

[The following report, replaces the Report of the Standing Committee on Finance, which was published on page 43 of the Announcements, Tablings and Committee Reports, dated 04 December 2023]

Report of the Standing Committee on Finance on the Public Procurement Bill [B18 - 2023] (National Assembly- section 76), dated 04 December 2023

The Standing Committee on Finance (SCOF), having considered the Public Procurement Bill [B18 - 2023] (National Assembly- section 76) referred to it, reports the Bill, with amendments [B18B – 2023], as follows:

1. INTRODUCTION AND BACKGROUND

- 1.1. The Public Procurement Bill (PPB), introduced in the National Assembly on June 30, 2023, and referred to SCOF for consideration, aims to establish a unified framework for public procurement across all government tiers and entities. The drafting process began in 2014 following Cabinet directives to modernize the public procurement system.
- 1.2. After public consultations and Cabinet approval on May 10, 2023, the PPB seeks to streamline procurement in accordance with constitutional principles, addressing the current fragmented regime.
- 1.3. The current public procurement system in South Africa is fragmented, governed by multiple outdated laws, leading to confusion and inconsistency. To address this, the Bill has been introduced with the following key objectives:
 - 1.3.1. The Bill aims to create a single regulatory framework for public procurement, eliminating the existing fragmentation and ensuring alignment with constitutional principles.
 - 1.3.2. It proposes the establishment of a dedicated office within the National Treasury with clearly defined functions to oversee and regulate procurement activities.
 - 1.3.3. The Bill seeks to clarify and define the functions of provincial treasuries in the context of public procurement to enhance efficiency and coordination.
 - 1.3.4. It outlines the functions of entities responsible for procurement activities, providing clarity on their roles within the new regulatory framework.
 - 1.3.5. The Bill includes measures to uphold the integrity of the procurement process, ensuring transparency, fairness, and accountability.
 - 1.3.6. The introduction of a framework for preferential treatment in procurement aims to address social and economic imbalances, promoting inclusivity.
 - 1.3.7. Specific general requirements applicable to procurement activities will be outlined to ensure consistency and compliance.
 - 1.3.8. The Bill authorizes the creation of regulations governing different procurement methods, with specific regulations for various types of procurement.
 - 1.3.9. Integration of information and communication technology into the procurement process to enhance efficiency and effectiveness.
 - 1.3.10. Establishment of mechanisms for resolving disputes related to procurement, ensuring a fair and efficient resolution process.
 - 1.3.11. The Bill addresses the repeal and amendment of existing laws, streamlining the legal framework for public procurement in South Africa.

2. PUBLIC PARTICIPATION

- 2.1 Following a Cabinet directive in December 2014 for NT to expedite the modernization of the public procurement system through a legal framework introducing broader policy changes, NT developed a conceptual framework for a draft PPB for discussions with stakeholders.
- 2.2 NT engaged with stakeholders at the national, provincial, and local levels of government, including professional bodies in auditing and accounting. This engagement aimed to obtain ideas, consider the advantages and disadvantages of policy proposals, and secure consensus on the strategic intent of the Bill.
- 2.3 Subsequently, NT prepared the first draft of the Bill, completed the Socio-Economic Impact Assessment (SEIA), and obtained the preliminary opinion of the Office of the Chief State Law Adviser.
- 2.4 Cabinet approved the Bill in February 2020 for publication for public comment for a three-month period. The closing date for comments was extended from May 31, 2020, to June 30, 2020.

- 2.5 Over 4000 commentators submitted their opinions. NT assessed all submissions and prepared a revised Bill.
- 2.6 The revised Bill underwent engagement at NEDLAC on April 13, 2022. The NEDLAC Public Finance and Monetary Policy Chamber, in collaboration with the Industry Chamber, established a task team comprised of representatives from the Government, Business, and Labour.
- 2.7 The NEDLAC task team held 15 sessions from May 6, 2022, to October 7, 2022. National Treasury briefed the task team on the Bill on May 6, 2022, and deliberations commenced on June 2, 2022. Outside discussions between social partners also occurred to seek consensus on specific key issues.
- 2.8 The NEDLAC task team reviewed the Bill, focusing on thematic areas according to the chapters of the Bill. The final NEDLAC report was signed on October 25, 2022, and submitted to the Minister of Finance.
- 2.9 Subsequently, the revised Bill, incorporating changes agreed upon in NEDLAC, underwent scrutiny by the Office of the Chief State Law Adviser. The Office issued a preliminary opinion for the Cabinet process. A final Socio-Economic Impact Assessment certificate was issued, subject to consultation with the Forum of South African Directors-General (FOSAD) before submission for Cabinet's consideration. FOSAD engagements took place on May 4 and 8, 2023.
- 2.10 On May 10, 2023, Cabinet approved the Bill for introduction in Parliament. The Office of the Chief State Law Adviser then certified the Bill.
- 2.11 On May 23, 2023, SCOF was informally briefed by NT and formally again on the tabled Bill on September 5, 2023. The call for public comment was published in all official languages in print media and on the Parliament website starting August 18, 2023, with a deadline of September 11, 2023. Extensions were granted to those who requested them.
- 2.12 SCOF held public hearings on the Bill on September 12 and 13, 2023. The Committee received written and oral submissions from various organizations (refer to Annexure A).
- 2.13 NT responded to submissions received during the public participation process on November 17, 2023, and November 24, 2023. Participants at the meetings on September 12 and 13, 2023, had the opportunity to comment on the responses provided by the NT.
- 2.14 The Committee deliberated on the PPB on November 28, 29, and December 1, 2023, and adopted this report on 4 December.

