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Research Paper on the Legislative Proposal to Regulate the Business Interest of State Employees Contracting with the State

1. Introduction

This paper discusses the submission of a legislative proposal by Honourable Ian Davidson of the Democratic Alliance (DA), aimed at the promulgation of legislation which will regulate the prohibition of party-political representatives as well as political parties from contracting with the State. The legislative proposal came before the National Assembly Standing Committee on Private Members' Legislative Proposals and Special Petitions ("the Committee") on 18 August 2010.

This paper sets out the particulars of the legislative proposal made by Hon. Davidson, stipulating the particulars of the proposed legislation, an explanation of the objectives of the proposed legislation, as well as an indication of its possible financial implications for the State, if any. This legislative proposal has accordingly been prepared with a schedule containing a draft Bill which will be referred to in order to illustrate how the stated objectives of the Bill would be achieved.

The paper concludes with arrangements undertaken by the Committee in seeking advice on the way forward regarding the provisions of the legislative proposal proposed herein. The Committee has since held a joint meeting with the Portfolio Committee on Public Service and Administration which had engaged in briefing and presentation lead by the Minister of the Department of Public Service and Administration, Mr Masenyani Richard Baloyi, on the 17 August 2011¹. The Department presented its Public Sector Integrity Management Framework in relation to anti-corruption measures speaking to the legislative proposal being considered herein.

This paper ends with recommendations based on a constitutional² evaluation and particularly in terms of criteria for referral and consideration of legislative proposals by this Committee as per the Rules of the National Assembly governing the Committee.³

2. Background

The proposal submitted by Hon. Davidson argues that there is no legislation currently regulating procurement practices where political office-bearers, public representatives or political parties directly or indirectly benefit from contracting with the State or organs of State.

¹ Joint Meeting held by the Committee on Private Members' Legislative Proposals and Special Petitions with the Portfolio Committee on Public Service and Administration, as reflected in the minutes to be adopted by the two committees respectively in due course.

² Constitution of the Republic of South Africa Act 108 of 1996.

³ Adjusted Rules on the Functioning of the Committee on Private Members' Legislative Proposals and Special Petition.



The legislative proposal aims to prohibit the above mentioned contracts through the introduction of a bill prohibiting contracting between the following categorical parties:

- an organ in the national sphere of Government; and
- companies or entities whether public or private, listed or unlisted.

This prohibition on contracting is proposed in circumstances where that company or entity has the following scenario:

- directors who are serving political party public representatives or political party office-bearers;
- where any serving political party or political party office-bearer individually holds more than 2% of the shares of the relevant company or entity; and
- where a political party, directly or indirectly, holds any shares in any company or entity.

The aim of this legislative proposal is to eliminate the abuse of power by political office-bearers and political party public representatives by introducing legislation which would in effect result in the following:

- a request of full disclosure of interest in any contractual activity with all organs of State, and
- a prohibition on the award of State contracts to any company that does not comply with prescripts of the law to be promulgated in regulation of these scenarios.

Hon. Davidson explained to the Committee that the object of the legislative proposal was the introduction of a bill that prohibits 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 event that this legislative proposal would be allowed to proceed, it would not have any financial implications for the State following enactment.

3. Details of this legislative proposal

3.1 Constitutional provisions pertaining to procurement

Procurement of goods and services by the State has its basis in Section 217 of the Constitution.⁴

- Procurement

⁴ Constitution of the Republic of South Africa Act 108 of 1996.



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 accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

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

- (a) categories of preferences 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) above is the Preferential Procurement Policy Framework Act.⁵ The proposal submits that current legislation does not in effect 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 therefore aims to prohibit any contracting between the State and such individuals and political parties.

4. Particulars of the proposed legislation

The legislation proposed aims at eliminating the power of abuse by political office-bearers, public representatives or political parties by requiring them to fully declare their interest in any contracting activity with the State, and by prohibiting the awarding of any State contract to a company that does not comply with the prescripts of the law to be promulgated as proposed by this legislative proposal.

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.

⁵ Act 5 of 2000.



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 directorship 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.⁶

In order to impose and regulate a procurement system as required by the Constitution, it is necessary to restrict the business interests that employees of the State as well as members of the controlling bodies of such entities are allowed to have in entities doing business with the State, and for that purpose also require the disclosure of such interest.

