Western Cape Government

Ministry of Finance and Economic Opportunities
Mireille Wenger I Provincial Minister
Mireille.Wenger@westerncape.gov.za | Tel: 021 483 4700

Standing Committee on Finance, Economic Opportunities and Tourism

Attention: Ms Zaheedah Adams

Per email: zadams@wcpp.gov.za

Dear Chairperson

RE: PUBLIC PROCUREMENT BILL, 2023 [B18B-2023]

Please find attached the comments of the Western Cape Government (WCG) on the Public Procurement Bill, 2023 [B18B-2023] (the Bill).

The WCG does not support the Bill in its current form. While we recognise that the Bill is an attempt to streamline and simplify the regulatory environment for public procurement, after detailed review and consideration, we have a number of concerns, many of which are crucial:

1. We submit that the NA and the NCOP have failed to fulfil their constitutionally imposed duties, and that the conduct of the NA and the NCOP, as well as the Bill, if passed, are inconsistent with the Constitution, for the following reasons among others:

    1.1. The version of the Bill which the National Assembly (NA) passed is substantially different from the version which was published by the Standing Committee on Finance (SC) for public comment. The NA failed to solicit public comment on the numerous material or fundamental changes, in contravention of its obligation under section 59 of the Constitution of the Republic of South Africa, 1996 (the Constitution), before passing the Bill. For example, the complete substitution of chapter 4 (replacing one clause with no less than nine new clauses) fundamentally departs from how the previous version of the Bill aimed to regulate preferential procurement, and significantly intrudes into the autonomy of organs of state to determine their own preferential procurement policies. The changes were not merely technical or semantic.

    1.2. The NA's failure to solicit comments on the abovementioned changes is a defect in the public participation process which the National Counsel of Provinces (NCOP) cannot cure by way of its own public participation process, because among other things the purpose and function of the NCOP is different from the NA, and the NCOP is a different body. Similarly, the public participation processes followed by the Provincial Parliaments, as requested by or agreed with the NCOP, cannot cure the defect.

    1.3. The Courts (including the Constitutional Court) have in numerous instances ruled against Parliament in cases where public consultation in the law-making process were found to be lacking.

1.4. Additionally, the comment periods provided by the SC to comment on the current version of the Bill, and the NA to comment on the previous version, were too short, as it was practically impossible for the WCG's relevant internal stakeholders to adequately and meaningfully apply their minds to the extensive contents of the Bill and engage with each other to submit all of the adequate and meaningful comments at the relevant stages which it would have submitted if the period for comment had been appropriate.

1.5. In the NA less than a full month was provided to interested parties to consider this high-profile, complex, and very important Bill. On the current version of the Bill, the call for comments by the Standing Committee was less than two weeks, which on the 8 February was belatedly extended to 22 February, providing a disrupted comment period of less than a full month.

1.6. We are of the view that the Bill does not conform to the Constitution in terms of the manner in which public participation has taken place by the Legislature (NA and NCOP).

2. Section 216 of the Constitution, 1996, (the Constitution), which falls under financial matters, primarily emphasizes treasury control and outlines measures to ensure transparency and expenditure control across various government spheres. Procurement is an essential component in achieving service delivery objectives by utilising fiscal resources allocated through budgeting and financial processes. It's worth noting that by segregating procurement into a distinct legal framework, there could be a potential disconnect between procurement processes and the financial regime. These two critical aspects, despite being intertwined in terms of objectives, could end up being addressed separately in terms of structure and procedure.

3. While the intention behind elevating the procurement legislative requirements to a separate legal framework is comprehensible, aiming to shift procurement from being merely administrative to a strategic element within government entities, it's essential to recognise that this approach might inadvertently lead to the isolation of procurement matters. This separation could potentially detach procurement from the integral components of revenue, expenditure, assets, and liabilities that are governed by financial mechanisms and controls.

4. We believe that ensuring synergy between procurement procedures and financial regulations is crucial to maintaining a holistic approach that aligns with government's overall objectives. As Parliament continues refining the Bill, we encourage careful consideration of these implications to strike a balance between strategic procurement and the fundamental financial principles that underpin efficient governance.

