Joint Strategic Resource (JSR) Submission on the Public Procurement Bill (B18B-2023)
To the Western Cape Provincial Legislature
6 March 2024

Introduction

On 30 June 2023, the Minister of Finance tabled its initial version of the Public Procurement Bill in Parliament. On 5 December 2023, the National Assembly sent a revised version, B18B-2023, to the National Council of Provinces (NCOP) for its consideration and deliberation.

The JSR made a written submission to the Standing Committee of the National Assembly and spoke to that submission in the public hearings held on 12 and 13 September 2023 as well as in the public hearings held on 17 November 2023. That submission detailed the specific expertise of the JSR shared and gained as part of the NEDLAC process of considering the Bill.[1] Paras 5-7. The submission also detailed the members of the JSR and its proposal for a strategic approach to public procurement in South Africa, in order to replace the current ineffective administrative approach.[2]

Substantively, in Part One of that 2023 submission, we briefly reiterated our perspective on the Bill – a strategic contracting paradigm. Paras 9-11. This paradigm should be contrasted with the administrative paradigm which characterised the National Treasury Bill brought into Nedlac and which still is largely presented in the version of the Bill tabled in Parliament and before your committee. Para 8. In our view, the administrative paradigm is both cause and effect of the problems of the current procurement system.

In Part Two of our 2023 submission, we presented a high-level analysis of the Bill, focusing upon three areas which are significant in judging any public procurement legislation: constitutional compliance with section 217 of the Constitution(paras 14-18), statutory alignment of the Bill within the existing regulatory framework (including the PFMA and MFMA) (paras 19-23), and lack of statutory elaboration of the principles that should drive the public procurement system (paras 24-26).

In this JSR submission to the Western Cape Provincial Legislature, we consider (a) the significant newly proposed text on preferential procurement in Chapter 4 which was introduced in B18B-2023 (the December 2023 version of the Bill), (b) the need for independence of the regulatory functions in public procurement, and (c) several other issues.

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[1] The members of the group of experts that assisted Nedlac in its consideration of National Treasury's 2022 version of the Public Procurement Bill became known within that process as the Joint Strategic Resource (JSR).
[2] Jonathan Klaaren et al., "A Strategic Public Procurement Paradigm for South Africa: Reflections on the Development of the Public Procurement Bill" (Public Affairs Research Institute, July 10, 2023), https://pari2.wpenginepowered.com/wp-content/uploads/2023/07/PPP28-06MAINfinx-1.pdf.

This submission takes B18B-2023 as its starting point. This submission does not take as a starting point the Zondo recommendations regarding public procurement reform (see the Oct 2022 Implementation Report at pp. 37-39). Nonetheless, we do below engage with the Zondo recommendation for incentivised whistleblowing in the field of public procurement (see Nov 2023 Implementation Progress Report at p.13) and the recommendation for standards of transparency consistent with the OECD Principles for Integrity in Public Procurement (see Oct 2022 Implementation report at p. 38).

This Submission concludes that the B18B-2023 version of the Public Procurement Bill:

I. Raises Significant Constitutional Issues;

II. Should Provide for the Independence and Effectiveness of Public Procurement Regulatory Functions;

III. Needs strengthened anti-corruption enforcement mechanisms in particular with respect to debarment and informant disclosure/incentivized whistleblowing.

I. **B18B-2023 Raises Significant Constitutional Issues**

There are a number of potential constitutional issues outstanding with B18B-2023. This is not surprising with legislation implementing policy directly and comprehensively in a field which is covered explicitly in the Constitution (section 217) and which itself constitutes around one-sixth of the South African national economy. The Public Procurement Bill is a significant Bill.

As we noted in September 2023, "the tabled Bill is not clear whether it sees procuring institutions or the National Treasury as the first mover in setting up public procurement policies for procuring institutions. This is an important constitutional question." Para 15. This ambiguity unfortunately persists in the B18B-2023. See PPB sections 8, 16 and 25.

