

Our ref: TM/PRWG/2024

Your ref:

19 April 2024

TO: Mr Yunus Carrim
Chairperson, Select Committee on Finance
National Council of Provinces

Per email: ycarrim@parliament.gov.za / [REDACTED]

Per email: [REDACTED]

Per email: nmangweni@parliament.gov.za

Per email: gsalie@parliament.gov.za

AND TO: Mr Mkhacani Maswanganyi
Chairperson, Standing Committee on Finance
National Assembly

Per email: jmaswanganyi@parliament.gov.za

Per email: awicomb@parliament.gov.za

Per email: tsepanva@parliament.gov.za

Per email: carends@parliament.gov.za

AND TO: Mr Enoch Godongwana
Minister of Finance

Per email: minreg@treasury.gov.za

AND TO: Dr Duncan Pieterse
Director-General, National Treasury

Per email: Duncan.Pieterse@treasury.gov.za

Per email: Lindiwe.Mnisi@Treasury.gov.za

AND TO: Ms Mendoe Ntswahlana
Chief Procurement Officer, National Treasury

Per email: CPO@treasury.gov.za

Per email: Lineo.Mohlabi@treasury.gov.za

RE: CONCERNS REGARDING THE PUBLIC PROCUREMENT BILL AND PUBLIC PARTICIPATION

1. This is a letter addressed to the National Assembly, the National Council of Provinces and the National Treasury regarding concerns with the Public Procurement Bill [B18-2023] and public participation. We write as a group of individuals and civil society organisations who have extensive experience in South African procurement law and practice, and who have engaged actively in the preparation of the Public Procurement Bill. In respect to the present matter, this letter is submitted on behalf of the following individuals and organisations:
 - 1.1. African Procurement Law Unit
 - 1.2. AmaBhungane Centre for Investigative Journalism
 - 1.3. Budget Justice Coalition
 - 1.4. Corruption Watch
 - 1.5. Equal Education Law Centre
 - 1.6. Legal Resources Centre
 - 1.7. Public Affairs Research Institute
 - 1.8. Public Service Accountability Monitor
 - 1.9. Shaun Scott
 - 1.10. The South African Medical Technology Industry Association
 - 1.11. Prof. Ron Watermeyer
2. The purpose of this letter is to raise concerns regarding the constitutionality of certain provisions (or omissions) in the Public Procurement Bill and the public participation process thus far. Procurement weighs heavily in government finances and operations. In consequence, the Bill will have pervasive impacts on the state's ability to protect and advance fundamental rights. We write to place on record our view that this Bill is legally deficient, that it is highly likely to be constitutionally challenged, and that its participation process has been flawed.
3. This letter should not be read as impugning the preferential and broader policy objectives that the government hopes to promote through the Bill, but rather to call into question the current Bill's adequacy as an instrument for doing so. This letter's main proposition is that Parliament should engage with, and be aware of, the constitutional deficiencies in the Bill before it is passed. The main request made is that, given the time that is still available to consider the Bill, Parliament and Treasury should consider

engaging in a workshop on the constitutionality of the Bill before it takes its final decision to pass it.

The process in the Standing Committee on Finance and National Assembly

4. Below is a brief overview of the factual context and background in respect to the Parliamentary process:
 - 4.1. On 18 August 2023, the Standing Committee on Finance published a call for submissions on the Bill. On 11 September 2023, despite short notice, a total of 112 written submissions were made.
 - 4.2. An important subset of these submissions foregrounded the public interest and noted serious deficiencies in the Bill. These included, *inter alia*:
 - 4.2.1. Public procurement in South Africa is constitutionally circumscribed by Section 217 of the Constitution, and Parliament is entrusted with legislating it. International practice strongly favours statutes that establish a standard set of procurement principles, managerial processes, and purchasing methods. The Bill instead granted sweeping powers to the Minister of Finance and the Public Procurement Office to decide these matters in regulations and instructions.
 - 4.2.2. The Bill not only failed to elaborate on constitutional principles, but it also failed to articulate clear constitutional concepts and properly allocate associated powers. The constitutional distinction between National Treasury's role under sections 216 and 217 was collapsed. The relationship between procurement policies, systems, and frameworks became confused. This created inconsistency in the assignment of functions between regulatory authorities and procuring institutions. Most notably, the Bill was unclear about whether procuring institutions or the National Treasury were to be the first mover in developing preferential procurement policies.
 - 4.2.3. The preferential procurement framework established under Chapter 4 was too vague and open-ended to meet the requirement of section 217(3). It listed several measures that could be targeted toward several groups, but left unclear how these were to be formulated into

coherent and constitutionally compliant preferential procurement policies and practices.

