IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: CCT103/25
CCT144/25

In the application for intervention of:

AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Applicant for intervention

In re:

The matter between:

CASE NO.: CCT 103/25

PREMIER OF THE WESTERN CAPE GOVERNMENT	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Second Respondent
MINISTER OF FINANCE	Third Respondent

The matter between:

CASE NO.: CCT 144/25

THE CITY OF CAPE TOWN	Applicant
and	
THE SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Second Respondent

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THE MINISTER OF FINANCE	Third Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent
SPEAKER OF THE EASTERN CAPE PROVINCIAL LEGISLATURE	Fifth Respondent
SPEAKER OF THE FREE STATE PROVINCIAL LEGISLATURE	Sixth Respondent
SPEAKER OF THE GAUTENG PROVINCIAL LEGISLATURE	Seventh Respondent
SPEAKER OF THE KWA-ZULU NATAL PROVINCIAL LEGISLATURE	Eighth Respondent
SPEAKER OF THE LIMPOPO PROVINCIAL LEGISLATURE	Nineth Respondent
SPEAKER OF THE MPUMALANGA PROVINCIAL LEGISLATURE	Tenth Respondent
SPEAKER OF THE NORTHERN CAPE PROVINCIAL LEGISLATURE	Eleventh Respondent
SPEAKER OF THE NORTH WEST PROVINCIAL LEGISLATURE	Twelfth Respondent
SPEAKER OF THE WESTERN CAPE PROVINCIAL LEGISLATURE	Thirteenth Respondent

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FOUNDING AFFIDAVIT

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I, the undersigned,

CAROLINE JAMES

do hereby make oath and state as follows–

INTRODUCTION

1. I am the Advocacy Coordinator of amaBhungane Centre for Investigative Journalism NPC (**amaBhungane**), the intervening applicant in this application.

2. AmaBhungane is a non-profit company duly incorporated under the company laws of South Africa with registration number 2009/024323/08, with its registered address at The Media Mill, 7 Quince Street, Milpark, Johannesburg, Gauteng.

3. I am duly authorised to depose to this affidavit on behalf of amaBhungane.

4. The facts that I depose to are true and correct and are, save where otherwise indicated, within my personal knowledge or apparent from documentation under my control. Where I make legal submissions, I do so on the advice of the applicant's legal representatives, with which advice I concur.

5. In this affidavit I will address the following issues in turn:

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5.1. First, I set out an overview and the purpose of this application;

5.2. Second, I will set out amaBhungane's interest in the matter as an intervening party and, in the alternative, an *amicus curiae*;

5.3. Third, I deal with the background facts giving rise to this application; and

5.4. Fourth, I will briefly highlight the grounds of amaBhungane's intervention, including an overview of evidence and submissions that amaBhungane will rely on.

OVERVIEW AND PURPOSE OF THIS APPLICATION

6. In this application amaBhungane seeks leave to intervene as a party, in terms of rule 8 of the Constitutional Court Rules (**the Rules**), in the matters between:

6.1. *The Premier of the Western Cape Government v the Speaker of the National Assembly and Others*, under case number CCT103/25; and

6.2. *The City of Cape Town v the Speaker of the National Assembly and Others*, under case number CCT144/25.

7. In the alternative amaBhungane seeks to be admitted as an *amicus curiae* in this application in terms of rule 10 of the Rules, and leave to make written

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submissions, as well as oral submissions to the extent that this Court deems it necessary.

8. The details of the parties in each of the aforementioned matters are set out in paragraphs 7 to 12 of the Founding Affidavit of the Premier of the Western Cape (**the Premier**) in the main application under case number CCT103/25; and paragraphs 14 to 19 of the Founding Affidavit of the City of Cape Town (**the City**) in the main application under case number CCT144/25. For ease of reference, I will refer to the parties in this affidavit as they are cited in the main applications.

9. Both the Premier and the City's applications concern the failure by Parliament and/or Provincial Legislatures to facilitate meaningful public involvement in the passing of the Public Procurement Act 28 of 2024 (**the Act**). The Act was assented to on 18 July 2024 and it will come into force on a date still to be proclaimed by the President.

10. AmaBhungane has a direct and substantial interest in the enactment of the Act. It participated substantially throughout the legislative process and has, since the passage of the Act, engaged legal representatives with a view to formulating a constitutional challenge to the validity of the Act.

11. It appears from the papers filed in the abovementioned matters that:

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11.1. The Premier lodged their application before this court on or about 6 May 2025;

11.2. The City lodged their application before this court on or about 27 May 2025.

12. Both applications are direct access applications, in terms of which the applicants seek to have the Act declared invalid on similar bases, namely:

12.1. In respect of the Premier's application, that Parliament failed to comply with a constitutional obligation as envisaged in section 167(4)(e) of the Constitution of the Republic of South Africa, 1996 (**the Constitution**) in that the First Respondent failed to act reasonably in carrying out its duty to facilitate public involvement as required by section 59(1)(a) of the Constitution before passing the Act; and

12.2. In respect of the City's application, that Parliament and the Provincial Legislatures failed to comply with their constitutional obligations to act reasonably in carrying out their duties to facilitate public involvement in the legislative process as required by ss 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution, before passing the Act.

