Supplement to Submissions on the Public Procurement Bill to the NCOP

NCOP Select Committee on Finance
25 March 2024

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This supplement to our submissions to the National Council of Provinces occurs against the background of a rushed parliamentary process, which seeks to pass complex legislation carrying a wide range of serious deficiencies. These deficiencies have been greatly amplified by the late introduction of a new and unconsulted Chapter 4. We are dealing with an annual trillion Rand of procurement expenditure. Features of the Bill before us threaten chaos in this expenditure, further deterioration in infrastructure and services, escalating pressure on the fiscus, and associated political and economic crisis. The late introduction of far-reaching changes violates the Constitution's assertion of careful, consultative, and participatory legislative drafting. We are deeply concerned about the process. It is constitutionally flawed and challengeable. While we appreciate the Select Committee of Finance's attempt to rectify these issues by providing three weeks for consultation between Treasury and stakeholders, we fear that the time and format are insufficient.

In its latest responses, Treasury too often evades the substance raised in our submissions. To illustrate we attach an annexure with early assessments of each response. In what follows we express only our most pressing concerns with the Bill.

First Comment on Chapter 4: The Treasury's responses to our submissions on the current Chapter 4 miss the mark. We are not against expanding preferential procurement, nor do we think that set-aside, sub-contracting, and similar measures are necessarily unconstitutional. Rather, we hold that preferential procurement provisions must be clear and coherent, firmly grounded on s217 of the Constitution, closely aligned with the rest of the Bill, and rigorously consulted and deliberated. The new Chapter 4 fails these tests.

s217(1) of the Constitution provides that procurement must proceed in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective. s217(2) reinforces that these principles do not prevent the use of procurement to achieve socio-economic objectives, but our courts have held that this does not mean that the s217(1) principles no longer apply. s217(3) requires national legislation to set a framework within which s217(2) must be implemented, and that framework should ensure that procurement systems continue to strike a balance between the s217(1) principles. Chapter 4 does not do this.

The existing preferential points system is not perfect. There are ways to greatly improve and expand preferential procurement within the ambit of the Constitution. But the instrument of a

preferential procurement system does attempt to strike a balance between the constitutional principles, by establishing the norm that procurement will proceed through open competition scored on price and preference. The preferential points system is broadly:

- Fair, because it opens participation to all comers according to clear and widely accepted rules of the game.
- Equitable, because it recognises historical disadvantages and allows for the allocation of preferences to address this.
- Transparent, because adjudication criteria are simple, objective, and measurable.
- Competitive, because open competition is the default, and any restrictions of competition must be justified.
- Cost-effective, because it focuses decision-making on price and leverages competition between suppliers to reduce costs to the fiscus.

The new Chapter 4:

- Restricts participation in procurement from the outset.
- Confuses even South Africa's leading procurement experts as to how the rules it seeks to establish might be meant to work in practice.
- It does not lay down any objective and measurable criteria for adjudication.
- It does not require restrictions on competition to be justified, and so opens the way to anti-competitive practices.
- It does not even mention price, which is highly unusual internationally.

These are all significant departures from the principles of fairness, equitability, transparency, competition, and cost-effectiveness. The framework introduced in Chapter 4 establishes little by way of guardrails for constraining these departures, or mechanisms for bringing those principles back into balance. This is constitutionally deficient. The Treasury's contentions that Chapter 4 only requires implementation when feasible, that it retains competition within what may be dramatically restricted supplier markets, that it must be read within the broader context of the Bill, and that guardrails will be raised in regulations; these contentions do not remedy the defects. There is little doubt that leaving the Bill as it is will unleash a wave of often ill-conceived experimentation, litigation, and disruption across procuring institutions and their supplier markets. South Africa's strained fiscus, deteriorating state capacities, and stagnant economy will not easily bear this.