In addition to the above issue, there are a number of other constitutional issues raised by B18B-2023. These include:

(a) The degree of competency of Parliament to legislate in this field in the national and provincial spheres as compared with the local sphere;

(b) A number of rights-based and substantive/procedural rationality potential challenges[3];

(c) The necessary clarity, certainty, and inclusion of price in the provisions on targeted procurement; and

(d) The need for inclusion of statutory principles including those linking to constitutional principles of section 217.

[3] For instance, the PPB as tabled automatically excluded leaders of political parties from participating in procurement as bidders and suppliers. Persons related to officials were also automatically excluded from submitting bids to the procuring institutions within which they are employed. However, the December 2023 PPB regulates these potential conflicts (including indirect conflicts) only through ordinary conflict of interest provisions.

The remainder of this section of the JSR submission goes on to treat two constitutional issues with B18B-2023: first, the necessary clarity, certainty, and the inclusion of price in the provisions on targeted procurement and second the need for inclusion of statutory principles including those linking to the constitutional principles of section 217.

I(A): The Necessary Clarity, Certainty and the Inclusion of Price in Provisions on Targeted (aka Preferential) Procurement

The December 2023 version of the PPB includes a number of sections of Chapter Four inserted into the Bill by the Office of the Chief Procurement Officer, never put out for public comment, and first presented to the National Assembly's Standing Committee on Finance shortly before that House's approval of that version of the Bill. These sections differ significantly from current public procurement practice and also are unclear in significant respects.

In quite possibly the most significant change, the December 2023 PPB no longer has provisions indicating that the policies referred to in Chapter 4 are necessarily preference-based in their effect (i.e. requiring bidders to compete, in part, on price, with the price score being added to the 'preference' score in order to determine the successful bidder). In fact, section 21 of the PPB requires that preferences will be applied only if the mechanisms provided for in sections 17 to 20 (set-asides, prequalification criteria, subcontracting and local content) do not apply.

In this regard, the revised Chapter 4 conflates two distinct constitutional concepts as set out in section 217(2) of the Constitution, viz. (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. In terms of section 217(2), these are two distinct mandates and should thus be clearly differentiated in the statutory framework required under section 217(3) of the Constitution. The conflation in the revised Chapter 4 will inevitably lead to uncertainty, contestation and (most likely) constitutional challenge to the statute. This will have significant adverse implications for the procurement system as witnessed by the similar scenario following the Constitutional Court ruling that the Preferential Procurement Regulations, 2017 were largely invalid in 2022.

The removal of price as one presumptively required criterion in evaluating the value for money of tenders offered to organs of state increases the potential for higher costs - which undermine growth and employment, as which increases the risk of corruption. As the President, citing the Zondo Commission, has noted, "one of the inherent problems with the current procurement regime is that it does not make clear whether the primary intention of the Constitution is for goods to be procured at least cost or for the procurement system to prioritise transformation. The Commission recommends that procurement officials be advised that "maximum value for money" must be primary." (See Oct 2022 Response at p. 39). This Bill does not give clear provisions in order to answer that question. Section 217(1) provides for public procurement that is fair, equitable, competitive, transparent and cost-effective. The removal of price does not align with those principles.

In addition, the Bill does very little to provide any clarity on how the five principles in section 217(1) should be balanced to achieve maximum value for money. That is, the Bill does not give procurement officials any clarity or guidance on how to manage the inevitable trade-offs between the different principles (e.g. fairness versus cost-effectiveness or equity versus competitiveness, etc.) to arrive at a procurement outcome that delivers maximum value for money as the overarching objective recognised by both the Zondo Commission and the President. This deficit in the Bill will continue to make it extremely difficult for front line officials to confidently take procurement decisions without the real risk of constant legal challenge. It also makes it very difficult for the Minister, PPO, provincial treasuries and every procuring institution to formulate operational elements of the procurement system (such as procurement policies, methods, criteria, etc.) with legal certainty and without the risk of challenge.