3 KEY PROVISIONS OF THE PPB

- 3.1 The Bill adopted by the Committee on 01 December contains the following:

Chapter 1: Definitions, Objects, Application, and Administration

- 3.2 The first chapter of the legislation sets the foundation with three key clauses. Clause 1 provides definitions crucial for interpreting the subsequent provisions. Clause 2 outlines the overarching objects of the Bill, while Section 3 addresses the application and administration of the Bill.

Chapter 2: Public Procurement Office, Provincial Treasuries, and Procuring Institutions

- 3.3 This chapter is organized into three parts, each dealing with specific aspects of the procurement process. Part 1 establishes the Public Procurement Office with Clauses 4 and 5 delineating its establishment and functions. Part 2 focuses on the functions of provincial treasuries, outlined in Clause 6. Part 3 delves into the decision-making processes and duties of procuring institutions, with Clauses 7 and 8 respectively.

Chapter 3: Procurement Integrity, Prohibition of Certain Practices, and Debarment

- 3.4 Chapter 3 addresses the ethical dimensions of procurement. It outlines codes of conduct in Clause 9, specifies permissible conduct in Clause 10, and introduces measures to prevent abuse and conflicts of interest in Clauses 11 to 13. It also establishes criteria for automatic exclusion and procedures for debarment in Clauses 13 to 15.

Chapter 4: Preferential Procurement

- 3.5 This chapter, governed by Clause 16, aligns with constitutional mandates by establishing a framework for preferential procurement policies. The Clause details set-asides, pre-qualification criteria, subcontracting conditions, and various measures to promote sustainable development, job creation, and support for small enterprises.

Chapter 5: General Procurement Requirements

3.6 Chapter 5 is subdivided into three parts, each addressing distinct facets of procurement. Part 1 details the procurement system, methods, and related matters in Clauses 25 to 29. Part 2 focuses on the utilization of technology in procurement, and Part 3 addresses access to procurement processes and information.

Chapter 6: Dispute Resolution

3.7 This chapter establishes a comprehensive dispute resolution framework. Part 1 deals with the reconsideration of decisions to award contracts (Clause 37). Part 2 establishes the Public Procurement Tribunal, specifying its composition, functions, and review processes in Clauses 38 to 54. Part 3 introduces a standstill process to prohibit contract conclusion during reconsideration or review proceedings (Clause 55).

Chapter 7: General Provisions

3.8 The final chapter encompasses various general provisions. It empowers the Public Procurement Office to investigate procurement-related matters (Clause 56) and outlines powers to enter and search premises (Clause 57). The chapter further covers warrants, delegation, limitation of liability, offenses, exemptions, departures, regulations, instructions, transitional measures, and amendments or repeals of legislation (Clauses 58 to 67). It concludes with the short title and commencement provision (Clause 68).

4 KEY ISSUES RAISED IN THE PUBLIC HEARINGS

4.1 During the consultation process, various stakeholders and the Committee identified concerns with numerous provisions in the initial draft of the Bill. In response to these inputs, the National Treasury undertook a comprehensive revision of the Bill. This iterative process resulted in substantial changes, notably the complete redrafting of Chapter 4, specifically addressing preferential procurement aspects.

Chapter 1: Definitions, Objects, Application and Administration of Act

4.2 In this chapter, the Bill lays the foundation by offering explicit definitions, outlining its objectives, and delineating the scope of application and administration. The definitions, vital for interpreting subsequent clauses, came under scrutiny during stakeholder engagements.

4.3 During consultations, stakeholders raised concerns about the precision and adequacy of certain definitions. Criticisms included assertions that some terms lacked clarity or were not appropriately defined. Stakeholders proffered alternative definitions or suggested incorporating new terms within Clause 1. This discourse emphasized the importance of terminological precision in the Bill.

4.4 A noteworthy proposal emerged during discussions, advocating for the expansion of the Bill's application to encompass higher education institutions, particularly universities. This proposal spurred deliberations on the Act's reach and its potential impact on diverse entities, reflecting a broadened perspective on public procurement.

4.5 In response to stakeholder feedback, National Treasury clarified its assessment methodology for defining terms. Three distinct criteria were employed-

4.5.1 Contextual Impact: Assessing whether the usage of a term within the PPB altered its conventional meaning when considering the entire text.

4.5.2 Relevance: If a term was absent in the PPB, the team deemed defining it unnecessary, emphasizing the importance of contextual relevance.

