



REPORT REGARDING NATIONAL TREASURY'S RESPONSES TO THE MANDATES FROM PROVINCIAL LEGISLATURES SUBMITTED TO THE NATIONAL COUNCIL OF PROVINCES: PUBLIC PROCUREMENT BILL [B18B-2023]

1. BACKGROUND

The Public Procurement Bill is a section 76 bill, meaning that it is a Bill that affects provinces. As part of this process, it has to be brought to the public for comments. This is an important part of the democratic process and the engagements with the public were robust and insightful.

2. THE PROCESS FOLLOWED TO DATE AND ENVISAGED ACTIVITIES GOING FORWARD

The following table summarises the activities undertaken and the outcomes of the activities relating to public comments submitted on the Public Procurement Bill (PPB) to the Select Committee on Finance and the respective provincial legislatures:

BRIEFINGS TO SECOF AND RELEVANT COMMITTEES OF PROVINCIAL LEGISLATURES

DATE	SELECT COMMITTEE / COMMITTEES OF THE PROVINCIAL LEGISLATURES	PHYSICAL / VIRTUAL
06 February 2024	Briefing by National Treasury on the Public Procurement Bill (PPB) [B18B – 2023] to the Select Committee on Finance (SeCOF)	Virtual
9 February 2024	Briefing of the Free State Legislature	Virtual
13 February 2024	Briefing of the Mpumalanga Legislature	Virtual
20 February 2024	Briefing of the Eastern Cape Legislature	Virtual
21 February 2024	Briefing of the Western Cape Legislature	Virtual
22 February 2024	Briefing of the North West Legislature	Virtual
27 February 2024	Briefing of the Northern Cape Legislature	Virtual
29 February 2024	Briefing of the Gauteng Legislature	Physical
08 March 2024	Briefing of the Limpopo Legislature	Physical

PROVINCIAL PUBLIC HEARINGS / PUBLIC PARTICIPATION SESSIONS

PROVINCE	DATE	VENUE	PHYSICAL/ VIRTUAL
SeCOF	23 February 2024	National public hearing	Virtual
Free State	15 February 2024	Ngwathe Local Municipality	Physical
	21 February 2024	Virginia / Welkom	Physical
	22 February 2024	Smithfield	Physical
Mpumalanga	22 February 2024	Mbombela	Physical
	29 February 2024	Enkangala	Physical
	06 March 2024	Balfour	Physical
Eastern Cape		Group 1	
	27 February	Bizana	Physical
	28 March 2024	Mount Frere	Physical
	29 March 2024	Lusikisiki	Physical
	01 March 2024	Mthatha	Physical
		Group 2	
	27 February 2024	Nqanqarhu	Physical
	28 February 2024	Sterkspruit	Physical
	29 February 2024	Ngcobo	Physical
	01 March 2024	Komani	Physical
		Group 3	
	27 February 2024	Butterworth	Physical
	28 February 2024	Alice	Physical
	29 February 2024	Mdantsane	Physical
	01 March 2024	Cambridge hall	Physical
		Group 4	
	27 February 2024	Jeffrey's bay	Physical
	28 February 2024	Uitenhage	Physical
	29 February 2024	Gqeberha	Physical
	01 March 2024	Makhanda	Physical
Gauteng	29 February 2024	Provincial Legislature	Physical
Western Cape	04 March 2024	George	Physical
	05 March 2024	Cape Town	Physical
	06 March 2024	Saldanha Bay	Physical

3. NEGOTIATING MANDATES ON THE PUBLIC PROCUREMENT BILL [B18B-2023]

3.1 National Treasury received the mandates from all the provinces (9 in total). Eight provinces supported the bill, with some proposals for amendments, while one province, the Western Cape, did not support the Public Procurement Bill. Those provinces who supported the Bill expressed gratitude for the Bill, and also for empowerment provisions in particular. The following themes emerged from an assessment of the negotiating mandates:

3.1.1 30-day payment

Proposal / Concern by the Provincial Legislature: 30-day payment is not adhered to by most departments. It needs to be re-addressed.

NT Response: With regards to 30 days payment, it should be noted that this is not the subject of this Bill, but more of a finance matter which is covered in MFMA and PFMA.

3.1.2 Preferential procurement (Chapter 4)

a) Clarity on geographical area

Proposal / Concern by the Provincial Legislature: Contractors from other provinces are still preferred over the locally based contractors.