In order to maintain the integrity of the public procurement system (by which we mean here the consistency, rationality, and the implementability in the South African context of the rules and principles taken as a whole as well as its anti-corruption aspect), the JSR advises that price be reinstated as a necessary (but not sufficient) criterion of key importance in evaluating tenders, in the context of a clear framework for preferential treatment. The JSR further recommends that the Bill sets out a clear framework for how value must be determined within the procurement context, including setting out the parameters of criteria, including price, to be used in determining value for money.

Chapter 4 also has significant uncertainty regarding its content. The relative weight of preferences, set-asides, prequalification criteria, subcontracting or local content, as against other evaluation criteria such as price and functionality, is essentially left to the Minister to decide by means of regulations. No guidance is given to the Minister in this regard. Sections 17, 18, 19 and 20 refer to other "prescribed criteria which may include complementary goals". No clues are provided as to the nature of these "complementary goals". It is questionable whether this high degree of delegation to the Minister is constitutionally permissible in the context of section 217 as we elaborate further below.

The lack of clarity and consensus regarding the meaning and interpretation of the current Chapter 4 will lead to greater opportunities for misdirection and attendant corruption given that no clear framework is provided to guide the inclusion within a procurement system which is fair, equitable, transparent, competitive and cost effective (e.g. the s 217(1) principles) of a South African specific preferential procurement policy as demanded by s 217(2)&(3).

I(B) The Need for Statutory Principles Including Those Linking to the Constitutional Principles of Section 217

As the JSR noted in its September 2023 submission, the tabled Bill nearly completely failed "to begin from the constitutional text and democratically elaborate on the specific principles and ideas that should drive South Africa's public procurement system." It should have but did not "create a single regulatory framework consistent with the Constitution. This should be an Act of Parliament that defines and articulates a public procurement system as

envisaged in section 217 of the Constitution and interpreted in light of section 33 and section 195. The Bill should embed statutorily the principles for procurement and establish checks and balances framed around section 217 of the Constitution." Paras 24-25. On this score, B18B-2023 is the same.

Policy principles for procurement should be formulated and embedded in primary legislation rather than in subordinate legislation. Having clear procurement principles at the level of statute enables effective and strategic action by procuring institutions. Furthermore such clear procurement principles facilitates across-government coordination, and eliminates reliance by both public and private actors on regulations and instructions to interpret and apply the constitutional principles. With a statute to rely upon and to interpret, different organs of state may be able to resolve differences of public procurement policy – as well as disputes with the private sector – and thereby to more effectively perform public functions and deliver public services.

The problem of the missing statutory principles and their failure to link with constitutional principles becomes particularly evident when turning to the place of procurement methods. There is little in this Bill to inform the range and variety of procurement methods that could be prescribed by the Minister. An Act with purposive interpretation and clearer objectives embedded could guide and shape procurement methods to be developed and implemented in the years to come and would promote not inhibit innovation and development in this area.

The consequence of vesting enormous discretion in the relevant Minister without setting any parameters or guiding principles in the Bill is that we could end up in a situation where the only options are an open bidding process, a request for quotations in low-value tenders, and single source procurement in emergencies or sole supplier situations. There are many circumstances in which it is at best inconvenient, at worst commercially or operationally damaging, to an SOC or other procuring institutions to be required to operate only with that limited menu of procurement options.

Moreover and of particular relevance for the provincial legislatures, there is a significant diversity of contexts in which public procurement is done in South Africa, ranging from widely divergent types of organs of state, to fundamentally different sectors, to different mandates, levels of maturity, resources and geographical factors, etc. Given this, it is questionable whether the relevant (national) Minister would be best placed to take primary decisions on the type and range of procurement methods that should be available. Parliament, as the body properly representing all perspectives and interests, is probably better placed (and arguably constitutionally obliged) to provide the main framework within which these decisions are to be taken.

Indeed, B18B-2023 has failed to provide direction in a number of needed areas of public procurement practice relating to methods. Current "grey areas" in relation to procurement methods, such as the use of panel appointments, unsolicited bids / proposals, limited bidding, electronic auctions, joint venture arrangements, shared procurement, and the standardisation of pricing amongst qualified suppliers on a database, are neither provided for

nor prohibited in the Bill, leaving it unclear as to whether these recognised procurement practices will be allowed, and if so in what circumstances or by which organs of state.