- 4.2.4. The Bill raised significant financial and capacity implications (and its published Socio Economic Impact Assessment recognised these on pages 16-18), but its Memorandum of the Objects asserted that it had none.
- 4.3. Public hearings were held on 12 and 13 September 2023. Stakeholders were given very limited time to make their oral submissions. Committee members generally avoided the substance of these submissions, and focused on expanding preferential procurement without concern for constitutionality. The task of responding to written stakeholder submissions was wholly outsourced to the National Treasury.
- 4.4. The National Treasury responded to public submissions and stakeholder input on 24 November 2023. Treasury only gave cursory attention to 36% of submissions, and 64% had not been responded to at all. Of the 36% of submissions that were responded to, many of the most pressing comments received evasive or inadequate replies from Treasury. Many of the provisions that stakeholders were concerned about, including those which raised serious issues of formal law, were either retained or adjusted in ways that failed to address stakeholders' concerns.
- 4.5. After the National Assembly submissions and hearings, the most extreme changes were reserved for Chapter 4 of the Bill, which establishes the framework for preferential procurement. The National Treasury put forward an extensive rewrite, introducing significant and unconsulted policy positions. The Committee adopted this rewrite and proceeded to remove reference to price and a points system. This internationally novel intervention was adopted without regard for the constitutional requirement that procurement must proceed through a system that is fair, equitable, transparent, competitive and cost-effective. The National Assembly proceeded to pass the Bill.

The process in the Select Committee on Finance and the National Council of Provinces

5. The Bill introduced into the National Council of Provinces maintained the formal deficiencies identified by stakeholders in the National Assembly, but these were amplified by the new Chapter 4. The new Chapter 4:

- 5.1. Failed to clearly locate the power to develop preferential procurement policies.
 - 5.2. Omitted reference to price or a points system, which is understood internationally as the default procurement method, and is closely aligned with the constitutional requirement that procurement proceed through a system which is fair, equitable, transparent, competitive and cost-effective.
 - 5.3. Contained extensive details regarding preferential procurement, but it introduced new vague and undefined terminology, it continued to establish a series of open-ended preferential provisions, and it left unclear how these provisions were to be formulated in coherent and constitutionally compliant preferential procurement policies and practices.
 - 5.4. Chapter 4 conflicted with other aspects of the Bill. For instance, section 17(1) appeared to establish restriction on competition as a default, undermining the section 33(2)(a)(i) requirement that all departures from open competition be publicly justified on a case-by-case basis. Section 17(5) appeared to preclude the use of functionality/quality as an adjudication criterion in a points system, which constrained the flexible elaboration of procurement methods recently promoted by the National Treasury before the Standing Committee and implied by Chapter 5.
6. The Select Committee on Finance called for public submissions. 28 organisations and four individuals made written submissions. 13 organisations participated in oral hearings on 23 February 2024. The Chairperson of the Select Committee noted flaws in the National Assembly's public participation process and entreated the National Treasury to respond more meaningfully to submissions made by stakeholders in the NCOP process.
 7. On 19 March 2024, National Treasury responded to the written submissions. At this point, it responded to most of them, but often merely noting or rejecting proposals, and in crucial instances responding in ways that again avoided the substance of comments made. In one case, Treasury acknowledged that the Tribunal proposed by the Bill will have financial impact, but this begs the question of why this was recognised so late in the process, and what else might be missed.
 8. Most significantly, most of Treasury's responses hinged on the proposition that many of the issues raised by stakeholders would be dealt with in the regulations. As stakeholders have not had any sight of the regulations, it is impossible to properly interrogate the effect and constitutionality of a Bill without sight of how the provisions

will play out in practice. The only way to do so is either to have sight of the regulations or to have such key provisions clearly articulated in the Bill itself.