13. amaBhungane became aware of the applications brought by the City and the Premier on or about 10 June and 16 May 2025 respectively. The challenges

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raised in those applications align with several of amaBhungane's key procedural concerns regarding the enactment of the Act. While amaBhungane has both substantive and procedural reservations about the constitutionality of the Act, following further consultations with its legal representatives, it has elected to participate in these proceedings in respect of the allegations that Parliament and the Provincial Legislatures failed to fulfil their constitutional obligations to facilitate public involvement in the legislative process, as required by sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution. These issues fall within the exclusive jurisdiction of this court in terms of section 167(4)(e) of the Constitution.

14. In light of the above, on 22 July 2025, amaBhungane addressed a letter to the parties in the main applications, notifying them of its intention to apply for leave to intervene as a party in these proceedings, alternatively to be admitted as an *amicus curiae*. In the same letter, and in view of the alternative relief sought, amaBhungane requested the parties' consent to its admission as amicus curiae. A copy of this letter is attached hereto marked **FA1**.

15. On 29 July 2025, the City responded to amaBhungane's letter consenting to amaBhungane being admitted as *amicus curiae* in its application in terms of rule 10. A copy of this letter is attached hereto marked **FA2**.

16. Furthermore, in an email dated 1 August 2025, the Premier likewise consented to amaBhungane being admitted as *amicus curiae*. A copy of this email is attached hereto marked **FA3**.

17. None of the other parties have responded to amaBhungane's letter dated 22 July 2025.

AMABHUNGANE'S INTERVENTION

18. As set out above, amaBhungane seeks leave to intervene in this matter as a party in terms of Rule 8 of this Court's Rules, alternatively, to be admitted as an amicus curiae in terms of Rule 10. In what follows, I set out amaBhungane's interest in the applications, and deal with the applicable legal principles for each form of participation in turn.

AmaBhungane's interest in the applications

19. AmaBhungane was founded to promote open, accountable and just democracy by developing investigative journalism in the public interest. It garnered local and international acclaim for its participation in the collaborative investigation into state capture, which exposed a network of corruption, particularly in the public procurement space, between the state and the Gupta family during former-President Jacob Zuma's presidency.

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20. AmaBhungane continues to investigate procurement-related corruption. Through its investigative journalism initiatives, it has developed an understanding of how weaknesses in the procurement regulatory framework have resulted in abuses of the procurement system and the absence of a culture of accountability.

21. AmaBhungane, therefore, has an interest in the promotion of a procurement regime that enhances transparency in furtherance of the constitutional objectives underpinning the Act, namely: the promotion of public administration committed to transparency, accountability and the economic, effective and efficient use of resources (section 195(1)(b), (f) and (g)); ensuring expenditure control across government spheres (section 216); and a procurement system which is fair, equitable, transparent, competitive and cost-effective (section 217(1)).

22. AmaBhungane has participated in various litigious proceedings concerning corruption in the public procurement. It has participated as a party, in several notable cases, including:

22.1. *President of the Republic of South Africa and Others v Public Protector and Others* 2020 JDR 0406 (GP); *Public Protector and Others v President of the Republic of South Africa and Others* 2021 (6) SA 37 (CC); *amaBhungane Centre for Investigative Journalism NPC v The President of the Republic of South Africa* 2021 JDR 3172

(NPC); and *amaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* 2023 (2) SA 1 (CC) challenging the constitutionality of the Executive Ethics Code for failing to require members of the executive to disclose donations made in support of internal party-political campaigns;

22.2. *amaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Others* 2020 (1) SA 90 (GP) and *amaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services* 2021 (3) SA 246 (CC) challenging the constitutionality of certain aspects of South Africa's telecommunications and surveillance regime; and

22.3. *Tiso Blackstar Group (Pty) Ltd and Others v Steinhoff International Holdings NV* 2022 JDR 1928 (WCC); *Ibex RSA Holdco Ltd and Another v Tiso Blackstar Group (Pty) Ltd and Others* 2025 (2) SA 408 (SCA); *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* 2022 (2) SA 485 (GP); and *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* 2023 (5) SA 319 (CC) vindicating the right of access to information to ensure, amongst other things, adequate corporate accountability.

23. Furthermore, amaBhungane has been demonstrably interested in the contents of the Act since the early stages of the legislative process. It responded to the calls for written submissions on the Public Procurement Bill. It submitted detailed written submissions including to the Standing Committee of Finance in the National Assembly on 11 September 2023. It supplemented these submissions on 25 April 2024. It made further submissions to the Select Committee on Finance in the National Council of Provinces (**NCOP**) on 24 March 2024.

24. In intervening in this application, amaBhungane also acts in the public interest, in terms of section 38(d) of the Constitution. The public undoubtedly has an interest in the regulation of public procurement and in the promotion of the efficient, economic and effective use of resources; the combatting of corruption; government accountability; and transparency in public administration. The welfare of the public is directly affected by the integrity of the procurement system, which determines the success of diverse aspects of society including, by way of limited example: the construction and maintenance of key infrastructure; the purchase of energy sources; the operation of transport assets; the provision of healthcare supplies; the delivery of social grants; municipal service delivery and job creation.

AmaBhungane's intervention as a party

25. In terms of rule 8, "[a]ny person entitled to join as a party or liable to be joined as a party in the proceedings may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a party".