The absence of a guiding framework in the PPB for procurement principles around which a range of procurement methods which can be developed will both hamper service delivery and open the door to large-scale wrongdoing, influence and manipulation as well as legal challenge to whatever methods are put forward in subordinate legal instruments.

II. **The PPB Should Provide for the Independence and Effectiveness of Public Procurement Regulatory Functions**

The PPB (December 2023) proposes a PPO that fulfills a number of functions and is located within National Treasury (as is the current Office of the Chief Procurement Officer). The PPB additionally proposes a Public Procurement Tribunal, also located (at least operationally) within National Treasury.

In the opinion of the JSR, adequate independence of the institutions fulfilling regulatory functions in public procurement – as distinct from the purchasing or operational functions – is crucial. Unfortunately, the current Bill does not provide for the adequate independence of these regulatory functions, in part because the agency/office performing those regulatory functions is not made distinct from the agency/office performing those purchasing functions.

Furthermore, the independence of the institutions performing the regulatory and enforcement functions in public procurement is to a significant degree crucial to achieving anti-corruption objectives. Greater independence for the implementation of these functions is likely to lead to greater anti-corruption achievement.

In this section, we thus address first the independence of the regulatory functions of the public procurement agency and second some aspects of those powers and functions themselves, particularly the power to conduct non-compliance investigations and the power to review the procurement system of a procuring institution.

II (A). Independence

While the JSR recognizes that independence is multifaceted and depends also upon the skills, capacity and experience of institutions, some of the current provisions for formal (legal) independence for the PPO and the PPT in B13B-2023 are as follows:

- S 4 (2) The Head and officials of the Public Procurement Office must perform their functions in terms of this Act impartially and without fear, favour or prejudice.
- S 38 (2) The Tribunal (a) is independent; (b) must be impartial and exercise its powers without fear, favour or prejudice.

There are a number of ways to strengthen independence around the implementation of these regulatory and enforcement functions.[4]

Consideration should be given to splitting the regulatory and enforcement functions of the current Office of the Chief Procurement Officer from the remaining ("chief buyer") functions. The chief buyer functions should continue to be exercised within National Treasury but the regulatory and enforcement powers could be placed within an independent regulatory body (akin perhaps to the Competition Commission and Tribunal) distinct from National Treasury.

This clear independence of the regulatory and enforcement functions would achieve their most effective implementation, thus contributing to the overall objectives of the public procurement system mandated by section 217 of the Constitution.

II (B) Effectiveness of Public Procurement Regulatory Functions

The tabled PPB gave the Public Procurement Office (PPO) significant duties and powers to investigate allegations of non-compliance. For instance, clause 50 provided for the PPO to investigate any alleged non-compliance with the Act, if requested by the relevant treasury or a procuring institution or on its own initiative. Following on from this purpose, clause 51 also authorised the PPO to enter and search premises of a procuring institution, an official of a procuring institution or a bidder or supplier to whom a bid has been awarded. For certain entries and searches, a warrant was required in terms of clause 52.

These powers of investigation, entry, and search were commented upon negatively in a number of comments on the initial version of the PPB tabled in 2023. According to the report tabled by National Treasury (NT) in November 2023 (p 14): "The most consistent view [from the public] raised in this chapter was around clause 51 on the PPO's power to enter and search premises. The power is for purposes of compliance and not to investigate criminal conduct."

These powers of investigation, search and seizure are now provided for in ss 56, 57, and 58 of the PPB (December 2023). Investigations by the PPO are, in terms of section 56, limited to "*alleged non-compliance with this Act other than an alleged commission of an offence…*"

The JSR supports the clarification by the OCPO that the PPB grants power not to conduct criminal investigations but only to investigate non-compliance with the PPB in the field of public procurement.

[4] For instance, the PPB establishes "a Public Procurement Office within the National Treasury" with a "Head" but does not specify or put onto a statutory basis the relationship of the Head to the Director-General of National-Treasury and by implication any other Director-General, which would be crucial for the effective independence of the Head and the PPO in relation to their role of overseeing compliance with the Bill by departments of state.