5. The functional scope of procurement regulation is extended in the Bill to cover goods and services, infrastructure, Public-Private Partnerships, and even donations, which itself militates against the intended simplification of the procurement regime. As outlined in our specific comments, the broadening of the scope brings a range of other legislation and regulatory frameworks into view which are inadequately considered or ignored by the Bill. Conversely, the disassociation of public procurement from public financial

management and broader service delivery systems will further fragment public management and reduce responsiveness to citizens.

6. The Bill should not discourage investment, whether local or foreign.

7. The Bill should provide a foundation for clear and certain policy direction.

8. The Bill's provisions related to local content should not inadvertently lead to delays and cost escalation in infrastructure projects.

9. We extend our support for accelerating the adoption of e-procurement and integrated financial management systems (IFMS). Nevertheless, we observe that addressing crucial matters like development and implementation planning, change management, rising costs, and effectively managing sub-national engagements and contexts is imperative. These issues must be adequately addressed.

10. While there is a proposal to replace certain legislation with regulations and subordinate legislation under Ministerial authority, it's important to consider that this transition might not guarantee the intended clarity, simplification, and streamlining.

11. The Bill does not effectively meet the standards set by section 217(1) in reconciling the requirements for transparency, competitiveness and cost-effectiveness with those of fairness and equity. In essence, the Bill loses sight of the core imperative of obtaining value for money in public procurement. Consequently, it does not provide for any systems or approach on which value for money can be transparently assessed relative to other procurement objectives.

12. In pursuing a unified policy framework, it is crucial to ensure that the distinct domains of different government spheres are not encroached upon. The constitutional, policy and legal basis for the centralisation of authority into a national public procurement office (PPO), based on our understanding of the institutional structure of the proposed PPO, is unclear, and in our view may be inconsistent with the Constitution. The proposal regarding the PPO would appear to be aimed at reducing corruption in public procurement through expanded central oversight and control. There is no evidence that additional central controls will reduce corruption, particularly given the highly regulated environment that exists already. Moreover, it is likely that this will have significant unintended consequences, including extensive and costly delays in decision-making, and additional opportunities for vexatious litigation.

13. The constitutional soundness of the PPO's power to issue binding instructions to other government spheres, particularly municipalities, raises concerns.

14. The Bill does little to improve transparency and public oversight over public sector supply chains. Very few public reporting requirements are established, and few opportunities are provided for oversight by members of the public without a direct interest in specific transactions. This is a significant omission for procurement reform efforts and out of keeping with emerging global best practices.

15. The dispute resolution process proposed in the Bill is administratively complex and impractical in the public procurement environment. As outlined in our *ad seriatim* comments, it obscures lines of accountability and seemingly appropriates judicial powers to the proposed Tribunal.

16. While section 217(3) of the Constitution necessitates a framework for preferential procurement, this Bill appears to extend beyond that requirement by also regulating the application of procuring institutions of section 217(1). A query arises regarding whether this approach contradicts the court ruling in *Minister of Finance v Afribusiness*[1] which underscores procuring entities' autonomy to formulate and implement their own procurement policies.

17. The legal intricacies involved in these matters warrant further exploration, particularly concerning their alignment with existing court rulings and the autonomy of procuring entities.

18. The Bill leaves little scope for ongoing reform and modernisation efforts at a sub-national government level. This is despite significant progress being made, albeit on a differentiated basis, in some provinces and municipalities. The WCG, for example, is extremely proud of the tremendous progress it has made with transversal contracting for security services, which has been opened up to small and previously disadvantaged suppliers. Initiatives such as these, which are extremely complex and litigious in their own right, would become impossible in terms of the Bill.

19. Finally, if the Bill is enacted, there needs to be effective Implementation and Change Management that focuses on the following key areas:
    - Implementation Strategy;
    - Resource Allocation;
    - Systems and Infrastructure;
    - Change Management Strategy;
    - Cost Analysis; and
    - Monitoring and Evaluation.