26. In Gory v Kolver[1] this Court stated the following in respect of applications for leave to intervene:

> "... *In every case this Court must ultimately decide whether or not to allow intervention by considering whether it is in the interests of justice to grant leave to intervene. Thus, in cases involving the constitutionality of a statute, while a direct and substantial interest in the validity or invalidity of the statute in question will ordinarily be a necessary requirement to be met by an applicant for intervention, it will not always be sufficient for the granting of leave to intervene. Even if the applicant is able to show a direct and substantial interest, the Court has an overriding power to grant or to refuse intervention in the interests of justice. Other considerations that could weigh with the Court in this regard include the stage of the proceedings at which the application for leave to intervene is brought, the attitude to such application of the parties to the main proceedings, and the question whether the submissions which the applicant for intervention seeks to advance raise substantially new contentions that may assist the Court.*" (own emphasis)

27. As a point of departure, I submit that amaBhungane has a direct and substantial interest in the matter and ought to be permitted to intervene as a party because:

[1] Gory v Kolver NO and Others (CCT28/06) [2006] ZACC 20; 2007 (4) SA 97 (CC), para 13.

27.1. amaBhungane participated in the public consultation process leading up to the enactment of the Act;

27.2. amaBhungane acts in the public interest to investigate and expose public procurement related corruption; and

27.3. this matter implicates constitutional values and is of a substantially constitutional and public character so as to justify an expanded approach to standing.[2]

28. I submit that amaBhungane not only has a direct and substantial interest in the matter, but that it would be in the interests of justice for it to be granted leave to interevene because:

28.1. The applications are not yet at an advanced stage in the proceedings, as no answering affidavits have yet been filed by the respondents. Furthermore, Rule 8 permits a party that is entitled to join as a party to, at any stage of the proceedings, apply for leave to intervene as a party.

28.2. The applicants in these proceedings have indicated that they have no difficulty in amaBhungane's involvement in these proceedings, and

[2] #Unitedbehnind v Buthelezi and Others ZAGPJHC 613, paras 23 – 26. See also Ferreira v Levin NO and others 1996(1) SA 984 (CC), paras 164-165, 226 and 229.

have specifically granted amaBhungane consent to be admitted as an *amicus curiae* in the event that it is not granted leave to intervene as an applicant.

28.3. As far as amaBhungane is aware, no civil society organisation has yet intervened in this application, given the importance of the Act and the far reaching implications that it could have should it be brought into effect, the voices of civil society must be heard. On this score, amaBhungane is not only a civil society organisation that was extensively involved in the public process leading to the enactment of the Act, but it is one of only nine civil society organisations that specifically wrote to Parliament, as well as the presidency, warning them, *inter alia*, of the procedural shortcomings in the passing of the Act. Copies of these letters are attached hereto marks **FA4** and **FA5** respectively;

29. For these reasons, and in light of the facts and intended submissions canvassed further below, amaBhunagne should be granted leave to intervene as a party in this application.

Alternative: admission as *amicus curiae*

30. Should this honourable court not be minded to grant amaBhungane leave to intervene as a party to this application, I respectfully submit that the court

should grant it leave to intervene as an *amicus curiae* and to make written and oral submissions at the appropriate juncture.

31. Although amaBhungane is yet to become privy to the submissions that shall be made by the respondents, if any, given its stance of supporting a declaration of invalidity of the Act due to procedural deficiencies, amaBhungane is already able to assert that it will make novel and helpful submissions in line with its interests and expertise that have not yet been canvassed by the parties.

32. If admitted as an *amicus curiae*, amaBhungane's submissions will focus on the negative impact of the inadequate process on civil society organisations. It will submit that due to the critically important subject matter of the Bill being considered, Parliament had a heightened duty to ensure that it followed an exemplary process to facilitate proper public participation. AmaBhungane will also make submissions on the inappropriate urgency with which the Bill was passed, in order to emphasise Parliament's duty to provide sufficient time for public participation.

33. AmaBhungane submits that this will be useful to this Court in its adjudication of this matter and is, to the best of my present knowledge, different from those of the other parties to the litigation.

FACTUAL BACKGROUND

34. Public procurement refers to the purchase of goods and services by the government departments, institutions and organs of State and is a vital government function, central to the service-delivery system and socio-economic development in South Africa.

35. Public procurement constitutes a major part of the national economy, accounting for approximately 19% of consolidated government spending. It is estimated that the government will spend R1.5 trillion on procurement over the next three years. Public procurement spend was estimated to equate to approximately 12-15% of South Africa's GDP in FY2021/22. In earlier years, this figure was even higher: total procurement spending in FY2017/18 was approximately 20% of South Africa's GDP.

36. The stated purpose of the Act is "to introduce uniform treasury norms and standards and a preferential procurement framework for procuring institutions", having regard to sections 195, 216 and 217 of the Constitution. It ultimately seeks to regulate public procurement in South Africa.

37. The effective regulation of public procurement is essential in ensuring delivery by procuring institutions of goods and services to the public. It is central to the ability of the state to deliver on fundamental constitutional rights, which is

of particular importance in a country where most of the population is reliant on the state for the provision of many basic socio-economic goods and services.

