



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

COMMITTEES

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2 March 2011

Honourable TA Mufamadi, MP
Chairperson: Standing Committee on Finance

Dear Honourable Mufamadi

Re: Request for Comments on a Private Member Legislative Proposal of Honourable Davidson

The consultation request letter from the Office of the House Chairperson: Committees, Oversight and ICT – dated 12 October 2010 – has reference.

In the spirit of **consultation**, as reflected in rule 235(2) of the Rules of the National Assembly, the Committee on Private Members' Legislative Proposals and Special Petitions, wishes to inform the Standing Committee on Finance that it will be deliberating on the **legislative proposal of Honourable Davidson, regarding the proposed prohibition on contracting between an organ of state in the national sphere of government and companies whose directors are party-political office-bearers or public representatives or political parties (ATC of 20 April 2010 2010)** in a meeting scheduled as follows:

Date: Wednesday, 16 March 2011

Time: 08h00 – 09h00

Place: Committee Room 3, 90 Plein Street (Upper Ground)

This is the last call for any consultation reports the Standing Committee on Finance may wish to forward to the Committee on Private Members' Legislative Proposals and Special Petitions prior to date of deliberation. If no consultation report is received by Monday, **14 March 2011** it will be assumed that the standing committee does not have any comments on the underlying principle of the legislative proposal that it wishes to bring to the attention of the Committee on Private Members' Legislative Proposals and Special Petitions at this time.

Yours Sincerely,

Honourable SG Thobejane, MP

Chairperson: Committee on Private Members' Legislative Proposals and Special Petitions

Private Member's Legislative Proposal

Memorandum submitted to the Speaker in terms of Rule 234 (1)

Introduction

Procurement of goods and services by the State has its basis in the Constitution. Section 217 reads as follows –

Procurement

217 (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institution referred to in that subsection from implementing a procurement policy providing for –

(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.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) may be implemented.

The legislation referred to in section 217(3) is the Preferential Procurement Policy Framework Act (Act 5 of 2000).

Current legislation does not regulate procurement practices where political office-bearers, public representatives or political parties directly or indirectly are beneficiaries to contracts with the state. This legislative proposal aims to prohibit any contracting between the state and such individuals and political parties.

Particulars of proposed legislation

The legislation proposed aims at eliminating power abuse by political office-bearers, public representatives or political parties by requiring them to fully declare their interests in any contracting activity with the state (including entities), and by prohibiting the awarding of any state contract to a company that does not comply with the prescripts of the law.

In practical terms the following procedures would apply in all contracting with the state:

1. A company's contracting proposal must be accompanied by a sworn statement that it complies with this legislation, namely –
 - a. that none of its directors are political party office-bearers as defined
 - b. that none of its directors are serving public representatives of political parties, in any sphere of government

- c. that none of its directors individually, or a political party, hold more than 2% of the shares in the company, and
 - d. that no political party will directly or indirectly be a beneficiary to the contract.
 2. The state must in turn ensure that it complies with the legislation by not awarding any contract before first ascertaining that the company has met the above requirements.
 3. Should a company wilfully mislead the state about its directors or shareholding, and the contract has not yet commenced, the contract shall be null and void and –
 - a. the state shall be entitled to claim reasonable compensation from the company via legal means,
 - b. the company shall be barred from any future state contracting, and
 - c. the company shall be liable to prosecution.
 4. Should a company wilfully mislead the state about its directors or shareholding, and the contract has already commenced or has concluded –
 - a. the state may institute such legal action against such company as it may deem fit,
 - b. the company shall be barred from any future state contracting, and
 - c. any monies paid to an office-bearer or public representative of a political party or to a political party shall be recoverable from such individual or party.
 5. Any unsuccessful contracting company will have the right to request from the state full details of the directorships or shareholding of the successful contracting company, at any stage after the contract has been awarded. Should such a third party company succeed in proving, through a court finding, that a contract has been awarded to another company in conflict with this law, it will have the right to claim damages from the state or such company, or both.

Objects of proposed legislation

To introduce a Bill prohibiting contracting between an organ of state in the national sphere of government and companies or entities, whether public or private, listed or unlisted, in the following circumstances –

- Where the company or entity have serving political party public representatives, or political party office-bearers, as directors, irrespective of the sphere of government they serve in ;
- Where any serving political party public representative or political party office-bearer individually hold more than 2% of the shares of the relevant company or entity; and
- Where a political party, directly or indirectly, hold any shares in any company or entity.

Financial implications to the state

This legislation should not have financial implications for the state.

IAN DAVIDSON, MP

Schedule

Bill

To prohibit contracting between an organ of state in the national sphere of government and companies whose directors are political party public representatives or office-bearers, or whose shareholders are political party public representatives or office-bearers, or political parties.

Be it enacted by the Parliament of the Republic of South Africa as follows -

Definitions

In this Act, unless the context indicates otherwise -

"company" means any company as defined in the Companies Act or any other entity set up for conducting business and includes a sole proprietor;

"director" means a director of a company, and includes a member of a close corporation or sole proprietor;

"political party" means any political party registered as such with the Independent Electoral Commission;

"political party office bearer" means any person holding a position of authority in the national, provincial or local executive structure of any political party;

"public representative" means any person holding a position in the state to which he or she was elected by public vote;

"state" includes any organ of state, including entities or parastatals, in the national sphere of government ;

Obligation of prospective contracting company

- (1) Any company wishing to contract with the state for goods or services must submit, in the prescribed form, together with its contracting proposal, a sworn statement that -
 - (a) none of its directors are political party office-bearers as defined in this law,
 - (b) none of its directors are serving public representatives of political parties, in any sphere of government,
 - (c) none of its directors individually, or a political party, hold more than 2% of the shares in the company, and
 - (d) no political party office-bearer or public representative, or political party, will directly or indirectly be a beneficiary to the contract.

Obligation of state

- (2) Before granting any contract the state must ensure that the proposal complies with the requirements in section (1), and in the event that the proposal does not comply the state may either outright reject the proposal or request the company in writing to comply within a period of 14 days of such request.
- (3) Should a company fail to fully comply within the period stipulated in section (2) the state shall be obliged to reject the proposal.

Cancellation of Contract

- (4) Should a court find that a company has wilfully misled the state about its directors or shareholding, and the contract has not yet commenced, the contract shall be null and void and –
 - (a) the state shall be entitled to claim reasonable compensation from the company,
 - (b) the company shall be disqualified from being considered for any future state contracting, and
 - (c) the company shall be liable to prosecution.
- (5) Should a court find that a company has wilfully misled the state about its directors or shareholding, and the contract has already commenced or has concluded –
 - (a) the state may institute such legal action against such company as it may deem fit,
 - (b) the company shall be disqualified from being considered for any future state contracting, and
 - (c) any monies paid to an office-bearer or public representative of a political party or to a political party shall be recoverable from such individual or party.

Unsuccessful contracting companies

- (6) (1) Any unsuccessful contracting company will have the right to request from the state full details of the directorships or shareholding of the successful contracting company, at any stage after the contract has been awarded.
- (2) Should such a third party company succeed in proving, through a finding of a competent court, that a contract has been awarded to another company in conflict with this law, it will have the right to claim damages from the state or such company, or both.

Short title

- (7) This Act is called the Prohibition of Certain Contracting Practices Act.