting a prescribed percentage of the contract to certain persons and categories of persons.

The list of persons to be reached by this clause is aligned with the list provided for in the prequalification for preferential procurement clause (clause 18). The term “feasible” is used in recognition of the fact that it may not always be possible to subcontract in all tenders due to the nature of some bids.

Provision is made that the persons or categories of persons identified for empowerment must be citizens, or owned by citizens, of South Africa in accordance with prescribed percentages.

- **Designation of sectors for local production and content (clause 20)**

In terms of this clause, the function to designate sectors, sub-sectors and products is conferred upon the Minister responsible for trade, industry and competition as industrial and trade policy falls within that Ministry’s mandate.

It also stipulates that bids that do not meet the minimum requirement for local content are unacceptable bids and thus disqualified from further evaluation. Unlike the way in which designations were previously determined, this clause provides for proposed designations to be gazetted and for the public to be given an opportunity to provide comments.

Furthermore, the Minister of Finance is also provided with the opportunity to comment on the proposed designation.

- **Other preference measures (clause 21)**

Provision is that if sections 17, 18, 19 and 20 are not able to be applied, preferences must be allocated as prescribed. This is meant to ensure that even if the measures provided for in this chapter are not practicable for some reason, transformation objectives are not compromised.

Measures to advance sustainable development (clause 22).

Measures for beneficiation & innovation, advancing creation of jobs, intensification of labour absorption & development of small enterprises within particular geographical area (clause 23)

- Contracting conditions (clause 24).

The above provisions will be expanded upon in regulations, but it was important that enabling provisions were set out in the primary legislation.

- **IMPACT OF PREFERENTIAL PROCUREMENT FRAMEWORK**

- Although apartheid was dismantled a number of years ago, there is still a need to eradicate its socio-economic legacy and advance policies that build an inclusive economy and promote social unity.
- This framework provides a menu of preference that must be followed in the prescribed order and the options of categories that seeks to provide preference in the allocation of contracts and the protection and advancement of persons or categories of persons disadvantaged by unfair discrimination.
- It goes further than the PPPFA in that it does not merely provide for preference points systems, but other measures that will ensure meaningful empowerment of the previously disadvantaged.

5.1.5 CHAPTER 5

The Committee noted that this chapter provides for General Procurement Requirements and provides for the Minister to prescribe, by regulation, a framework within which procuring institutions must implement the procuring system, which includes—

- (a) a strategic approach to procurement—
- (b) types of procurement methods
- (c) the requirements and procedure to be followed for each prescribed method (clause 25(1))

It also provides for, amongst others, the following-

- Measures to prevent abuse of procurement system, e.g. investigate allegations of corruptions, rejecting recommendation to award and cancellation of contracts in specified circumstance (clause 27).
- Measures for access to procurement processes are to be determined in regulations (clause 32).
- The disclosure of procurement information and its format (clause 33).
- Protection of confidential information including personal information (clause 34).

5.1.6 CHAPTER 6

The Committee noted that this chapter addresses Dispute Resolution. It provides for:

- The right of a bidder to seek reconsideration by a procuring institution of its decision to award a bid and, if dissatisfied, then a review by a Tribunal (clauses 37 and 49).
- The establishment of a Public Procurement Tribunal, its composition, the qualifications of the members and other relevant provisions for the functioning of the Tribunal (clauses 38-48).
- The Tribunal to also review a debarment order issued by a procuring institution against a bidder or supplier (clause 50).
- An application made to the Tribunal to be heard by a panel constituted by the Chairperson of the Tribunal (clause 47).
- It should also be noted that:
- A procuring institution is prohibited from awarding a contract during the reconsideration or review proceedings (clause 55).
- A party dissatisfied with a Tribunal order may institute judicial review in terms of Promotion of Administrative Justice Act (clause 54).

The Committee noted that these provisions are in the Bill to provide for a bidder who is aggrieved to have access to these dispute resolution mechanisms so that matters may be resolved speedily and in a more cost-effective manner than the court processes.

5.1.7 CHAPTER 7

This chapter deals with General Provisions. It provides for:

- The Public Procurement Office to investigate any procurement related matter for purposes of establishing any non-compliance with the Act (clauses 56-58).
- The Bill provides for the criminalisation, among others, of conduct of a person who-
- knowingly gives false or misleading information or evidence.

- interferes with or exerts undue influence on any official of a procuring institution or a member of the Tribunal in the performance of their functions.
- connives or colludes to commit a corrupt, fraudulent, collusive or coercive or obstructive act related to procurement.
- causes loss of public assets or funds as a result of negligence (clause 61)
- Limitation of liability for powers and duties performed in good faith in terms of the Act (clause 60).
- Provision is made for exemptions from the provisions of the Act and regulations, as well as departures from instructions (clauses 62 and 63).
- Provision is made for amendments to, and the repeal of, 16 Acts listed in Schedule to the Bill which includes the repeal of the PPPFA and amendments to the PFMA and MFMA (clause 67).
- The provisions of the Act may be brought into operation by the President on different dates and allows for differentiation regarding categories of procuring institutions (clause 68).