38. For example, according to the 2024 General Household Survey, approximately 73.1% of households rely on the public healthcare system; according to 2022 Census, approximately 95% of children attend public schools; and according to SASSA's 2023/2024 Annual Report, approximately 47% of the country relies on social grant payments for survival. I annex the relevant pages of the above reports as **FA6**, **FA7** and **FA8**.

39. Effective public procurement is thus an important tool to ensure greater social equity within South Africa. Ensuring that the state effectively procures goods and services at a high standard and low cost allows the state to meet the socio-economic needs of many individuals who cannot afford to have their needs met through the private sector.

40. Public procurement is also a fertile breeding ground for corruption. Unchecked interference in public procurement processes by government officials has previously enabled large-scale looting and eventual state capture in South Africa. This underscores the importance of the Act in curbing procurement corruption through the adoption of a reasonable and efficient oversight mechanism, and guaranteeing that procurement processes are fair, equitable, transparent, competitive and cost-effective.

41. In accordance with section 217(1) of the Constitution, the Act necessarily must enable and mandate procurement systems that are fair, equitable, transparent and cost-effective. In this regard, section 2(2) of the Act provides that the standards established by the Act must: (i) ensure effective and economic use of resources through cost, benefit and risk assessments; (ii) combat corruption by promoting transparency and accountability; (iii) advance transformation; and (iv) streamline processes and improve efficiencies. The prescription of a preferential procurement framework in national legislation is also expressly required by section 217(3) of the Constitution.

42. However, the Act, in its current form, cannot effectively achieve its stated purposes. There are fundamental and patent flaws in its construction, which render various sections of the Act inconsistent with the Constitution.

43. It is against this background that amaBhungane, together with other organisations to which I will refer below, made comprehensive submissions at every stage of the public participation process to highlight defects in the Act and propose better alternative choices. However, the inadequate public participation process facilitated by Parliament deprived us of the opportunity to meaningfully influence the final contents of the Act.

44. Despite these and many other concerns amaBunghane and other civil society organisations raised through each stage of the process, the Act was signed into law.

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The Legislative process at the National Assembly

45. As will be demonstrated below, the legislative process at the National Assembly was marred by procedural irregularities that severely constrained public participation in the enacting of the Act.

46. On 23 May 2023, an informal briefing took place where a draft version of the Public Procurement Bill (**Bill**) was given to Treasury by the Standing Committee on Finance and the NCOP Committee. The Minister consequently introduced the Bill in the National Assembly on 29 June 2023.

47. On 5 September 2023, the Treasury briefing on the Bill occurred. The summary of the briefing, a copy of which is attached as **FA9**, contains the queries immediately raised by attendees.

48. When questioned, in relation to preferential procurement, regarding what the "allowable premium" was, Mr Mathebula, the Chief Director: Supply Chain Management Policy, Norms, and Standards at Treasury indicated that the PPPFA prescribed a maximum premium of 11.1% (for 90/10) and 25% (for 80/20). Mr Mathebula explained that, since the PPPFA would be repealed when the Bill became law, the department "will have to specify in its subsequent regulations what premium the State would be willing to pay".

49. On 18 August 2023, a call for public comments was issued with the deadline for submission for written comments being 11 September 2023. Those

wishing to make oral submissions were invited to indicate this in their written submissions. A copy of amaBhungane's written submissions is attached as **FA10**.

50. The first public hearings on the Bill were held over 12 and 13 September 2023. During these hearings, not all members of the public who made submissions were able to make oral submissions. Only 21 organisations, including amaBhungane, presented submissions on the Bill. A copy of amaBhungane's presentation, which reiterated the salient points contained in its written submissions, is attached as **FA11**.

51. On 17 November 2023, Treasury responded to the public submissions and stakeholder input. The documents presented during this response meeting were circulated to the Standing Committee on Finance the evening prior. During the presentation of responses, representatives from Treasury revealed that, due to time constraints, approximately 20% of the submissions received during the public comment process were considered. Approximately 80% of the spreadsheet provided by Treasury, reflecting the public comments received, contained no notes or commentary at all from Treasury.

52. Treasury proceeded to present an entirely redrafted version of Chapter 4 of the Bill. The revised version of Chapter 4, which was not subject to any consultation, introduced for the first time a wide range of material new amendments to the Bill. The Chapter contained eight new sections, including

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one on pre-qualification and a dedicated and extensive section expanding on set-asides (which previously had been addressed in one line).

53. The meeting report, a copy of which is attached as **FA12**, reveals that a number of attendees raised grave concerns regarding the introduction of what amounted to an entirely new Chapter 4, circulated only hours before the meeting. Mr William Mathebula (Treasury's representative) attempted to read Chapter 4 aloud in the meeting, "to have it on record that stakeholders were briefed." In response to protestations by attendees, who indicated that more time was required to consider and engage on this crucial and complex aspect of the Bill, the Chairperson of the meeting noted that:

> *"[The 17 November 2023 meeting] was the correct platform to cover all the issues. Members should have an understanding of what is contained in the documents because it had been distributed earlier. He called on the official to briefly summarise the information and allow stakeholders and Members to comment."*

54. On 24 November 2023, a further meeting was held to continue discussing Treasury's responses to the public submissions. A copy of the report from that meeting is attached as **FA13**. In response to opening queries regarding whether Treasury had considered the submissions made on the Bill, Mr Mathebula confirmed that the days since the 17 November 2024 meeting had been used to "try to catch up on submissions that were not previously considered". He noted further that, although "progress was made, it was not possible to review all stakeholder comments due to the volume of the submissions".