First Proposal on Chapter 4: Chapter 4 must as its central, default measure provide for a points system, including price, preference and quality. It may continue to make provision for set-asides, sub-contracting, and other measures, but such departures from the points system must be justified by published and consulted economic research and analysis conducted by the Public Procurement Office. This research and analysis must show how thresholds, price ceilings, and other mechanisms proposed for specific categories of procurement and procuring institution work to limit deviation from the section 217(1) principles. Procuring institutions should proceed with the points system where set-asides, sub-contracting, or other measures are impractical. These are essentially the same guardrails that the Bill already ensures for local

content, and we do not see how set-asides, sub-contracting, or other measures are in principle or practice different.

Second Comment on Chapter 4: There are serious issues with how Chapter 4 aligns with the rest of the Bill. A central purpose of this legislation, expressed in the Bill's preamble, is to construct a single statutory framework for public procurement, replacing the PPPFA as the legislation of s 217(3). However, the Bill now establishes two frameworks, one in Chapter 4 and another in Chapter 5. These frameworks deal with overlapping subject matters, but the first is now largely built up in statute, and the second is deferred to regulations.

There was a clear rationale for why the second deferred to regulations, to facilitate flexibility in evolving the procurement regime, especially with regard to procurement procedures and structures. But Chapter 4 now entrenches a series of procedural steps inappropriate to statute, and so at various points interferes with Chapter 5's objective of creating a flexible, strategic, and innovative procurement regime. Treasury's response that s217 of the Constitution is not inconsistent with itself does not address the evident fact that Chapter 4 and 5 of the Bill are.

Second Proposal on Chapter 4: A process for the identification and elimination of inconsistencies between Chapter 4 and other parts of the Bill must be undertaken. Provisions that advance balance between the s217(1) principles and ensure anti-corruption must be kept.

Comment and Proposal on Sections 5 and 6: The powers of the PPO and provincial treasuries to review the procurement policies of procuring institutions have been taken out of the Bill. We see this as a basic function of a strong, regulated, and coherent procurement regime, and believe that these powers should be reintroduced.

Comment and Proposal on Sections 25, 30 and 33: There are tensions between s30, which deals with ICT-based procurement, and s25 and s33, which provide for procurement methods and transparency respectively. s30 creates a parallel process for expanding procurement methods and transparency and should instead be more closely aligned with and refer to s25 and s33. We have legislative language ready to address this in our submissions.

Comment and Proposal on Section 33: s33(2)(iv) still needs to be aligned with the amendments to the Companies Act. It currently requires release of beneficial ownership information only under s56(7)(aA) of the Companies Act. s56(7)(aA) covers what are defined as "affected companies," which includes public companies, state-owned enterprises, and a small subset of private companies. Companies that don't fall under the definition of affected company, including many companies contracting with the state, are required to report their beneficial ownership information under s56(12). The lack of reference to s56(12) in the Bill means that many companies contracting with the state will not be caught within the beneficial ownership provisions of the Bill. Under s56(14), the CIPC is required to hold a register of the records of beneficial ownership reported under both s56(7)(aA) and s56(12). It may be sufficient for s33(2)(iv) of the Bill to refer to s56(14), rather than s56(7)(aA).

Comment and proposal on Section 1: In South Africa's legislative landscape, the legitimate scope of confidentiality is established in the Promotion of Access to Information Act. The Protection of Personal Information Act addresses how institutions handle personal information. By including "personal information protected in terms of the Protection of Personal Information Act" in the Bill's definition of "confidentiality," this definition may be read too broadly to constrain release of all personal information. This undermines the Bill's objective of expanding transparency. s1 should only allow confidentiality where this is legitimate under the Promotion of Access to Information Act.

AmaBhungane, Corruption Watch, the Public Affairs Research Institute (PARI), and the Public Service Accountability Monitor (PSAM) are part of the Procurement Reform Working Group (PRWG).

The Procurement Reform Working Group, formed in 2020, includes representatives from a range of civil society organisations as well as independent researchers who collaborate on research and advocacy towards reforming the effectiveness and transparency of the public procurement system in South Africa.

This supplement is endorsed by a number of those organisations, i.e. the Budget Justice Coalition, Imali Yethu, and the Legal Resources Centre (LRC).

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