4.5.3 Clarity Enhancement: Evaluating whether a term required definition for improved clarity or if refining the PPB text sufficed.

4.6 This nuanced approach underscored NT's commitment to refining definitions based on contextual necessity, relevance, and the overarching goal of enhancing clarity throughout the Act. Stakeholder input and subsequent clarifications collectively shaped the foundational elements of the Bill.

4.7 A summary of terms that were refined/ redefined included the following:

4.7.1 Acceptable Bid: Stakeholder comments on bid evaluation prompted the inclusion of "acceptable bid" in the proposed revision to Chapter 4. "Acceptable bid" is now defined as a bid fully compliant with the specifications and conditions set out in the invitation to bid.

4.7.2 Bid: Concerns about duplications led to the redefinition of "bid" and the removal of the term "bid document." "Bid" now refers to a written offer capable of acceptance and conversion into a contract, in a form determined by the procuring institution in line with compliance requirements.

4.7.3 Emergency: Stakeholders suggested expanding the definition of "emergency" to include business disruption and financial loss. "Emergency" now encompasses

unexpected and dangerous situations posing immediate risks, including threats to health, life, human rights, property, financial loss, livestock, environment, cybersecurity, or the ability of the procuring institution to maintain critical business functions.

- 4.7.4 Immediate Family Member: Stakeholders proposed excluding "previous spouse" due to unclear socio-economic impacts. "Immediate family member" now includes the spouse, civil partner, life partner, children, step-children, parents, and siblings.
- 4.7.5 Infrastructure: Stakeholders advocated for the inclusion of "digital infrastructure." "Infrastructure" covers physical facilities or structures and systems, including digital or analogue communication systems, required to provide services directly or indirectly to the public.
- 4.7.6 National Security: Stakeholders suggested adding "cyber-attack" to the definition of "National Security." "National Security" now includes protection against cyber-attacks, specifying various threats to the Republic.
- 4.7.7 Small Enterprise: Stakeholders emphasized granting preference to Small, Medium, and Micro Enterprises (SMMEs). "Small Enterprise" aligns with the National Small Enterprise Act, 1996 (Act No. 102 of 1996).
- 4.7.8 Transformation: Stakeholders sought clarity by defining "Transformation." "Transformation" is defined as the process of change redressing past imbalances, unfair discrimination, and achieving representation of economically active populations, incorporating socio-economic objectives.
- 4.7.9 Transversal Term Contract: Stakeholders urged a broader definition beyond contracts established by the relevant treasury. "Transversal term contract" now covers contracts arranged by the relevant treasury or other legally mandated procuring institutions.
- 4.7.10 Instruction: Suggested expansion to include provincial treasuries. "Instruction" involves instructions issued by the Public Procurement Office and Provincial Treasuries.
- 4.7.11 Publish: Proposed amendment to include an easily accessible central online portal. "Publish" means publication in the Gazette, on a website, or on an easily accessible central online portal publicly available.
- 4.8 There was also proposed removal of some definitions from the PPB as follows:
 - 4.8.1 Bid Document: Stakeholders argued that the definition of "Bid document" duplicates the "bid" definition and is not commonly used to refer to a bid response but rather to the invitation document issued by the procuring party.
 - 4.8.2 Decision: Stakeholders found the definition of "decision" unclear and open to different interpretations. After deliberation, it was suggested that the term "decision" could be applied in various contexts, leading to potential ambiguity.
 - 4.8.3 As a result, both these terms were removed.

Stakeholder Concerns and Proposed Amendments to Clauses 2 and 3

- 4.9 Clause 2(a): Stakeholders proposed the replacing of "value for money" with "efficient, effective and economic use of resources" in Clause 2(a) to align with constitutional language.
- 4.10 Clause 2(2): Stakeholders proposed the replacement of "the uniform treasury norms and standards" with "the objects referred to in subsection 1" in Section 2(2).
- 4.11 Addition of Clause 3(3)(c): Stakeholders proposed the adding of Clause 3(3)(c) to include "all procurement carried out by any person on behalf of an organ of state."
- 4.12 Clause 3(4) was expanded by inserting "on matters related to public procurement" after "other legislation."
- 4.13 Other amendments included clauses 2(2)(g), 2(2)(d) and the insertion of a new clause, Clause 2(2)(e).

Chapter 2: Public Procurement Office, Provincial Treasuries and Procuring Institutions

- 4.14 In this chapter, which encompasses Clauses 4 to 8, the establishment, functions, and potential conflicts of the PPO, Provincial Treasuries, and Procuring Institutions take center stage. Stakeholder input has been instrumental in shaping concerns around the PPO's independence, potential conflicts of interest, and the relationship between the PPO and provincial treasuries.
- 4.15 Stakeholders voiced significant apprehension regarding the perceived independence of the PPO, primarily due to its proposed placement within NT. Concerns centered on the potential for conflicts of interest, raising questions about whether the PPO, if situated in NT, could maintain the expected level of impartiality. Moreover, stakeholders sought clarification

on the relationship between the PPO established by the Bill and the existing Office of the CPO within NT.