5. Constitutional considerations

5.1 Limitation of rights

Notwithstanding the arguments made in favour of this proposal, it is recommended that constitutional consideration be made to the possible implications of proceeding with this legislative proposal, regarding the rights to freedom of association and political rights⁷, in relation to the parties addressed by the proposed legislation before the Committee. It must be noted that the proposed legislation has implications to potentially limit the above mentioned rights in the event that this proposal is accepted and proceeded with by the Committee.

⁶ Particulars of the proposed legislation as per memorandum submitted to the Speaker of the Parliament of South Africa
⁷ Section 18 and 19 of the Constitution of the Republic of South Africa Act 108 of 1996.



Section 18 and 19 rights are contained in chapter 2 of the Constitution and are termed the Bill of Rights⁸, these rights may only be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom taking into account the following relevant factors including:-

Section 36 (1) (a) the nature of the right;

- (b) the importance of the purposes of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

6. Response by Hon. Davidson to clarify seeking questions by the Committee

In response to the question of possible infringement on the Constitutional rights to freedom of association and political rights of party political representation, Hon. Davidson admitted that those rights should not be infringed unnecessarily. It was further explained that the legislative proposal is in line with procurement standards in place in terms of the legislation already in place, namely the Public Services Act 103 of 1994. The legislation already in place is also constitutionally regulated when it comes to disclosure of interests by state employees contracting with the State.⁹ In addition, the current framework of procurement policies focus also falls on regulations to prevent corruption, as is the main aim of this legislative proposal.

Hon. Davidson also admitted that proposed section 1(d) will have to be revised as it currently reads as follows:

"A company's contracting proposal must be accompanied by a sworn statement that complies with the legislation, namely that no political party will directly or indirectly be a beneficiary to the contract."

It has also indicated that reference to indirect benefits will have to be removed as it would impact on fundraising initiatives of political parties, thereby reflecting the infringement on the political party rights in terms of Section 19 of the Constitution.¹⁰

In addition, the 2% limitation outlined in the objectives was an arbitrary number and could be revised, as it was admitted that the 2% linked to shares and profit margins and this estimation can differ depending on the type of business, and that the underlying principle is based on company competitiveness.

7. Deliberations by the Committee since submission of this legislative proposal

⁸ Limitation of Rights Section 36 of the Constitution of the Republic of South Africa Act 108 of 1996.

⁹ Section 217 of the Constitution of the Republic of South Africa Act 108 of 1996.

¹⁰ Constitution of the Republic of South Africa Act 108 of 1996.



7.1 Joint Meeting with the Portfolio Committee on Public Services and Administration

The Committee has been briefed by the Department of Public Service and Administration (the Department) at a joint meeting with the PC on Public Services and Administration held on the 8 June 2011, whereby a presentation was made by the Department's Legal Services Department.

The presentation focussed on an overview of the Department's legislative programme for 2011. The presentation was made by a legal services official from the Department, Advocate E van Schoor. Adv Van Schoor, outlined and confirmed that the Department's Legislative Programme includes a Public Services Amendment Bill.¹¹ The Department advised the Committee that the aims of this Bill are also to strengthen the legal framework with respect to governance and anti-corruption. The objectives of the Bill are similar to those of the proposed legislative proposal submitted by Hon. Davidson.

The Department further spoke to the fact that the Minister for Public Service and Administration made reference to policy guidelines pertaining to anti-corruption measures and ethics in his budget speech of 26 May 2011. The Department has since submitted a draft Public Sector Integrity Framework¹² to Cabinet for approval. This Framework promotes new legislation or changes to existing legislation, including subordinate legislation such as regulations in order to deal with the issues of financial interests and disclosure and code of conducts when it comes to the participation of public servants in State business contracts

8. Public Sector Draft Integrity Framework

The need for ethical monitoring and regulation of State employees involved in contracting with the State necessitated the widening of the scope of application envisaged by the Public Service Act 1994 in relation to anti-corruption measures and ethics. In addressing the concerns raised by the legislative proposal currently before the Committee on Private Members' Legislative Proposals and Special Petitions for consideration, the Department brought before the Committee the Public Sector Integrity Framework document as a means of illustrating the corrective measures to be put in place. The Framework contains proposals directed at combating corruption of this nature. It must, however, be pointed out that this policy framework only addresses the issue of potential corrupt practices of State employees and does not address corruption conducted by political party office bearers.