55. Many of the provisions that stakeholders raised concerns about were either retained or adjusted in ways that did not meaningfully address stakeholders' concerns. By way of pertinent example, the concern raised by numerous stakeholders (including Transnet, one of the major entities implicated in state capture) regarding the location of the PPO within Treasury and the effect of that on its ability to carry out its mandate independently and impartially was either not responded to, summarily "noted", or met with a hollow and opaque response, such as the following:

> *"We have noted the comments on the potential conflict if the PPO is placed within National Treasury, however, the decision to place it within the National Treasury was based on s216 of the Constitution that the National Treasury should prescribe by introducing uniform treasury norms and standards and uniform expenditure classifications. Considering that procurement forms part of expenditure controls, the PPO would be best placed within the National Treasury. Unfortunately, we are unable to comment on [cadre] deployment issues, as it is not the subject of this Bill."*

56. A similar example can be observed in relation to concerns raised about the independence of the Procurement Tribunal, the members of which would be appointed and dismissed by the Minister. Drawing a distinction without difference insofar as addressing the issue was concerned, Treasury responded repeatedly that:

> *"A Tribunal is an independent and impartial body that is established by a national legislation. Further, the fact that members of the Tribunal are appointed by the Executive does not mean that the Tribunal itself is established by the Executive."*

57. Each participating stakeholder was, as in the first meeting, given a mere two minutes to respond to the presentation by Treasury, including the revised Chapter 4. AmaBhungane noted its concerns regarding the truncated time for comments, the failure by Treasury to have regard to all the submissions received, and the inadequacy of the transparency provisions and anti-corruption regime established by the Bill's provisions.

58. On 28 and 29 November 2023, the National Assembly's Standing Committee on Finance met for its clause-by-clause deliberation of the Bill. This session was led by Advocate Empie van Schoor from Treasury. The A-version of the Bill, including the new Chapter 4, was adopted, with reservations from the representatives from the Economic Freedom Fighters and the Democratic Alliance.

59. On 6 December 2023, the Standing Committee on Finance adopted the B-version of the Bill, retaining the significantly expanded Chapter 4 provisions without alteration, and passed the motion of desirability.

60. The Bill then progressed to the National Council of Provinces for concurrence.

Progression of the Bill to the National Council of Provinces

61. The Bill introduced into the National Council of Provinces retained the deficiencies identified by stakeholders in the process before the National Assembly, which were amplified by the revised Chapter 4.

62. On 30 January 2024, the National Council of Provinces' Select Committee on Finance (**NCOP Committee**) issued a call for comments on the Bill by 12 February 2024, which was extended to 22 February 2024. On 6 February 2024, the NCOP Committee met to discuss the Bill and were given a presentation by Treasury.

63. The Report of the NCOP Committee on the Public Procurement Bill indicates that a total of 27 written submissions were received on the Bill, including one from amaBhungane. A copy of the meeting report for this meeting is attached as **FA14**.

64. On 23 February 2024, the NCOP Committee heard oral submissions on the Bill at a public hearing. A copy of the meeting report for this meeting is attached as **FA15**. The 7 May 2024 meeting report of the NCOP Committee indicates that twelve organisations participated in the oral hearings. As was the case before the National Assembly, the public hearing was held only one day after the period for submissions had ended. A copy of the meeting report for this meeting is attached as **FA16**.

65. During this meeting, the representative of the Democratic Alliance noted that material changes had taken place between the Bill introduced in the National Assembly, and the Bill placed before the NCOP Committee. He pointed out that, because of these differences, the NCOP Committee could not assume

that the National Assembly had thoroughly ventilated the material content of the Bill.

66. The Chairperson of NCOP Committee acknowledged that the version of the Bill before the NCOP had materially changed from the initial Bill that had been introduced in the National Assembly. He noted that, although Parliament has the right to alter a Bill substantially, it is obligated to listen to public comment, because that is the nature of a healthy democracy.

67. The meeting concluded with the observation on behalf of the Chairperson that the Bill had been in process for over a decade and that to try and rush it, when it had only been introduced in the National Assembly at the eleventh hour, did not appear to be constructive.

68. On 14 March 2024, Treasury was scheduled to present their responses to the public submissions to the NCOP Committee. However, the meeting was postponed because of technical difficulties. The Democratic Alliance representative in attendance noted that committee members had only received the presentation by email two hours before the meeting was due to begin.

69. On 19 March 2024, Treasury presented their response to the NCOP Committee. Representatives from civil society were, again, given only two minutes to respond to the presentation. At the 19 March 2024 meeting, the

Chair of the NCOP Committee, Mr Yunus Carrim, asked civil society representatives to send short supplementary submissions to Treasury to highlight their continued problems with the Bill. I note here that the call for supplementary submissions was indicative of the inadequacy of the previous facilitation of public involvement. But even this supplementary process failed to cure the inadequacies of the previous stages of the process.