- 4.16 Another focal point of discussion revolved around potential conflicts arising from the PPO's 'binding instructions' to all procuring institutions across various spheres, as outlined in Clauses 5 and 6. Stakeholders expressed concerns about potential contradictions between the PPO's directives and those issued by provincial treasuries at the regional level.
- 4.17 NT addressed concerns by emphasizing transparency and compliance. They proposed a mechanism wherein any proposed binding instructions from the PPO would be published in the Government Gazette for public comment before implementation. This approach aligns with the transparency principles and legal requirements specified in Clause 16 of the Interpretation Act, 1957.
- 4.18 NT clarified that provincial treasuries possess the authority to issue binding provincial instructions within their respective provinces. However, these instructions must align with the overall framework set by the PPO, ensuring consistency without compromising the effectiveness of the Act.
- 4.19 This nuanced dialogue between stakeholders and NT not only underscores the complexity of establishing a robust procurement framework but also highlights the commitment to transparency, compliance, and effective collaboration among the various entities involved in the procurement process.
- 4.20 The amendments in the Bill were as follows:
- 4.20.1 Stakeholders raised concerns about the independence of the PPO and potential conflicts of interest. The proposed amendment suggests inserting the following addition to Clause 5(2)(a): "the PPO should publish any proposed binding instruction in the Government Gazette and on the PPO website for public comment prior to implementation thereof."
- 4.20.2 Addressing concerns about potential conflicts between instructions from the PPO and provincial treasuries, the proposed amendment suggests inserting the following addition to Clause 6(2)(a): "the provincial treasury should publish any proposed binding instruction in the Provincial Gazette and on their website for public comment prior to implementation thereof."
- 4.20.3 To enhance clarity, the proposed amendment suggests rewording Clause 5(3) to read: "The Public Procurement Office should publish different instructions in terms of subsection (2) for—"
- 4.20.4 Similarly, the proposed amendment suggests rewording Clause 6(3) to read: "A provincial treasury should publish different instructions in terms of subsection (2)(a) for—"
- 4.20.5 Acknowledging concerns that the term "guidelines" might convey a sense of binding authority, the proposed amendment recommends removing the word "guidelines" from Clauses 5(2)(b) and 6(2)(b) and 28(b), as the nature of these guidelines would be non-binding.
- 4.20.6 Considering implementation challenges for different procuring institutions and categories of procurement, the proposed amendment suggests removing Clauses 5(2)(c) and (d), and Clause 6(2)(d) and (4), as procuring institutions are expected to develop and review their policies within the prescribed framework.
- 4.20.7 Aligning with the overall structure of the Bill, the proposed amendment suggests deleting the term "develop" from Clause 8(1)(b) to ensure consistency with Clause 18 of the Bill.
- 4.20.8 To streamline the legislation and avoid redundancy, the proposed amendment suggests deleting Clause 8(1)(d) from the Bill, as details regarding needs analysis and clear business cases would be provided in the regulations.
- 4.20.9 Considering operational details, the proposed amendment suggests deleting Clauses 8(1)(e) and 8(1)(f) from the Bill, as these specifics would be appropriately addressed in the regulations, keeping primary legislation focused on broader principles.
- 4.20.10 With a focus on empowering procuring institutions, the proposed amendment suggests deleting Clause 8(2)(b) from the Bill, trusting in the reconsideration processes outlined in Clause 8(2)(a) and Clause 31.

Chapter 3: Procurement Integrity, Prohibition of Certain Practices and Debarment

- 4.21 In this chapter, stakeholders voiced predominant concerns centering on the imperative need for robust mechanisms to deter corruption and secure safeguards for whistleblowers within the context of public procurement. Stakeholders collectively asserted

that the Bill should adopt a more explicit stance on corruption within public procurement processes, emphasizing the necessity for provisions dedicated to the protection of whistleblowers.

- 4.22 Stakeholders contended that the inclusion of whistleblower protection measures would not only empower individuals to report corruption but would also serve as a deterrent to corrupt practices.
- 4.23 One notable focus of stakeholder discussions was the scrutiny of Clause 13 within the Bill. A considerable portion of concerns revolved around the perceived encroachment on constitutional rights, particularly the freedom of trade, occupation, and profession. Stakeholders expressed reservations about whether certain provisions in Clause 13, particularly those related to automatic exclusion from procurement, might unjustifiably impede individuals' opportunities to engage in business with the state. This debate underscores the delicate balance between enforcing anti-corruption measures and ensuring the protection of constitutional rights.
- 4.24 NT, in response to these concerns, advocated for collaborative efforts with law enforcement agencies and relevant departments within the justice cluster to address issues related to corruption and the role of anti-corruption agencies. Moreover, the proposal suggested amending the Protected Disclosures Act to enhance provisions specifically related to the protection of whistleblowers. This strategic approach aims to strengthen the legal framework surrounding whistleblower protection and foster a more effective collaborative environment with law enforcement entities.