However, given the reduction in scope of PPO investigations, the extensive powers of the PPO as retained in B18B-2023 may be unduly intrusive. Indeed, the OCPO/NT accepted that at least some aspects of this investigation by the PPO into PPB non-compliance need to be revisited. In Annexure B to its comments tabled in November 2023, in responding to comments submitted by Orizur Consulting Enterprise Pty Ltd, the NT accepted the need to revise at least section 51: "As indicated, clause 51 needs to be reviewed and aligned with powers of law enforcement agencies."

As far as we are aware, this process of review and alignment has not yet been carried out. It should be carried out with the involvement of South Africa's law enforcement agencies.

To be clear, this clarification and review of the PPB's investigation powers needs also to be aligned with the existing investigative power of the Special Investigative Unit (which has been investigating complex procurement fraud cases for nearly ten years), the new Investigating Directorate of the NPA, as well as with any new anti-corruption agency that results from the continuing work of the NACAC and consideration of its advisories.

Finally, to be effective the regulatory functions in public procurement need to include the power of review of policies made by procuring institutions. The Bill as tabled gave the proposed Public Procurement Office and Provincial Treasuries the power to review procurement policies of procuring institutions and to propose changes. B18-2023 section 5(2)(d). The version of the Bill that has been passed by the National Assembly has removed these provisions, and this weakens the regulatory and enforcement powers in public procurement that could and should be exercised towards integrity and accountability in the public procurement system. This regulatory power should be restored.

III. **B18B-2023 Needs Strengthened Anti-Corruption Enforcement Mechanisms and Strengthened Transparency**

The PPB (December 2023) contains several anti-corruption enforcement mechanisms including debarment. However, the Bill is currently lacking an enabling provision for incentivized whistleblowing in the field of public procurement. The two key enforcement mechanisms of debarment and whistleblowing are discussed in turn.

III(A)(i): The PPB Should Strengthen Its Debarment Provisions

Significantly revised from the version initially tabled in Parliament, section 15 of the PPB (December 2023) now attempts to embrace a decentralised model for debarment in its authorization for procuring institutions to debar untrustworthy suppliers, directors, members, trustees, etc. Section 15 of the PPB is intended to replace the current instruction from OCPO in terms of section 6 of SCM Instruction Note 3 of 2021/2022 and to extend this function to local government.

In terms of the PPB, these institutions send information regarding debarment orders made by them to the PPO for inclusion in a central register. These debarment orders may be

appealed to the independent Public Procurement Tribunal (PPT). Apart from the possibility of appeal to the PPT, this regime largely mirrors the status quo.

The PPB has not taken advantage of the opportunity to align the debarment provisions in public procurement regulation with the tender defaulter (e.g. debarment) provision in anti-corruption law. Sections 28-33 of the Prevention and Combatting of Corruption Act 12 of 2004 currently provide for a Register of tender defaulters also in National Treasury. Apparently, this Register is currently empty. The regulatory mechanism for debarment is not aligned with the criminal mechanism for debarment.

Some interpretation questions also arise from section 15 of the PPB, including: (a) whether section 15(3) is a closed list of grounds for debarment, or whether other abuses of the procuring institution's supply chain management system could justify debarment; (b) whether an individual procuring institution must debar a supplier from doing business with all organs of state or only the procuring institution, or a sub-set thereof (section 15(10) refers to debarment from "participating in procurement by participating institutions generally or in circumstances specified in the order", but that does not provide much guidance for procuring institutions); (c) what standard of proof is required to justify debarment – for example under sub-section 15(3)(d) "*committed any offence involving…"*: is a conviction for that offence a necessary precondition to debarment? (Sub-section 15(3)(f) expressly refers to the supplier having been convicted of an offence referred to in that section, but 15(3)(d) and the others do not.)

These interpretation questions are largely considered 'grey areas' under the status quo regime of the instruction note. Their lack of resolution weakens the regulatory debarment regime. It would be very useful if the PPB took the opportunity of passing a law in this area to clarify the intended official position on these matters.