Our further Chapter-by Chapter comments are as follows, which must be read with the detailed comments attached to this letter:

1. **Chapter 1: Definitions, Objects, application and administration of Act.**
    1.1. The Bill's current inclusion of regulations, codes of conduct, instructions and notices under the definition of "This Act" poses challenges by enabling the issuance of binding instructions at an administrative level, rather than at an executive level. This could lead to confusion and operational disruptions, potentially perpetuating past issues and audit misinterpretations.

2. Chapter 2: Public Procurement Office, Provincial Treasuries and Procuring Institutions
    2.1. The creation of a PPO within the National Treasury could centralise power, raising concerns about delays, disruptions and abuse of authority. This centralisation could hinder effective decision-making at the regional and local

[1] Minister of Finance v Afribusiness NPC (CCT 279/20) [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC) (16 February 2022) at para 113

levels. This has been problematic in the past. The ability of the PPO to issue binding instructions for various levels of government might not align with constitutional principles, particularly in the context of municipalities. The PPO may also determine a model policy for different categories of procuring institutions and different categories of procurement. This could be problematic in that the PPO is far removed from sub-national procurement as well as market dynamics closer to the ground. This could result in dire consequences as we note from prior experience with the Office of the Chief Procurement Officer.

2.2. The utilisation of various regulatory instruments results in confusion regarding their legal standing. Courts have frequently addressed the distinction between policy and legislation, asserting that while laws hold binding force, policies are not equally binding, permitting those subjects to such policies to reasonably deviate from their provisions. The introduction of additional regulatory instruments within the Bill raises questions about their status and implications.

2.3. The Bill would allow a procuring institution to reconsider its decisions under specific circumstances prescribed by regulation, like errors of law, fact, or fraud. However, this approach conflicts with the legal doctrine of "*functus officio*," which dictates that administrative decisions made by delegated authorities are final and unalterable once rendered. This doctrine ensures clarity and fairness by defining the limits of rights granted and obligations imposed upon both parties involved.

3. Chapter 3: Procurement Integrity, Prohibition of certain practices and debarment

3.1. The power to issue debarment orders should be carefully examined, considering the legal consequences when a party has not been found guilty in a court of law. Clear specification of the criteria and processes is required to avoid unnecessary litigation and enable public supply chains to be protected from undesirable suppliers.

4. Chapter 4: Preferential Procurement

4.1. While section 217(3) of the Constitution requires a preferential procurement framework, the current Bill extends its reach beyond necessity. The framework should offer guidance rather than imposing mandatory requirements, allowing for region-specific adaptation and respond to service delivery needs and market dynamics. The Bill leaves no discretion for procuring institutions despite factors such as the likely impact and cost of the requirements, and alternative approaches which could achieve the same goals in a more cost-effective manner, which may lead to poor outcomes.

4.2. The Bill also delineates specific measures like sub-contracting and import limitations. This restricts the autonomy of procuring institutions to fashion their own preferential procurement policies as envisioned in section 217(2). Furthermore, it appears there's little room for these institutions to weigh the potential impact, cost implications, or alternative approaches. This approach will have a seriously negative impact on service delivery.

4.3. Regarding key takeaways from Constitutional Court judgments and two decades of experience, chapter 4 of the Bill promotes the repealed 2017 regulations to become provisions within the Bill, despite the mounting evidence of their limited impact in actual implementation. While the Bill aims to introduce flexibility and advance strategic procurement intentions, it paradoxically introduces a rigid rule-based framework into the preferential procurement landscape. This shift from a framework approach to a more stringent structure, has the potential to impede progress in enhancing social value outcomes from public procurement while negatively impacting on service delivery. It is imperative to note that the provisions related to local content must not inadvertently lead to delays and cost inflation in infrastructure projects.

4.4. Moreover, the Bill significantly broadens the scope of socio-economic objectives in multiple sections. This expansion, however, seems to lack comprehensive evaluation of potential consequences, costs, or alternative strategies that could be more practical and rational at the sub-national spheres of government.

4.5. As a result, an unintended outcome emerges: a substantial premium that needs to be paid, a factor that seemingly wasn't adequately considered during the initial framing of the framework. This oversight points to the necessity of a more comprehensive and balanced approach in the Bill's formulation.