70. While Treasury appeared, by this point, at least to have glanced cursorily at the majority of the submissions, its responses continued to fail to engage properly with the key points raised therein, in many instances summarily dismissing them as "noted". For example, in relation to the concerns consistently raised by numerous organisations regarding the location and independence of the PPO, Treasury responded that:

> *"[S]ection 216(2) of the Constitution, which mandates the NT to enforce compliance with uniform norms and standards, including procurement standards, as part of its functions. Accordingly, the inclusion of the PPO within the NT aligns with this constitutional mandate. The Bill proposes to grant the PPO original powers, effectively separating it from other functions of the NT. However, it is argued that this separation is unnecessary since the PPO's role primarily pertains to government procurement activities, not those of the private sector. Therefore, there is no need for the PPO to operate independently, as it serves a governmental function similar to provincial treasuries."*

71. In other instances, Treasury's response was to indicate that essential aspects of the Bill would be dealt with, not in the parliamentary process, but in regulations. For example, in relation to the contentious Chapter 4, Treasury noted that:

> *"The comments by stakeholders on the Bill as introduced in Parliament on 30 June 2023, stated that Chapter 4 did not have the necessary details on the exact principles; they wanted Treasury to elaborate. ... On the evaluation criteria for the percentages picked up on the premiums government agreed to pay to use procurement as a strategic lever to drive socio-economic and other policy objectives, Treasury said it ... would come up with the evaluation criteria, which included price. It had to publish this so the public had a chance to comment. ... In the current law, there were maximum premiums the state agreed to pay in the preference points system. The public would have an opportunity to comment on what would be published. Treasury would consider these views when it developed what would be prescribed by the minister through regulations."*

72. On 25 March 2024, amaBhungane, along with other civil society stakeholders, submitted a short joint supplementary submission to the NCOP Committee. The 25 March 2024 supplement, attached as **FA17**, underscored, in particular:

72.1. the serious deficiencies of the rushed parliamentary process, including the belated introduction of a new Chapter 4;

72.2. the departure in Chapter 4 from the principles reflected in section 217 and the absence of any objective and measurable criteria for adjudication;

72.3. the undermining of the objective of ensuring transparency by the broad definition of "confidentiality".

73. On 17 April 2024, the NCOP Committee met again to hear Treasury's responses to the supplementary submissions made by the Procurement Reform Working Group (**PRWG**), Joint Strategic Resources, and National

Economic Development and Labour Council (**NEDLAC**). Business Unity South Africa, the National Research Federation, COSATU, Public Service Accountability Monitor, the South African Medical Technology Industry Association, Willpower, the Institute of Race Relations, and the Department of Military Veterans also participated in this meeting. A copy of the meeting report is attached as **FA18**.

74. AmaBhungane, in its capacity as a member of the PWRG, raised the concern that it had only received a copy of the report that Treasury had compiled of engagement with stakeholder comments and on which it was presenting the day before (16 April 2024). Consequently, it was not able to meaningfully respond to its contents, or to engage with the views any member of Parliament (**MP**) might express on the Bill. AmaBhungane emphasised that its submissions at this stage were also restricted to textual improvements that had been effected, but that the more substantive concerns with the Bill remained unaddressed.

75. On 19 April 2024, a joint letter was sent by a group of civil society organisations (namely the Legal Resources Centre, amaBhungane, African Procurement Law Unit, Budget Justice Coalition, Corruption Watch, Equal Education Law Centre, Public Affairs Research Institute, Public Service Accountability Monitor, The South African Medical Technology Industry Association) together with Mr Shaun Scott and Professor Ron Watermeyer, to the NCOP Committee. A copy of this letter is attached as **FA4**.

76. The letter:

76.1. reiterated the concerns repeatedly raised regarding the constitutionality of certain provisions in the Bill (focusing in particular on Chapter 4 and the total relegation of key substantive aspects to subordinate legislation);

76.2. again noted that the public participation process was constitutionally inadequate, specifically: the severely truncated timelines and belated delivery of documents; the absence of meaningful engagement – or any engagement – by Treasury with the majority of stakeholder comments. Even where comments raised had been acknowledged by Treasury to be important, these remained unaddressed, as the process had been hastily advanced and rigorous consultation and drafting could not feasibly be achieved in the timelines; and

76.3. highlighted that engagement to date had been between Treasury and stakeholders, with indications of the views of MPs being almost entirely absent from the process. Stakeholders who participate in the parliamentary process should be capable of influencing Parliament's decision-making on the Bill. Here, it was impossible to do so, because stakeholders did not know Parliament's views on key constitutional issues and provisions in the Bill.

77. On 23 April 2024, the NCOP Committee met to discuss the Bill. The Parliamentary Legal Advisor acknowledged the 19 April 2024 letter and the questions regarding public participation. He stated that he believed the NCOP Committee had provided reasonable opportunities for meaningful and effective participation. He did not set out in any detail the reasons that he considered the opportunities for participation to be reasonable, nor did he engage with the specific flaws in the public participation process highlighted in the 19 April 2024 letter. He observed simply that "stakeholders were provided an opportunity to comment on [the Bill]."