The proposals contained in the framework will have widespread application as opposed to the limited application of the Public Service Act of 1994¹³, which gave rise to the concerns raised by the legislative proposal currently before the Committee for consideration. The resultant effect of the Framework is that it will be applicable to administration in national, provincial and local government in relation to regulation of business interests of State employees when contracting with the State.

¹¹ Emanating from Public Services Act 103 of 1994.

¹² Submitted to the Committee and circulated for consideration by Members for the deliberations of Wednesday, 16th August 2011.

¹³ Public Service Act of 1994 (Proclamation 103 of 1994).



Public entities are, however, not covered by this framework due to having their own founding legislation which has measures in place to regulate issues in this regard. The Public Finance Management Act of 1999¹⁴ also contains measures regarding financial administration of public entities which are generally applicable. The Department of Public Service and Administration concluded its presentation to the Committee by stating that an analysis of public entity founding legislation, and legal instruments issued in terms thereof will indicate if and to what extent the proposed legislative changes in the Procurement (Business Interests of Employees) Bill (clause 2 and 3) are created for.

8.1 National measures for administration in national and provincial government

The following outlines the legislative guidelines contained in the Draft Public Sector Integrity Framework, which notably cover aspects of Hon Davidson's legislative proposal. Herein under follows some of the specific provisions which regulate the potential involvement of state employees in accessing State tenders:

- National Treasury issued treasury instructions applicable to national and provincial departments and specified public entities requiring that bidders as parties to a procurement process in relation to tenders must furnish details of directors, trustees and shareholders for the accounting officer to check against the institution's employees, if applicable, to check if the necessary approval exists for the staff member to undertake other remuneration work.
- Prescripts of National Treasury were issued regarding the supply chain procurement process which requires that bidders declare their relationships with officials in the relevant national or provincial department.
- The Public Service Code of Conduct in Chapter 2 of the Public Service Regulations, 2001, requires employees to recuse themselves from procurement processes in which they have an interest.
- The Financial Disclosure Framework in Chapter 3 of the Public Service Regulations requires that senior managers in national and provincial departments must declare interests regarding the previous financial year before the end of April every year.

The Department in its presentation to the Committee confirmed that the above-mentioned measures have been put in place in order to cover the main aims of the proposal in Hon. Davidson's Procurement (Business Interests of Employees) Bill (clause 2 and 3), which does to some extent cover the concerns raised in Hon. Davidson's proposal.

8.2 Aspects of the legislative proposal which are not covered by existing legislation

In terms of the regulation of administrative practices in national and provincial government, the following aspects of the main proposal in the Procurement (Business Interest of Employees) Bill (clause 2 and 3), are not covered by existing national legislation:

¹⁴ Public Service Management Act 1 of 1999.



- A declaration by an entity of interests of family members of employees of an institution in that entity before they enter into a contract with that institution.
- A declaration by an employee of interests and those of family members in entities doing business with the State. Though senior managers must declare their business interests currently, there is no requirement that it must indicate whether the business in question is rendering services to the State.
- Prohibition on an employee to own or control 5% of the shares, stock, membership or other interest alone or together with family member/s and/or business partner/s and/or other employee/s in an entity doing business with the State.

The Department advised the Committee that the aims of the proposed measures mentioned in Paragraph 6, are under consideration by Government in proposals to strengthen anti-corruption measures in the administration in all spheres of Government through the implementation of the Public Sector Integrity Framework.

9. Finalised Public Sector Integrity Management Framework

This Public Sector Integrity Framework aims to provide a compendium of ethical and good governance measures that will align all other related measures regulating ethics and integrity in the public sector. The framework has the following objectives:

1. To strengthen existing measures regulating probity in the public service;
2. To strengthening capacity in the public service to prevent corruption;
3. To monitor and evaluate the ensuring of compliance; and
4. To enforce measures regulating ethics and good governance and to act as a deterrent to corruption and unethical practices.

Honourable Davidson's legislative proposal concedes that such a framework will help to protect the integrity of Government and foster public confidence in institutions of the State. The overall purpose of the framework is to promote ethical conduct in the public service and to manage unethical conduct with regard to conflicting financial interests, gifts, hospitality and other benefits for public servants whom are party to State business contracts. It further seeks to provide guidelines for remunerative work done outside the public service.

Further proposals in the Integrity Framework are made in respect of the deployment of ethics officers in the public service and minimum conduct requirements. Some of these measures will require legislation to become enforceable. The Department of Public Service and Administration



will also conduct communication and awareness workshops to explain all measures contained in the framework and assist departments with its implementation through the development implementation guidelines.¹⁵ The scope of application of this framework is applicable to all State employees as provided for by the Public Service Act, 1994¹⁶.