NT Response: The concern has been noted and addressed in the Bill in that a proposal has been made to clarify that geographical area refers to a municipal area, district and provincial area.

The issues on promoting enterprises in a particular geographical area have been provided for in Chapter 4.

b) Beneficiation of raw materials

Proposal / Concern by the Provincial Legislature: The Bill must promote local beneficiation.

NT Response: The issue relating to the above has been provided for in Clause 23 (new cl 22).

c) Application of set-asides to categories beyond women, youth and persons with disabilities

Proposal / Concern by the Provincial Legislature: The government's pursuit of trying to redress the past by prioritizing the previously disadvantaged groups like women and disabled people, ends up giving rise to an unintended consequence of further disadvantaging the young males.

NT Response: The set aside provision extends to categories beyond women, youth and people with disabilities. Refer to Cl 17

d) Awarding of bids to foreign nationals

Proposal / Concern by the Provincial Legislature: Concerns were raised regarding foreign business owners being preferred.

NT Response: At various places in chapter 4, provision is made for the persons or categories of persons mentioned in the provisions to have a prescribed percentage of ownership by South African citizens.

e) Question relating to authority of procuring institutions to prescribe their own preference point systems.

Proposal / Concern by the Provincial Legislature: Section 16: Does this mean procuring institutions must prescribe their own preference point system, such as 80/20 and 90/10?

NT Response: With regards to Chapter 4, it should be noted that it is the Minister who prescribes the thresholds and preference measures. The term "prescribed" means "prescribed by regulation in terms of s 64", and it is the Minister who has that regulation-making authority. Procuring institutions in terms of cl 16, are then required to develop and implement their preferential procurement policies in accordance with the objects of this Act, the framework in Chapter 4 and the regulations made thereunder. In other words, their policies cannot go outside of what is provided for in the Bill.

f) Proposed exclusions from clause 17(5)

Proposal / Concern by Provincial Legislature: It is proposed that clause 17(5)(b) be excluded from the Bill.

NT Response: Since the criteria for evaluation will be prescribed, it is proposed that cl 17(5) be amended to read as follows: "Qualifying bids must be evaluated further in terms of the prescribed criteria". (It has been proposed elsewhere that cl 17(5)(a) to (d) be omitted and only read as stated above.)

g) Clarification of clause 18(3)

Proposal / Concern by Provincial Legislature: Clause 18(3) should be clarified.

NT Response: The clause on prequalification has since been elaborated on to provide the necessary clarity. A proposal was also made to consider adding the following additional categories to the list in 18(c): i) a small enterprise which is owned by black people within a particular geographical area who are youth; a small enterprise which is owned by black people within a particular geographical area who are women; a small enterprise which is owned by black people within a particular geographical area who are military veterans; a small enterprise which is owned by black people within a particular geographical area who are living with disabilities;

h) Additional definitions proposed for concepts in chapter 4

Proposal / Concern by Provincial Legislature: Addition of appropriate definitions for set-asides, prequalification, functionality, complementary goals, statement of requirements to obviate interpretational challenges.

NT Response: Clauses on set-asides and prequalification have since been elaborated on to provide the necessary clarity and therefore defining them may not be necessary. Functionality has been removed from Chapter 4 but included in Chapter 5 in a different context and does not need definition. These terms will be clarified further in the regulations with context to avoid interpretational challenges. "Complementary goals" has been removed from Chapter 4. Statement of requirements refers to the scope of work or what the procuring institution wants to buy.

i) Set-Aside proposals

Proposal / Concern by the Provincial Legislature: 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."

NT Response: Clauses on set-asides, and prequalification have since been amended from the previous provisions and all processes on their application will be prescribed in the regulations.

j) Military Veterans

Proposal / Concern by the Provincial Legislature: Insertion of the following category: "(k) military veterans"

NT Response: Military Veterans is already included as a category in clauses 17,18 and 19.

k) B-BBEE Act vis-à-vis Bill (Chapter 4)

Proposal / Concern by the Provincial Legislature: Comments indicate that there is misalignment with the B-BBEE Act and the Bill and that the Bill must create alignment so that the transformation agenda can be achieved.