5. Chapter 5: General Procurement Requirements

5.1. The inclusion of technology in procurement processes is commendable, but its potential impact on provincial autonomy and the role of relevant departments (provincial Departments of Premiers, Public Service and Administration and SITA) should be taken into account.

6. Chapter 6: Dispute Resolution

6.1. Reconsidering an award by a procuring institution, now permitted by the Bill, contradicts administrative law principles and clashes with the doctrine of *functus officio*. The Bill's inclusion of internal remedies undermines decision-making authority, posing a fundamental challenge to the accountability framework established by the PFMA and Local Government: Municipal Finance Management Act, 2003.

6.2. The convoluted appeals mechanism introduced can weaken the intended government delivery through procurement, leading to adverse service delivery effects. This raises concerns about capacity, particularly at relevant treasuries like the NT. This approach could also hinder applicants from accessing courts for dispute resolution, impacting freedom of contracting and contract dispute mechanisms. Implementation costs, red tape, and delays are further drawbacks. Additionally, PAJA requirements might keep public administration entangled in dispute resolution, impeding service delivery.

6.3. The establishment of a Tribunal elongates and complicates procurement procedures, posing cost and volume challenges for the Tribunal's workload. This creates uncertainty about the finality of procurement and the authority of institution accounting officers. The creation of the Public Procurement Tribunal for reviewing decisions made by procuring institutions adds confusion.

6.4. The contemplated Tribunal decision review aligns with administrative, not judicial, procedures as per section 7(2) of PAJA.

6.5. Given the extensive procurement transactions across South African institutions, the envisioned Tribunal seems ill-equipped to handle internal remedy proceedings for all institutions nationwide.

6.6. State organs differ in procurement maturity, and for the Western Cape, this form of legislation restricts progress and innovation in procurement.

6.7. In summary, the present legislation will effectively stall public procurement, introducing a review process by the Tribunal within 10 days for aggrieved bidders. This process can be prolonged through extensions and further petitions for court reviews, leading to procurement standstill. Emergency situations might allow procurement but without much consideration for service delivery impacts. Additionally, Tribunal fees contribute to the Total Cost of Ownership of procurement processes.

6.8. The rationale behind establishing the Tribunal is to uphold fairness, transparency, and the prevention of corruption. A method to achieve this goal involves enhancing upfront openness and providing greater visibility into procurement activities and their outcomes to the public. By enabling the public to monitor decision-making, there's a possibility to obviate the need for a tribunal. This approach not only proves more cost-effective but also promptly enhances supply chain management (SCM) practices within government entities.

7. Chapter 7: General Provisions

7.1. Granting the PPO, the authority to conduct search functions at private premises, a responsibility typically associated with the criminal justice system, introduces significant legal risks for the government. Unfortunately, the limitation of liabilities clause doesn't adequately address the legal ramifications stemming from this provision.

7.2. The requirement for judges to issue warrants for search and seizure proceedings represents a departure from the norm. In standard procedure, such warrants are obtained through applications to court, typically facilitated by attorneys or law enforcement. However, with the proposed changes, state organs will now need to seek these warrants directly from the high courts with appropriate jurisdiction. In all likelihood, legal representation, including counsel, will be essential.

7.3. The PPO is granted extensive jurisdiction across the country, a level of authority not typically conferred upon courts below the Constitutional Court. This presents an unusual and potentially imbalanced distribution of power and authority.

In our view the Bill is fatally flawed by the absence of a clear, evidence-based problem statement, a compelling vision and a set of principles to guide its approach. Without these critical informants, efforts in the Bill to streamline or simplify the regulatory environment remain partial and, given the broad scope of its intended application, often inconsistent and inappropriate.

The WCG has also made detailed comments and recommendations that are attached. Part A provides a review of Constitutional and Legal concerns, and Part B provides more detailed technical and clause specific comments.

it is proposed that this Bill is withdrawn pending the institution of an interactive policy process, culminating in a White Paper, that would lay out the longer-term framework for procurement reform and modernisation in South Africa. The WCG, which has significant capacity and experience in these matters, would be an active and willing participant in the proposed policy process and discussions.

MIREILLE WENGER

PROVINCIAL MINISTER OF FINANCE AND ECONOMIC OPPORTUNITIES

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