78. Concerningly, when discussing the letter, Mr Yunus Carrim, the Chairperson of the NCOP Committee, intimated that it was not for the NCOP Committee or legislative process to consider the constitutionality of the Act. Instead he stated that:

> *"At this stage, the Committee could not determine whether to continue processing the Bill. Furthermore, he added, it was up to the courts to decide [the Bill's] constitutionality."*

79. On 30 April 2024, the NCOP Committee met virtually to hear the provincial mandates on the Bill and Treasury's responses. The Western Cape voted against the Bill and called for a "comprehensive review to ensure the Bill aligns with constitutional guidelines for public procurement". The remaining provinces indicated that they were in favour of the Bill, subject to various recommendations regarding amendments. The Western Cape, Gauteng and Kwa-Zulu Natal all recommended that the PPO, as envisaged in the Bill, was

insufficiently independent. Gauteng also indicated that certain of its members had noted that the Bill was inadequate, in that it lacked provisions for assessing and ensuring cost-effectiveness as required by section 217 of the Constitution, failed to balance preferential procurement considerations with other procurement principles, gave overarching powers to the PPO to issue instructions on preferential procurement in other spheres of government.

80. On 2 May 2024, the NCOP Committee continued deliberations on the Bill. The Chairperson of the NCOP Committee particularly highlighted the department's capacity to implement the Bill and the extent of matters left to regulations as being "serious concerns". He noted that:

> *"[o]ne of the reasons [the Committee] was asking for the Bill to be reviewed within twenty-four months was that it believed Treasury would have had enough time to discover how to better the Bill and what changes needed to be made. Two, the regulations would be clearer".*

81. The Chairperson of the NCOP Committee stated that the draft Bill would be sent to stakeholders the next day (Friday, 3 May 2024) and that they would be allowed to comment by Monday, 6 May 2024. The NCOP Committee was due to vote on the Bill the next day, Tuesday, 7 May 2024.

82. On 7 May 2024, the NCOP Committee voted on the Bill, and all provinces – except the Western Cape – voted in favour of the Bill, subject to the various recommended amendments. The meeting report, a copy of which is attached as **FA19**, notes that one significant proposed amendment made to the Bill was

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the inclusion of clause 68, which requires the department to conduct a review of the Act at NEDLAC within 24 months of its promulgation. The report explains that:

> "*[The majority of] members supported this proposed amendment as they viewed the Bill as temporary and transitional due to its significant impact on procurement across the three spheres of government and the several outstanding matters that have not been addressed by the legislation*".

83. The Bill was thereafter returned on 8 May 2024 to the National Assembly for concurrence. A copy of the NCOP Committee Report on the Bill is attached as **FA20**.

84. In the section summarising key issues emerging from the process before the NCOP Committee, the Report includes "Potential non-compliance with the law and the Constitution" and states that:

> "*Some stakeholders cautioned that [Treasury's] consideration of about 36 percent of the public comments received, and the lack of a framework for implementation with principles and checks and balances from a drafting point of view, might be legally challenged. The Bill raises significant issues concerning section 217 of the Constitution; and the lack of clarity about pricing mechanisms in the Bill may not align with the Constitution. [Treasury] advised that the concerns mentioned are of such a nature as to let the Bill fail constitutional muster, however, certain proposals have been made for amendments to limit the risks of potential constitutional challenges.*"

85. On 13 May 2024, the National Assembly adopted the NCOP amendments to the Bill. On 16 May 2024, the Bill was passed by both houses and sent to the President for assent.

The President's assent

86. On 24 May 2024, a similar group of individuals and civil society organisations, including amaBhungane, wrote a letter to the President. The letter provided a background into the inadequacies of the public participation process, and the inadequacies of the Bill itself. The letter specifically highlighted that the Bill was unconstitutional both from a substantive and procedural point of view. It then made an extensive request to the President that he, before signing the Bill into law, engage with the individuals and organisations so that they have an opportunity to make representations to him on the substantive and procedural shortcomings.

87. The hope was to bring these to the attention of the President to inform his assessment of the constitutionality under section 79 of the Constitution. A copy of this letter is attached as **FA5.**

88. As evidenced by a read receipt received on 27 May 2024, and an acknowledgement of receipt and response from Mr Robert Hlongwane from the Private Office of the President on the same day, the letter was duly

received. A copy of both are attached as **FA21** and **FA22**. Unfortunately, no response to the letter, and the request, was received.

89. On 18 July 2024, the Bill was signed into law and became Act 28 of 2024. The Act was then published in Government Gazette 50967 on 23 July 2024.

SUBMISSIONS TO BE ADOPTED BY AMABHUNGANE

90. Below I summarise the submissions that amaBhungane shall make should it be granted leaver to intervene as a party.

Parliament Failed in its Obligation to Facilitate Meaningful Public Participation

91. This Court has repeatedly emphasised the importance of meaningful public participation in the legislative process. I am advised and submit that the Court has set out the following key principles in a series of cases.

91.1. Public participation in the law-making process is a manifestation of the constitutional values of democracy, transparency, and accountability. It enhances the legitimacy of laws and strengthens our democracy by ensuring that those affected by legislation have a voice in its formulation.

91.2. Public participation acts as a safeguard to prevent the interests of the marginalised being ignored or misrepresented. The significance of

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public participation for the advancement of South Africa's democratic project is underscored by the colonial and apartheid governments' complete disregard of the views of the people in legislating their lives.