Chapter 4: Preferential Procurement

- 4.25 Stakeholders emphasized concerns regarding section 217(3) of the Constitution, which stipulates that national legislation must establish the framework for implementing the policy outlined in section 217(2). Stakeholders asserted that Chapter 4 of the PPB should serve as this framework, rather than leaving it to the Minister to prescribe. The stakeholders argued that the drafting of Chapter 4 in the tabled Bill did not align with the constitutional requirement, creating ambiguity.
- 4.26 Additionally, stakeholders found Chapter 4 unclear, vague, and challenging to implement. They contended that procuring institutions were burdened with the task of developing policies for preference measures without the necessary guidance outlined in section 217(3). Some stakeholders felt that Chapter 4 did not adequately address the redress of historically disadvantaged black individuals, while others believed there was insufficient emphasis on achieving value for money. Despite diverse opinions, the consensus was that Chapter 4 required revision to provide clarity, considering the constitutional provisions and the objectives of the PPB.
- 4.27 Some stakeholders expressed the view that preferential procurement should be discretionary, allowing procuring institutions to decide whether to implement such policies. They argued that the PPB lacked the authority to compel procuring institutions to adopt preferential procurement.
- 4.28 Furthermore, stakeholders suggested revisiting the designations from the 2017 Preferential Procurement Regulations, indicating a need for clarity on this aspect in the PPB.
- 4.29 Another significant viewpoint highlighted the concern that price should not be used as an evaluation criterion for tenders. Stakeholders argued that this could be deemed unconstitutional, citing section 217(1) of the Constitution, which emphasizes cost-effectiveness and competition as principles of public procurement.
- 4.30 NT contested the notion that preferential procurement is discretionary, emphasizing that section 217(1) of the Constitution already incorporates the concept of "equitable" as a fundamental principle in procurement. "Equitable" encompasses both distribution and redistribution, addressing the fair sharing of wealth, opportunities, and resources in the country. It maintained that resuscitating elements from repealed legislation would be imprudent.
- 4.31 The debate over the use of price as an evaluation criterion persisted, with NT asserting that section 217(1) of the Constitution allows for cost-effectiveness and competition in public procurement, challenging the argument against considering price in tender evaluations. However, eventually price was replaced with "complementary goals", as an evaluation criterion.
- 4.32 Chapter 4 was completely redrafted following public comments and deliberations in the Committee.

Chapter 5: General Procurement Requirements

- 4.33 Stakeholders expressed notable concerns and viewpoints pertaining to Chapter 5, specifically addressing potential conflicts and contradictions between regulations issued by the Minister and instructions issued by the Public Procurement Office (PPO) and Provincial Treasuries (PTs). A prevailing theme of confusion among stakeholders centered around the delineation of roles among key entities, including the Minister, the PPO, the PTs, and procuring institutions.
- 4.34 The concerns extended to understanding the hierarchy of legislative implementation, where the Minister of Finance issues regulations, the PPO and PTs issue instructions, and procuring institutions carry out the regulations and any issued instructions.
- 4.35 Stakeholders emphasized the need for clarity on the distinct roles and responsibilities of each player in the procurement landscape. The overarching sentiment is that when regulations are established by the Minister, instructions from the PPO and PTs should align with, not contradict, the legal provisions set forth by the Minister. Establishing a clear understanding of the hierarchy and complementary roles was seen as crucial for effective implementation of legislation without conflicts.
- 4.36 Concerns and viewpoints were also raised regarding clauses related to access and disclosure of procurement information within Chapter 5. A prominent perspective suggests that there should be no threshold based on the value of procurement contracts when making information available to the public.
- 4.37 Stakeholders advocate for complete transparency in the procurement system, asserting that all public procurement contracts, irrespective of their value, should be open to public scrutiny. The primary objective behind this proposal is to enhance transparency, mitigate corruption risks, and ensure accountability in the procurement process. It is noted that any measures related to access and disclosure of information should align with existing legislation, including the Protection of Personal Information Act (POPIA) and the Promotion of Access to Information Act (PAIA). Stakeholders stress the importance of harmonizing transparency efforts with relevant legal frameworks governing data protection and information access.