III(A)(ii): The PPB Should Provide for Interim Incentivized Whistleblowing in Public Procurement

The PPB is missing the mechanism of incentivized whistleblowing in the field of public procurement. The JSR endorses the lesson from the Zondo Commission that whistleblowing should be taken seriously. Whistleblowing is a clear counter-corruption mechanism and is of particular importance in the field of public procurement. Whistleblowing is a key control that belongs in and should be aligned and fitted to public procurement and not left entirely to the Protected Disclosures Act 26 of 2000. As recommended by Zondo, in the field of public procurement, beyond patriotic whistleblowing, there is an urgent need for a mechanism of incentives for information regarding procurement fraud.

It may well be that a future statute provides for a new anti-corruption agency and provides a comprehensive reform of and provision for whistleblowing in South Africa to explicitly include incentivized whistleblowing. Be that as it may, in the interim the JSR advises that the PPB must be supplemented with a clause enunciating broad principles and explicitly allowing informants in the field of public procurement corruption to receive proportionate incentives or rewards for that information where recoveries have been made. Such a provision would

be of direct assistance to the law enforcement agencies (including the Special Investigating Unit) investigating allegations of corruption in the public procurement field.

The JSR is of the view that it is unwise, within current South African conditions, to postpone the statutory introduction of such whistleblowing mechanisms in public procurement to some future comprehensive law reform on all forms and types of whistleblowing. It is clear that any such future reforms are still far from realisation. In the meantime, appropriate mechanisms for tailored channels of whistleblowing in public procurement are urgent, as recent experience has clearly demonstrated. The JSR is thus of the view that the current legislative opportunity should be used to introduce urgently needed whistleblowing mechanisms in procurement. The introduction of whistleblowing mechanisms in procurement in this Bill would provide valuable inputs into the development and refinement of more general whistleblowing interventions in future.

The JSR advises an interim empowering clause such as the following:

"(1) The Minister of Finance is empowered and directed to formulate and enact regulations providing for proportionate financial incentives for informants reporting information to law enforcement agencies which materially assists with realized recovery of funds directly linked to public procurement fraud (including corruption); such regulations may differentiate among eligible persons and shall disqualify persons with false motives.
(2) Such incentives shall be valid and payable only after the recovery of the funds in a court of law."

III(B): The PPB Should Adopt Transparency Standards (including Open Data and Open Contracting)

Zondo has recommended transparency standards in public procurement consistent with the OECD Principles for Integrity in Public Procurement. In these Principles, transparency is covered in Principles 1 and 2. Principle 1 states: "Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers." Principle 2 states: "Maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering."

The current PPB enacts transparency primarily through two distinct sections. The first is the information technology based procurement mandated in section 30: "Information and communication technology based procurement". There is no mention of the role, responsibility or place of procuring institutions in the design/consultation process provided for in section 30(2).

The second is the disclosure regime for procurement information in section 33. The minimum requirements in s 33(2) of the PPB (December 2023) for disclosure of procurement information concern exclusively transaction transparency. There is no explicit requirement in B18B-2023 for public procurement policy transparency nor for data at points within the full procurement cycle or database transparency. There is thus apparently no requirement

that the procurement policies and similar elements of the "procurement system" of a procuring institution (mandated in PPB s 25(3)) be disclosed nor that the machine-readable data ("open data") (mandated in PPB s30(2)(b) read with the definition of "open data" in section 1) be disclosed.

From a JSR perspective, the current PPB provisions have failed to fully embrace an important tool – open contracting – in ensuring that public contracts are fair, open and efficient through open data and smarter engagement. Open contracting, which has been adopted in procurement reforms by many countries, follows the money across the full procurement cycle commencing with the planning and onto delivery and implementation through disclosure of machine-readable data in a common model. This allows officials and civil society alike to interpret and use the data. Open contracting can be effectively used to support the objectives stated in 2(2)(a) and to facilitate course correction when these objectives are breached.

The JSR advises that section 33 of PPB should be expanded to embrace an open contracting system which requires disclosure across the full procurement cycle.

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