9. In the subsequent Select Committee meeting, the Chairperson again raised concerns about the public participation process, considered stakeholder submissions that the Bill be referred back to NEDLAC for proper consultation, and instead opted for a more flexible approach. Stakeholders were granted an opportunity to make supplemental submissions consolidating their central concerns. The Treasury was then required to engage in one-on-one consultations with those stakeholders, and then to report back to the Select Committee on Tuesday 16 April 2024. It is significant to note that the entire process up to this point mainly entailed engagement between stakeholders and Treasury, instead of engagement between stakeholders, Treasury and Parliament. Parliament's views on the substantive issues raised were not expressed and so stakeholders could not meaningfully engage with those views with aims to influence and contribute to Parliament's decision-making.
10. The issues raised by stakeholders were constitutionally and operationally complex. The time frames offered were too short to adequately address this complexity. The Treasury met with stakeholders for an hour each (with some overrun of meeting time) on Monday 8 April and Tuesday 9 April 2024. The issues were too complex for this hour, so many stakeholders were asked or volunteered to make additional supplements by 9 April and 10 April 2024 respectively. With the deadline for the Treasury report-back set for Tuesday 16 April, time frames were now so truncated as to make meaningful engagement with many of the core concerns of stakeholders impossible.
11. It is understood that not all comments made by stakeholders can or should be favourably received by the Treasury. Stakeholders also understand that there will not be agreement on every single detail in the Bill. But the sub-set of proposals considered here are of such fundamental import to the viability of law that they should have been addressed earlier. In meetings with the Treasury on 8 and 9 April 2024 some proposals that were previously made by stakeholders in the National Assembly and earlier were acknowledged as important, but many remain unaddressed because incorporating them into the Bill would require rigorous consultation and drafting, which cannot feasibly be achieved within deadlines.
12. In reference to the Treasury's written report, made available to stakeholders on Tuesday 16 April 2024, consultation appears to have produced some progress, but we lack legislative text confirming this. Treasury has suggested that it will define confidentiality by the grounds of refusal contained within the Promotion of Access to Information Act (PAIA), but civil society proposed to define confidentiality by what is

legitimate under PAIA, and what is legitimate under PAIA *necessarily includes* the public interest override under section 46. More broadly, the progress that has been made so far is too marginal to address basic constitutional issues underlying the Bill.

13. Considering the principle that stakeholders who participate in the process should be *capable* of influencing Parliament's decision-making on the Bill, it has become impossible to do so given that stakeholders do not know Parliament's views on key constitutional issues and provisions in the Bill. Stakeholders believe that while it is important to engage with the Treasury in this process, it is also important to engage directly with members of Parliament as the duty-bearers of conducting public participation. This way, a multi-stakeholder approach (including members of the public, Treasury, and members of Parliament), with responses from Parliament specifically, would be most ideal to ensure full and meaningful participation in this process.

Request

14. In light of the patent deficiencies of the Bill, the likelihood of legal challenge, and the inadequacies of the public participation process, the undersigned individuals and civil society organisations render the following request:
 - 14.1. That stakeholders be provided with an opportunity to respond to the actual text of the Bill proposed by the Treasury with a short one or two page supplement;
 - 14.2. That the Bill be thoroughly scoped for constitutional and related formal legal issues by a workshop including Treasury, parliamentary legal officers, and independent legal academics and practitioners with knowledge of public procurement law and operations;
 - 14.3. Given the extensive implications of the new Chapter 4 for social and economic policy, that a report of the expert committee mentioned in 14.2. together with the Bill be referred back to NEDLAC for further consultation between government, business and labour;
 - 14.4. That the parliamentary process be restarted with adequate time frames for meaningful engagement with written and oral submissions.
 - 14.5. That Treasury urgently begins to consult on and start drafting subordinate law, so that it can quickly dovetail with the parliamentary process that the Bill must follow. This is considering that the Bill's provisions will only be practically

operational if subordinate law is in place. It is therefore critical that stakeholders are made aware of the content of the regulations before the Bill is passed.

15. We believe that this will fortify the Bill against likely legal challenges and ultimately expedite its overall implementation.
16. If this is not suitable or feasible, kindly provide full reasons within 10 days of receipt of this letter to Tsukudu Moroeng at [REDACTED]
17. We trust that you find this in order.

Yours faithfully,



Concerned Group of Civil Society Organisations and Individuals

Per: Tsukudu Moroeng