Chapter 6: Dispute Resolution

- 4.38 The prevailing sentiments expressed by stakeholders regarding this chapter, underscore the current obligation for bidders to exhaust internal processes within the Procuring Institution before seeking recourse in the courts. Stakeholders argued for the allowance of direct access to the courts, especially in situations where bidders lack confidence in the Procuring Institution's ability to impartially address their grievances.
- 4.39 The proponents of this view advocated for a balanced approach, contending that while internal dispute resolution mechanisms should be explored first to curtail legal costs and unnecessary litigation, there should also be flexibility for bidders to approach the courts directly, particularly when the integrity of the internal processes is in doubt. The overarching goal is to expedite dispute resolution, preventing potential disruptions to service delivery.
- 4.40 Concerns were raised regarding the perceived independence and powers of the Tribunal as outlined in the Bill. Questions linger about the Tribunal's equivalence to the courts, pondering whether it will function as specialized courts or introduce additional bureaucratic processes. Stakeholders suggested the inclusion of an industry representative in the Tribunal, echoing the framework laid out in Chapter 6 of the Bill. This addition is seen as a means to infuse contextual insight and expertise into the Tribunal's proceedings.
- 4.41 Stakeholders have identified a potential contradiction between the Tribunal processes in Chapter 6 and the stipulations of section 62 of the Municipal Systems Act (MSA). The MSA explicitly states that its provisions should not diminish the applicability of other relevant appeal procedures as per existing laws. This has prompted commenters to seek clarification and alignment with established legal frameworks to ensure cohesiveness and consistency in dispute resolution processes.

Chapter 7: General Provisions

- 4.42 The prevailing concern echoed by stakeholders in this chapter centers on Clause 51, specifically addressing the authority vested in the Public Procurement Office (PPO) to enter and search premises. Stakeholders underscore a shared perspective that this power should be confined to ensuring compliance and should not extend to the investigation of criminal conduct.
- 4.43 The consensus emphasizes a need for clarity and precision in delineating the purposes for which this power is intended, with a focal point on fostering adherence to regulatory requirements rather than delving into potential criminal activities.

- 4.44 Stakeholders have consistently raised apprehensions concerning the clause related to the limitation of liability. The crux of these concerns was that the Bill should go beyond mere limitation of liability and explicitly indemnify officials against any criminal liability.
- 4.45 Stakeholders contend that it should provide robust indemnification measures to shield officials from criminal consequences arising in the course of executing their duties. This collective sentiment emphasizes the necessity for comprehensive protection and clarity within the legal framework.
- 4.46 In summary, stakeholders advocate for a compliance-centric interpretation of the PPO's powers, reserving them for ensuring adherence rather than delving into criminal investigations. Simultaneously, there is a resounding call for augmenting the protection afforded to officials by explicitly including provisions that indemnify them against criminal liabilities.

5 COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

Public Consultation and Participation

- 5.1 The Committee notes the comprehensive and multi-stage process undertaken by NT for the development of the Public Procurement Bill. Initiated following a Cabinet directive in December 2014, the process involved extensive engagement with stakeholders at national, provincial, and local levels, including professional bodies. The timeline, from the conceptualization in 2014 to Cabinet approval in May 2023, showcases a thorough and inclusive approach to legislative development.
- 5.2 The Committee acknowledges the robust stakeholder engagement, including interactions with government, business, and labour representatives through the NEDLAC task team. Public participation, evidenced by over 4000 commentators during the public comment period, reflects a commitment to inclusivity and responsiveness to diverse perspectives.
- 5.3 The Committee notes the involvement of the NEDLAC task team in the review and deliberation of the Bill, focusing on thematic areas. The final NEDLAC report, signed on October 25, 2022, demonstrates a collaborative effort involving key social partners and contributes to the Bill's refinement.
- 5.4 The Committee recognizes the meticulous scrutiny of the revised Bill by the Office of the Chief State Law Adviser, issuance of a preliminary opinion, and the final Socio-Economic Impact Assessment certificate. Cabinet approval in May 2023, following engagements with the Forum of South African Directors-General (FOSAD), reflects due diligence and compliance with legal and procedural requirements.
- 5.5 The Committee acknowledges the formal introduction of the Bill to Parliament on May 10, 2023, subsequent briefings to SCOF in May and September 2023, and the call for public comments. Public hearings held on September 12 and 13, 2023, allowed for diverse inputs from various organizations, contributing to the democratic and participatory nature of the legislative process.
- 5.6 The Committee deliberated on the Public Procurement Bill on November 28, 29, where some changes were effected in the Bill which was adopted with a motion of desirability by the Committee on December 1, 2023. The adoption of this report signifies the conclusion of the Committee's considerations and its readiness to present the Bill for adoption in the National Assembly.
- 5.7 The Committee believes that sufficient time for consultation was allocated for the processing of this Bill. While recognizing the importance of thorough engagement, the Committee acknowledges the necessity to balance the duration of public consultation, considering practical constraints and the need for legislative progress.
- 5.8 The Committee acknowledges that despite the allocated time for consultation, there might be a desire for more engagement from certain stakeholders. The Committee emphasizes the pragmatic understanding that public consultation and participation cannot be endless. There is a need for a balance between inclusivity and the imperative of advancing the legislative process within reasonable timeframes.
- 5.9 The Committee acknowledges and appreciates the valuable contributions made by stakeholders, including the NEDLAC task team, during the development and refinement of the Bill.

Unified Procurement Framework and Constitutional Alignment

- 5.10 The Bill aims to establish a unified framework for public procurement in alignment with the constitutional principles of fairness, transparency, and competitiveness.