9.1 Identified shortfalls in the current legislative framework

The Department has identified that the challenges apparent in the public service as far as the implementation of ethical and anti-corruption measures are concerned, is due to non-compliance with legislation and lack of enforcement. Furthermore, there are inconsistencies found in the existing legislation regarding the application of sanctions.

Allegations of corruption reported to the anti-corruption hotline are referred back to Departments for follow-up, but because Departments do not have sufficient investigative capacity, initial investigations are never completed. The ineffectiveness of the Protected Disclosure Act, 2000¹⁷ has also resulted in the lack of confidence in blowing the whistle against unethical conduct and corruption.

The following policy gaps or shortfalls are identified by the Department in the framework as a direct result of limited implementation of the measures which result in the measures not being fully effective. The gaps are as follows:

- The ambiguity with regard to the acceptance of gifts found in the Code of Conduct (Chapter 2 of the Public Service Regulations, 2001, as amended, and the Financial Disclosure Framework (Chapter 3 of the mentioned Regulations. In terms of the Code of Conduct, a public servant is prohibited from using his/her position to obtain private gifts or benefits. The financial disclosure framework prescribes that members of the Senior Management Service must disclose gifts valued at R350.00 or more;
- Limited application of the Financial Disclosure Framework has resulted in 'unregulated public servants' having business interests which are in conflict with public interest. In terms of the Financial Disclosure Framework, only members of the Senior Management Service are required to disclose their financial interests annually to the relevant Executive Authority. Recent Government reports on the implementation of the Financial Disclosure Framework have pointed at a policy gap in the disclosure system. According to the Public Service Commission and the Auditor General reports, the majority of public servants with business interests are officials on salary levels 4 to 8 and are excluded from the financial disclosure framework; and

¹⁵ Public Sector Integrity Management Framework issued by the Department of Public Service and Administration, document distributed to the Committee on 16 August 2011.

¹⁶ Public Service Act of 1994 (Proclamation 103 of 1994).

¹⁷ Protected Disclosure Act 26 of 2000.



- Despite the Public Service Anti-corruption Strategy identifying the need to regulate post-public employment when it was introduced in 2002, no measures have been put in place in this regard.¹⁸

9.2 Interventions to fight corruption and promote ethical conduct

The Department has in the framework document before the Committee, made a submission which proposes intervention strategies around additional measures which will strengthen the implementation of ethical conduct and good governance when State employees are involved in contractual business dealings with the State.

Herewith a list of interventions which will deal with issues arising from matters related to concerns raised by the legislative proposal currently being considered by the Committee, as laid out in the Public Sector Management Framework document.¹⁹ The following interventions will be prioritised in order to be legislatively regulated:

- Acceptance of Gifts, Hospitality and other benefits;
- Disclosure of Financial Interests and Assets of employees;
- Amendments to the Financial Disclosure Form;
- Restrictions on Remunerative Work outside the Public Service;
- Post-public service employment activities;
- Designation and Appointment of Ethics Officers;
- Stricter enforcement/implementation of the measures put in place; and
- Strengthening Investigation and disciplinary capacity through the establishment of a Special Anti-Corruption Unit.

Therefore the Department is in agreement with the concerns and objectives raised by Hon. Davidson in the legislative proposal currently before this Committee for consideration. It further recommends an alignment of policies, legislation and related instruments in order to give meaning to an ethical code of conduct for public servants in national and provincial departments when engaging in contractual business dealings with the State.²⁰

¹⁸ Public Sector Integrity Management Framework issued by the Department of Public Service and Administration, document distributed to the Committee on 16 August 2011.

¹⁹ Ibid

²⁰ Ibid



10. Recommendations

The Committee's mandate is to ensure that all legislative proposals that come before it for consideration fall within the ambit of rules governing the functioning this Committee in terms of Rule 235A (a) – (f).²¹ Accordingly, in applying the criteria for consideration of a legislative proposal as mandated to the Researcher of the Committee, rules 235A (e) and (f) are evaluated. Thus the legislative proposal is evaluated against the aforementioned rules:

The Committee on Private Members' Legislative Proposals and Special Petitions will confine its consideration of the legislative proposal to the following inquisitorial criteria in terms of National Assembly Rules 235A (a) – (f) :-

- a) Whether the legislative proposal goes against the spirit, purport and object of the Constitution;
- b) Whether the legislative proposal seeks to initiate legislation beyond the legislative competence of the Assembly;
- c) Whether the legislative proposal duplicates existing legislation or legislation awaiting consideration of the Assembly or Council;
- d) Whether the legislative proposal pre-empts similar legislation soon to be introduced by the national executive;
- e) Whether the legislative proposal will result in a money bill; or
- f) is frivolous or vexatious.