NT Response: There is a proposed amendment to the Preamble and in Chapter 4 to align the Bill with B-BBEEA.

l) Local content / designations

Proposal / Concern by Provincial Legislature: Concern about whether there was a way to standardize the local content as currently municipalities were doing different things and that in itself has a tendency of attracting irregular expenditure and causing confusion in the procurement system, among others.

NT Response: Clause 20 sets out the process to be followed regarding local production and content.

m) Reconsideration of clause 21

Proposal / Concern by Provincial Legislature: There is a need for reconsideration of the subsections in this clause (clause 21) as they look similar.

NT Response: It has been proposed that Clause 21 be removed.

n) Outside contractors vs local businesses

Proposal / Concern by Provincial Legislature: It is a serious concern that main contractors are from far and outside areas and local businesses only benefit from subcontracts.

NT Response: The Bill, in chapter 4, makes provision for preference measures to be provided for persons and categories of persons within a particular geographical location. These provisions would assist in addressing the concerns raised.

3.1.3 Proposal relating to the functions of the PPO

Proposal / Concern by Provincial Legislature: It is proposed that there be an addition of clause 4 under the function of the PPO that this office must also ensure that there is compliance from different procurement institutions as far as planning is concerned to avoid allocated funds being returned unspent.

NT Response: Clause 25 of the Bill provides for the Minister to prescribe a framework for the procurement system to be applied by procuring institutions, and clause 25(3)(d) states that the procurement system referred to in subsection (1) must provide for procurement planning and budgeting in a manner consistent with this Act: This provision, read together with clause 5. (1) (a), which provides that the Public Procurement Office must, in accordance with this Act promote compliance with this Act by procuring institutions, sufficiently accommodates the concern, therefore, the addition of clause 4 is not necessary.

3.1.4 CIDB grading system

Proposal / Concern by Provincial Legislature: Another point of concern is that one would work on a project as a contractor from grade 1 to grade 4 but when comes to having to get a tender on a higher grade like 7, there would be a requirement of experience and that becomes a barrier.

NT Response: PPO will collaborate with CIDB to look at the grading system.

3.1.5 Tribunal to be structured locally (Ombudsman)

Proposal / concern by the Provincial Legislature: The stakeholders urged for the establishment of an Ombudsman on procurement issues.

NT Response: Tribunal will play the role of an Ombudsman, and panels will be constituted closer to where the dispute is.

3.1.6 Translation of bid documents to all languages

Proposal / concern by the Provincial Legislature: Technical tender documents must be user-friendly and must be in different languages for people to understand what is required / The tender documents must be translated into all official languages as most emerging business people find it difficult to interpret or comprehend as they may find it too technical.

NT Response: Translation into all official languages will be consulted with PANSALB and other relevant bodies for this requirement to be considered for inclusion in the regulations.

3.1.7 Parliament and Provincial Legislature (Separation of Powers)

Proposal / Concern by the Provincial Legislature: That National Treasury should provide clarity on the possible erosion of the notion of separation of powers, since it is proposed that some parts of chapter 4 of the Bill would be applicable to other arms of the state.

NT Response: Parliament and provincial legislatures are only going to apply Chapter 4 of the Bill in recognition of the separation of powers and that Chapter 4 is a function of s217(3) of the Constitution, and that they have their own financial management Act.

The reason for providing in cl 3(2) that Chapter 4 and related provisions apply to Parliament and provincial legislatures is that the PPPFA applies to these legislatures and, if it is repealed by the Bill (when enacted), there will be no national legislation setting a framework for these legislatures, as required by s217(3) of the Constitution, to implement preferential policy envisaged in section 217(2) of the Constitution. Parliament and provincial legislatures were removed from the PFMA in view of their constitutional status and regulated in the Financial Management of Parliament and Provincial Legislatures Act, 2009, as amended ("the 2009 Act") – see the Preamble of this Act. Chapter 6 of the 2009 Act deals with supply chain management. The constitutional principle of separation of powers, one of the cornerstones of our constitutional democracy, requires that Parliament and the provincial legislatures remain responsible for the sound financial management of their respective institutions.

3.1.7 Independence of PPO

Proposal/Concern by the Provincial Legislature: That National Treasury should provide clarity how it intends overcoming potential conflict of interest due to the housing of the Public Procurement Office within the National Treasury, since the National Treasury is also a procuring institution;

NT Response:

The location of the PPO within the National Treasury has been deliberated on and agreed that it should remain within the National Treasury. In addition, it should be noted that although the PPO will be located within the National Treasury, the PPO will not procure on behalf of the National Treasury. The National Treasury like any other department will have its own procurement function for its own requirements.