5.11 The Bill demonstrates a concerted effort to reform and modernize the existing legal framework governing public procurement in South Africa. Through a meticulous schedule of amendments and repeals, the Bill aims to address shortcomings, introduce progressive changes, and align procurement practices with contemporary standards. The comprehensive nature of the proposed amendments, covering Acts from various sectors, reflects a holistic approach to enhance transparency, fairness, and efficiency in procurement processes. The focus on preferential procurement, ethical standards, and compliance underscores a commitment to promoting inclusivity and accountability in the procurement landscape.

5.12 To ensure a unified procurement system, the Bill completely repeals the State Tender Board Act, 1968 (Act No. 86 of 1968), National Supplies Procurement Act, 1970 (No. 89 of 1970), and Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000).

5.13 To ensure alignment, it also amends the Housing Act, 1997 (Act No. 107 of 1997), National Water Act, 1998 (Act No. 36 of 1998), State Information Technology Agency Act, 1998 (Act No. 88 of 1998), Correctional Services Act, 1998 (Act No. 111 of 1998), Public Finance Management Act, 1999 (Act No. 1 of 1999), Road Traffic Management Corporation Act, 1999 (Act No. 20 of 1999), Construction Industry Development Board Act, 2000 (Act No. 38 of 2000), Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003), Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003), Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), Electricity Regulations Act, 2006 (Act No. 4 of 2006), and Infrastructure Development Act, 2014 (Act No. 23 of 2014).

Preferential Procurement Framework

5.14 The inclusion of a preferential procurement framework aligns with constitutional provisions found in section 217 and aims to address the persistent historical economic disparities. The chapter on preferential procurement triggered substantial feedback, resulting in comprehensive revisions. It also necessitated the refinement of certain definitions such as "transformation" in Clause 1 of the Bill and the introduction of new terms, including "economically active population" and "BBBEE status level contributor," among others.

5.15 The Preferential Procurement framework in this Bill shifts away from assessing bids solely on price, incorporating additional complementary objectives for procurement. This progressive step aims to empower individuals and entities historically disadvantaged, countering the perverse outcomes associated with the PPPFA framework.

Technology Integration

5.16 The Bill emphasizes the use of technology for efficiency in procurement processes. The Committee encourages the continuous exploration and incorporation of innovative technologies to enhance the efficiency, transparency, and effectiveness of procurement systems.

Transparency and Anti-Corruption Measures

5.17 The Bill includes measures to combat corruption through access to procurement information and transparency initiatives. The Committee supports these anti-corruption measures and recommends continuous monitoring and evaluation to ensure their effectiveness in practice.

Dispute Resolution Mechanisms

5.18 The Bill establishes dispute resolution mechanisms, including reconsideration processes and the Public Procurement Tribunal. The Committee recommends robust training programs for relevant stakeholders to ensure a smooth and effective implementation of dispute resolution mechanisms.

Prevention of Abuse of Procurement System

5.19 The Bill includes measures to prevent the abuse of the procurement system. The Committee recommends periodic reviews of the effectiveness of measures to prevent abuse, with adjustments made as needed to strengthen the system.

Capacity Building for Procuring Institutions

5.20 Given the importance of the capacity of procuring institutions, the Committee recommends the development of comprehensive capacity-building programs to enhance the skills and knowledge of officials involved in procurement.

Review of Debarment Criteria

5.21 The Committee recommends a periodic review of the debarment criteria to ensure that they remain relevant and effective in promoting ethical conduct and deterring potential transgressors.

6 CONCLUSION

6.1 The Committee agrees with amendments proposed in the A list of the Bill as presented to the Committee on 01 December 2023.

6.2 The Committee reports the Bill with amendments [B18B-2023].

The Democratic Alliance and the Economic Freedom Fighters reserve their position.
Report to be considered.

Annexure A – Stakeholders to the Public Procurement Bill [B18 – 2023] public participation process, in no particular order:

1. South African Institute of Race Relations NPC,
2. IRR Legal NPC,
3. Black Business Council (BBC),
4. Black Business Council in The Built Environment Youth Chamber (BBCBE YC),
5. Transnet,
6. Public Service Accountability Monitor (PSAM) at Rhodes University,
7. HP South Africa (Pty) Limited,
8. Basadi Ba Molao Education and Training Services,
9. South African Black Technical and Allied Careers Organisation (SABTACO),
10. Submissions & commentary from a group of construction & engineering companies,
11. International Women's Forum of South Africa (IWFSa),
12. Orizur Consulting Enterprise Pty Ltd,
13. National Education Health and Allied Workers' Union (NEHAWU),
14. African Procurement Law Unit (APLU),
15. Department of Defence,
16. AmaBhungane,
17. COSATU,
18. Southern African Clothing and Textile Workers' Union (SACTWU),
19. National Research Foundation (NRF),
20. Corruption Watch,
21. Association for the Advancement of Black Accountants of Southern Africa (ABASA),
22. Budget Justice Coalition (BJC) and Imali Yethu (IY) [Joint Submission],
23. Futuregrowth Asset Management,
24. African Women Leaders Network (AWLNSA),
25. Petroleum Oil and Gas Corporation of South Africa (PetroSA),
26. ST Beauties & Cosmetics (PTY) LTD,
27. National Union of Metalworkers of South Africa (NUMSA),
28. Mariaan Smit,
29. Snehlanhla Molefe and Sanele Khomo,
30. Equal Education (EE) and the Equal Education Law Centre (EELC),
31. Mbusiswa Ngcobo,
32. Apparel and Textile Association of South Africa (ATASA),
33. Master Builders South Africa (MBSA),
34. Professor Annamaria La Chimia,
35. Mining Equipment Manufacturers of South Africa (MEMSA),
36. Joint Strategic Resource (JSR),
37. Catalytic Strategy Think Tank Steering Committee,
38. SCAW South Africa (PTY) Ltd,
39. South African Institute of Chartered Accountants (SAICA),
40. RSA Clusters Group NPC,
41. Steel and Engineering Industries Federation of Southern Africa (SEIFSA),