Taking into consideration the presentation of the Public Sector Integrity Management Framework by the Department lead by its Ministry, it is recommended that the Committee on Private Members' Legislative Proposals and Special Petitions apply National Assembly Rules 235A (c) and (d).

It is recommended that the Committee deliberates on the viability of proceeding with Hon Davidson's legislative proposal considering the fact that the Department's Legislative Programme makes provision for the introduction of the Public Service and Administration Bill to Parliament by September 2011²². This Bill will partially cover the concerns raised by the legislative proposal currently being considered by this Committee.

During the joint meeting held by the Portfolio Committee on Public Service and Administration with this Committee, a presentation was lead by the Minister of the

²¹ Adjusted Rules on the Functioning of the Committee on Private Members' Legislative Proposals and Special Petitions.

²² Department of Public Service and Administration Legislative Programme for 2011, document made available to the Committee.



Department of Public Service and Administration assuring these Committees that the Public Sector Integrity Management Framework would eventually cater to the legislative need to protect the integrity of government and foster public confidence in institutions of the State.

Thus it can be said that there is a possibility of the Committee on Private Members Legislative Proposals duplicating legislation awaiting consideration by the Assembly or pre-empting similar legislation soon to be introduced by the national executive.

Therefore it is recommended that the committee deliberate against proceeding with this legislative proposal in light of application of the Rules²³ to which this Committee must confine itself when considering whether or not to allow a legislative proposal to proceed.

Rule 235A (e) states that the Committee must confine its consideration of the legislative proposal before it and determine whether it will result in a money bill. This legislative proposal will not result in a money bill²⁴ as reflected in section 77 of the Constitution, as it does not speak to the drafting of a bill that appropriates money, abolishes or reduces, or grants exemption from national taxes or levies.

Rule 235A (f) relates to whether the legislative proposal is frivolous or vexatious. In considering the reasoning behind the legislative proposal, it would appear that the legislative proposal aims to eliminate the abuse of power by political office bearers and political parties' public representatives that directly or indirectly were beneficiaries to contracts with the State. Thus in principal there is merit in the legislative proposal coming before the Committee.

This legislative proposal is therefore not frivolous or vexatious. However there are concerns of constitutionality, with particular reference to justifiable limitation of the Bill of Rights as discussed above, should this legislative proposal be permitted to proceed. Particular scrutiny has to be given to the possible implications of the limitation of rights contained in the Bill of Rights, which could result from this legislative proposal if proceeded with in its current format.

This is however not the decision of this Committee, in terms of the rules this Committee is confined to the Rule 235A criteria for consideration of proposals.²⁵ It is therefore recommended that this legislative proposal may require revision given the response and admissions and submissions made by the Member proposing this legislative proposal in the response to questions seeking clarity, as discussed above.²⁶

²³ Adjusted Rules on the Functioning of the Committee on Private Members' Legislative Proposals and Special Petitions, Rule 253A.

²⁴ Section 77 of the Constitution of the Republic of South Africa Act 108 of 1996.

²⁵ Adjusted Rules on the Functioning of the Committee on Private Members' Legislative Proposals and Special Petitions.

²⁶ Adopted minutes of the Committee on Private Members' Legislative Proposals and Special Petitions dated 1 September 2010.



In conclusion, this legislative proposal will not result in a money bill, and has merit to come before the Committee for consideration as it is not frivolous and vexatious, as per the confining rules within which this Committee is empowered to act²⁷. The ruling party's²⁸ policies are silent on the subject matter of this legislative proposal.

It can therefore be concluded that the Department's Public Sector Integrity Framework discussed herein, does to a considerable extent, make provision for the concerns raised by the legislative proposal currently before this Committee for consideration.

²⁷ Adjusted Rules on the Functioning of the Committee on Private Members' Legislative Proposals and Special Petitions. Rule 235A.

²⁸ Ruling Party being the African National Congress August 2011.



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