3.1.8 Functions of PPO and Provincial Treasuries

Proposal / Concern by Provincial Legislature: Further amendments to clause 4(1) to establish PPO's at Provincial level with the same functions.

NT Response: The functions of the Public Procurement Office and Provincial Treasuries are clearly articulated in the Bill and in the case of Provincial Treasuries, there are some functions that they will perform which are exactly the same as the PPO with the difference being that such functions will only be performed within the Provincial Administration of that Provincial Treasury; and in relation to procuring institutions within that province; and some are only functions that the PPO can perform as they relate to functions which set the minimum norms and standards for all procuring institutions.

Proposal / Concern by Provincial Legislature: That National Treasury should provide clarity on the possible erosion of the notion of separation of powers, since it is proposed that some parts of chapter 4 of the Bill would be applicable to other arms of the state.

NT Response: Parliament and provincial legislatures are only going to apply Chapter 4 of the Bill in recognition of the separation of powers and that Chapter 4 is a function of s217(3) of the Constitution, and that they have their own financial management Act.

3.1.9 Broad-Based Black Economic Empowerment

Proposal / Concern by Provincial Legislature: Amendment to the definition of “Black People” to qualify it so that it does not just align with the definition in the BBEE 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 BBEE 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).

NT Response: The proposal to augment the definition of black people beyond the B-BBEE definition and the reasons to justify the proposal is not very clear to us considering that any amendment to the definition of black people may have implications to other parts of the Bill especially Chapter 4. The province may need to clarify this point during negotiations.

There is a proposed amendment to the Preamble and in Chapter 4 to align the Bill with B-BBEEA.

3.1.10 Trumping clause

Proposal / Concern by the Provincial Legislature: The Bill states that in the event of a conflict between a provision of this Act and a provision of any legislation, the provision of this Act prevails. Therefore, this Act needs to be clear and conscience to avoid any misinterpretations since it will be the guiding rule for procurement.

NT Response: The trumping clause only relates to procurement matters that may also be provided for in other Acts - that may conflict with this Act.

3.1.11 Procurement Methods

Proposal / Concern by the Provincial Legislature: Definitions such as Request for Bid, Request for Proposal and Request for Quotes are not expressed, and these are operational terms used and differ in meaning and implementation. Instead, the only definition provided for its BID.

NT Response: The issues raised around RFPs, RFQs and other similar issues will be addressed through regulations and guidelines.

Procurement methods for different categories of procurement and related matters will be prescribed as per cl 25 (new 24) through regulations

3.1.12 Regulations

Proposal / Concern from the Provincial Legislature: Regulations must be developed as soon as possible to ensure the implementation of the Bill once it becomes an Act.

NT Response: Agree, regulations will be developed and consulted to address the matters to be prescribed.

Proposal / Concern from the Provincial Legislature: The Minister to be empowered to prescribe regulations and / or framework.

NT Response: The Minister is already empowered in terms of cl 25 (new 24) and cl 64.

3.1.13 Instructions

Proposal / Concern from the Provincial Legislature: Section 5, bullet 2 (a) states that the Public Procurement Office may issue binding instructions as provided for in this act. This is precisely what has SCM practitioners in trouble during covid. Whereby instruction notes that are impossible to implement were issued without proper consultation. It is advisable that a method of consultation and engagement be devised since implementers know the real challenges and how to effectively implement some for best practice instead of issuing instructions that are impractical.

NT Response: PPO instructions will be consulted and it is proposed that it be gazetted prior to implementation.

3.1.14 Dispute Resolution

Proposal / Concern from the Provincial Legislature: On dispute resolution, stakeholders wanted to establish the person who will be responsible for appointment of the tribunal.

NT response: The Minister as per Clause 39.

3.1.15 Clarity regarding the role of PPO vis-à-vis the OCPO

Proposal / Concern from Provincial Legislature: There is a need for clarification of the roles of Public Procurement Officer (PPO) and Office of the Chief Procurement Officer (OCPO)

NT Response: The Bill does not provide for the OCPO. The Bill establishes the PPO and provides the functions of the PPO as per Clause 5. Once the Bill is enacted, the PPO will perform its functions in terms thereof.