42. Public Affairs Research Institute (PARI),
43. Dr. Ron Watermeyer,
44. Dr Ncedo S. Mkondweni,
45. WECONA (Collaborations: The Women's Economic Assembly, UN Women, and the Department of Women, Youth & Persons with Disabilities),
46. South African Energy Efficiency Confederation (SAEEEC),
47. South African Furniture Initiative (SAFI),
48. Barnes Tubing Industries (Pty) Ltd ("Barnes Tubing"),
49. Consulting Engineers South Africa (CESA),
50. Sakeliga,
51. Pharmaceutical Task Group (PTG),
52. Abracon,
53. Industrial Development Corporation (IDC),
54. Johnson and Johnson (Worldwide Government Affairs and Policy),
55. Bitou Local Municipality,
56. Columbus Stainless (Pty) Ltd,
57. Unisa College of Law,
58. South African Medical Technology Industry Association (SAMED),
59. Consumer Goods Council of South Africa (CGCSA),
60. Msunduzi Municipality,
61. Gautrain Management Agency, Construction Sector Charter Council (CSCC),
62. CBE inputs on Procurement Bill Comments (including MBSA SBTACO SAIA BKIA and Councils for the Built Environment Professions)
63. South African Bureau of Standards (SABS),
64. Hall Longmore (Pty) Ltd ("Hall Longmore"),
65. Hot Dip Galvanizers Association of Southern Africa (HDGASA),
66. Construction Industry Development Board (CIDB),
67. City of Cape Town,
68. Auditor-General South Africa (AGSA),
69. Haggie Steel Wire Rope (Pty) Ltd,
70. Drakenstein Municipality,
71. Mossel Bay Municipality,
72. Saldanha Bay Municipality,
73. Ilifa Labantwana,
74. McKinnon Chain,
75. National Energy Regulator of South Africa (NERSA),
76. Maysene Logistics (PTY) Ltd,
77. Mireille Wenger: Provincial Minister of Finance and Economic Opportunities: Western Cape Province,
78. Manufacturing Circle,
79. South African National Space Agency (SANS),
80. SA Municipal Law Forum,
81. Pharmaceuticals Made in South Africa (PHARMISA),
82. International Wire Convertors (Pty) Ltd (IWC),
83. Mattress Component Manufacturers (Pty) Ltd (MCM),
84. Ndlovu Scraper Ropes (Pty) Ltd (Ndlovu),
85. Barnes Reinforcing Industries (Pty) Ltd (BRI),
86. Planact Power Operations and Leadership Association of Southern Africa (POLASA),
87. Perishable Products Export Control Board (PPECB),
88. Business Unity South Africa (BUSA),
89. Water Research Commission (WRC),
90. Women's Economic Assembly, Un Women & The Department Of Women, Youth & Persons With Disabilities,
91. Lucas Raphela,
92. Lebo Matlou and Victoria Motloung (CSIR/SPU Commentary),
93. KwaZulu-Natal Provincial Treasury (KZNPT),
94. Proudly South African (Proudly SA),
95. RSC Ekusasa Mining Joint Venture (Pty) Ltd (RSC),
96. SACC Women's Forum,
97. South African Clothing Manufacturers Association (SACMA),

98. Ethekekwini Municipality,
99. South African Institute of Black Property Practitioners (SAIBPP),
100. State-Owned Entities Procurement Forum's (SOEPF),
101. Textile Federation of South Africa,
102. Cape Town Stadium (RF) SOC Limited,
103. Webber Wentzel (on Behalf of Cipla Medpro South Africa (Pty) Ltd),
104. Department of Forestry, Fisheries, and the Environment (DFFE),
105. Beaver Agency,
106. TK Tilodi,
107. National Strategic Plan on Gender Based Violence and Femicide Pillar 5,
108. Tradecore Steel (Pty) Ltd (Tradecore),
109. Western Cape Property Development Forum (WCPDF),
110. Western Cape Provincial Treasury Municipality (MFMA),
111. Public Procurement Reform Project, and
112. Passenger Rail Agency of South Africa (PRASA)