6. INPUTS BY LEGAL SERVICES

The Legal Services unit welcomed the presentation by the NCOP Permanent Delegate and indicated that the Bill as presented is legally sound. It was mentioned that the Legislature will allow for the public participation processes to unfold as part of processing the bill and thereafter a report will be compiled together with the Negotiating Mandate and sent to NCOP for further handling and processing.

7. DELIBERATIONS BY THE COMMITTEE

The Committee welcomed the presentation by the Mpumalanga NCOP Permanent Delegate, the National Treasury and inputs by the Provincial Treasury. The Committee noted and agreed that the provisions of the bill will enhance the procurement system.

8. PUBLIC INVOLVEMENT

To adhere to Section 118(1) of the Constitution that mandates the Legislature to facilitate public involvement in the legislative and other processes of the Legislature and its Committees, the Committee resolved to conduct public hearings in the three (3) Districts within the Province. The Committee public hearings were held as follows:

DATE	VENUES
Thursday, 22 February 2024	Ehlanzeni District: City of Mbombela Local Municipality – Matsulu Community Hall
Thursday, 29 February 2024	Gert Sibande District: Victor Khanye Local Municipality – Sinethemba Community Hall
Wednesday, 06 March 2024	Gert Sibande District; Dipaleseng Local Municipality – Siyathemba Community Hall

8.1. Public Hearings

Invitations to the public hearing were extended to a broad segment of stakeholders. The Committee made a call for attendance of the public hearing and to submit written submissions by using digital media. The Bill was also published in the Lowvelder Media, Khanyisa News, Timeless News, Mpumalanga Provincial Legislature Website and social pages.

No written comments were received in respect of the advertisements in all digital media platforms.

The Public Participation and Petitions Unit (PPU) of the Legislature mobilised communities and public education workshops were also held so that the public can have a better understanding of what is required from them, thereafter the public hearings were also conducted within the (03) districts.

During the public hearings Committee Members explained that the Legislature seeks inputs and opinion on the legislation at hand from specific stakeholders and communities within the Province. It was emphasised that the inputs by stakeholders and communities are important to the Legislature and they will be duly considered, conveyed to the NCOP and National Government through the relevant channels.

The public was provided with an overview of the Bill by the Legal Section from the Legislature; and the Provincial Treasury also outlined some of the clauses during the public hearings.

8.2 Comments by the Public

Although the public agreed in general on the proposed objectives of the Bill; some issues were raised, amongst them the following:

a. Members of the public in Matsulu Community Hall raised the following:

- Members of the community welcomed the bill as presented and requested the portfolio committee to ensure that the requirements for CIDB certificates be reviewed as it becomes expensive for citizens to renew their membership annually.
- The bill must also address the challenges faced by sub-contractors.

b. Members of the public in Sinethemba Community Hall raised the following:

- Members of the community welcomed the bill as presented and requested the Hon Members of the Committee to ensure that more workshops on the bill are conducted once it's passed to ensure that citizens clearly understand the provisions of the bill.
- Members of the public acknowledged that the bill will allow public institutions to have the same system and will have a clear mandate on Black Economic Empowerment.
- Members of the public support the bill in terms of the dispute resolution that is enclosed which will redress the long legal costs and processes.

c. Members of the public in Siyathemba Community Hall raised the following:

- Young people requested to be prioritized in all government business projects.
- Young people raised serious concern that they are not considered for government business projects even if they present all needed documents,.
- Government projects are not completed because unskilled people are given tenders.
- People with disability are not considered and there is a lot of nepotism in municipalities

The stakeholders and members of the three communities present at the public hearings, unanimously supported the Bill.

9. OBSERVATIONS AND FINDINGS MADE BY THE COMMITTEE

The Committee made the following observations and findings:

- 9.1. The impact of the preferential framework provides a menu of preference that must be followed in the prescribed order and the options of categories that seeks to provide preference in the allocation of contracts, the protection and advancement of persons or categories of persons disadvantaged by unfair discrimination.
- 9.2 For contracts above a prescribed amount, a procuring institution must provide for subcontracting a prescribed percentage of the contract to certain persons and categories of persons
- 9.3 Public Procurement Office will be established within the National Treasury Office and it will have a range of functions.

10. VOTE OF THE LEGISLATURE

The delegation representing the Province of Mpumalanga in the National Council of Provinces (NCOP) is conferred with authority to vote in favour of the Public Procurement Bill [B18B – 2023].

11. CONCLUSION

The Chairperson, Hon TS Thomo, extends his appreciation to Members of the Committee, the Mpumalanga NCOP Permanent Delegate, Hon DG Mahlangu, the MEC for Finance; Economic Development and Tourism, officials from the National and Provincial Treasury for their active participation, input and contributions during the deliberations on the **Public Procurement Bill [B18B - 2023]** as well as the support staff for contributing to the production of this report.



HON TS THOMO, MPL

CHAIRPERSON: PORTFOLIO COMMITTEE ON PREMIER'S OFFICE: FINANCE; ECONOMIC DEVELOPMENT AND TOURISM

16/04/2024

DATE