3.1.16 Automatic Exclusion

Proposal / Concern from Provincial Legislature: Section 13, automatic exclusion from submitting bids does not have immediate family members but on section 11(a) they are mentioned. Is there any reason for this?

NT Response: Cl 13 provides for automatic exclusion of specific persons from submitting bids whereas Cl 14 directs officials on what to do when they are given instructions that are inconsistent with this Act.

3.1.17 Protection of Officials

Proposal / Concern from Provincial Legislature: There is no protection of procuring officials against the notorious behaviour of business forums who demand a percentage and to chase people away from briefing sessions, including projects.

NT Response: Protection of officials from intimidation by business forums is a criminal matter that must be reported and dealt with by law enforcement agencies.

3.1.18 TR16A and Municipal SCM regulations will be repealed and replaced with the new regulations.

Proposal / Concern from Provincial Legislature: Section 25(1)(b)-(c) refers to procurement methods. Is this the different types of procurement? Will there be alignment between TR16A6.6 and Municipal Supply Chain Regulations section 32? Clarity must be obtained if that will form part of the procurement methods since it is not covered in section 26 of the Procurement Bill.

NT Response: TR16A and Municipal SCM regulations will be repealed and replaced with the new regulations of the Bill.

3.1.19 Disposal

Proposal / Concern from Provincial Legislature: That the criteria used to dispose of assets, for example, land, buildings, etc., preference must be given to the previously disadvantaged persons.

NT Response: The details relating to the disposal of assets will be considered for provision in the regulations in terms of bids for income generating contracts.

3.1.20 Other Officials

Proposal / Concern from Provincial Legislature: Under chapter 3, clause 9(1) and (2), code of conduct, it was suggested that the words "or other official" be explicitly defined on which officials the bill is referring to.

NT Response: proposed replacement of other with any.

3.1.21 Debarment

Proposal / Concern by the Provincial Legislature: The Bill must ensure that the process of debarment is fair and ensuring an efficient and timely sharing of information to ensure that debarred suppliers do not continue to do business with government.

NT Response: The process for debarment is outlined in cl 15 of the Bill and that the Tribunal has the power to review debarment where procuring institutions may have imposed debarment unfairly. All debarred persons will be entered into relevant register to prohibit procuring institutions from doing business with such persons.

3.1.22 Framework / Procurement System

Proposal / Concern by the Provincial Legislature: The Minister to prescribe appropriate and differentiated framework.

The Minister to be empowered to prescribe regulations and / or framework.

NT Response: The framework to be prescribed by the Minister is a single framework but that framework will provide for differentiation for procurement of different categories of goods and services as provided for in cl 64(7).

The Minister is already empowered in terms of cl 25 (new 24) and cl 64.

3.1.23 Integrated ICT system

Proposal / Concern by the Provincial Legislature: There is a need for reconfiguration of clause 20 regarding technology. There is a need for consolidation in respect of advertising. The seamless integration of the system, especially on laws dealing with procurement into the envisaged regulations will be highly appreciated.

NT Response: The intention of Clause 30 is to ensure a seamless integration of **ICT** systems; the details thereof will be provided for in the regulations.

3.1.24 Incentivised Whistleblowing

Proposal / Concern by the Provincial Legislature: The addition of incentivized whistleblowing provisions in the Bill aligned and fitted to public procurement and not left entirely to the Protected Disclosures Act 26 of 2000.

NT Response: The view of the National Treasury is that whistleblowing needs to be considered as part of the Department of Justice's process and for inclusion as an amendment in Protected Disclosures Act – the department has published a paper for comments in this regard.

3.1.25 Demand Management

Proposal / Concern by Provincial Legislature: Clause 25(3)(c) - clarity as to why "demand management" in clause 25(c) is separate from procurement planning in clause 25(d) as the separation of these functions may have an impact on job descriptions in each institution.

NT Response: Procurement planning and budgeting are part of demand management; however, demand management is a strategic process that forecasts the requirements at the organizational level to manage demand for the entire organisation. The procurement planning and subsequent budgeting is informed by the outcome of the demand management process.

3.1.26 Disclosure of procurement information

Proposal / Concern by the Provincial Legislature: Clause 33(2)(b): a timeframe needs to be inserted. Reason: The use of the phrase “as quickly as possible” is open to interpretation.

NT Response: Clause 33(2)(b) is recommended to be amended to 30 days