91.3. The reasonableness of public participation is determined by looking at the entire process, including the adequacy of notice, accessibility of hearings, and whether the process enabled meaningful engagement from those affected by the legislation. The reasonableness standard is ultimately informed by a consideration of the nature of the relevant proposed legislation, the importance of the proposed legislation, the impact of the proposed legislation on the interests of the public, ensuring the efficiency of the law-making process and what Parliament themselves considers to be reasonable in the circumstances.

91.4. Parliament cannot merely engage in a perfunctory manner. Where consultation is superficial or rushed, to the extent that it undermines the democratic process, such legislation cannot be said to have been enacted in accordance with the Constitution.

91.5. What is required is not merely a formal checking of the box, but a real and meaningful opportunity for the public to contribute to the legislative process. The participation of the public in the legislative process through public participation process is intended to offer the

those who participate an opportunity to influence legislation. This requires that Parliament must properly consider the content of the submissions it receives and demonstrate a willingness to consider all the views expressed by the public within the participation process. Ultimately, a reasonable opportunity to participate in legislative affairs must be an opportunity capable of influencing the decision to be taken. It is unreasonable if the content of a public hearing could not possibly affect Parliament's deliberations on the legislation or if Parliament does not ensure that it considers the submissions it receives. If the hearing is not effectively or timeously advertised, if people are unable to attend the hearing, or if the submissions made at the hearing are not transmitted or accurately transmitted to the legislature, then the hearing is not capable of influencing Parliament's deliberations.

91.6. Importantly, Parliament bears the onus to prove that the process it adopted to facilitate public participation was reasonable. Our courts have made it clear that there can be little sympathy for Parliament if it fails to discharge this onus on the basis that it had not kept sufficient records, particularly where it had a duty to do so.

91.7. Parliament is statutorily obliged to keep proper records of public participation. In terms of the National Archives and Records Service of South Africa Act 43 of 1996, public bodies such as Parliament are

obliged to retain records and may not destroy them except as provided for in the Act.

91.8. In terms of section 13(1), the National Archivist is charged with the proper management and care of public records in the custody of governmental bodies. In terms of section 13(2)(a), no public record under the control of a governmental body may be transferred to an archives repository, destroyed, erased or otherwise disposed of without the written authorisation of the National Archivist.

92. With the above in mind, amaBhungane respectfully submits that Parliament plainly failed in its constitutional obligation to facilitate meaningful public involvement in the following three ways.

First: Inadequate timeframes and meaningful opportunities for public comment

93. I have set out the history of the Act in detail above. The legislative process involved calls for written submissions as well as public hearings. But the hallmark of the process was the inadequate timeframes that were provided to stakeholders.

94. With respect, this is not a case in which Parliament was quickly required to publish legislation dealing with an urgent national disaster (such as Covid-19). Neither was the Bill treated with any specific or particular expedition (weaving its way on normal timeframes through the legislative process).

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95. The Act is essential to improve the state's efforts to reduce the scourge of corruption facilitated by public procurement processes. This, however, amplifies the need for Parliament to facilitate more input with stakeholders in earnest – stakeholders who have insights that can contribute meaningfully to the state's efforts in curbing corruption and respecting, protecting, promoting and fulfilling the rights in the Bill of Rights.

96. Against the context of widespread state corruption, ensuring the involvement of outside stakeholders also acts as an important check against whatever perverse incentives members of the executive may have held when developing the regulatory framework intended to guide public procurement. It also mitigates against the weakness of the legislature's oversight, which was acknowledged in the Zondo Report as a contributing factor to the proliferation of widespread state corruption.

97. Importantly, the fact that the public participation process was unduly rushed is not merely amaBhungane's view. The rushed nature of the consideration of the public comments is further illustrated by National Treasury's own documents.

98. For instance, the document entitled "Comment Matrix – National Treasury's responses to Written Submissions to Select Committee on Finance, National Council of Provinces", dated 14 and 18 March 2024, expressly states:

"NOTE: Due to time constraints-

(a) a quality check of the responses to ensure alignment and correct textual errors should still be done; and

(b) some instances not all comments of a particular commentator have been responded yet (e.g. clause-by-clause comments of the Western Cape Government)." (Emphasis added)

99. The statement that in "some instances not all comments of a particular commentator have been responded [to] yet" illustrates that it was intended that they would be at a later stage (prior to the National Assembly and the NCOP adopting the Bill).

100. The rushed nature of the public participation process is also illustrated by the addition of section 68 of the Act. Section 68 of the Act provides that the Minister must:

"(a) within 24 months after this Act is first published as an Act in the Gazette, review the implementation of this Act and the need for amendments to this Act;

(b) consult stakeholders, including Nedlac, during the review; and

(c) within 27 months after this Act is first published as an Act in the Gazette, make public a report on the review and submit it to Parliament."

101. AmaBhungane respectfully submits that the inclusion of clause 68 by the NCOP (and adopted by the National Assembly) was a clear concession that the Act was not ready to be passed. But if the NCOP (or the National

Assembly) took the view that various issues in relation to the Bill still needed to be resolved, the correct course of action was to reject the Bill to stand over for the new Parliament, and for those issues properly to be resolved prior to the Bill being enacted.

102. This is borne out by the statements of the Chairperson of the NCOP Committee on 2 May 2024, at paragraph 62 above. It is worth re-stating that he conceded that:

> *"[o]ne of the reasons [the Committee] was asking for the Bill to be reviewed within twenty-four months was that it believed Treasury would have had enough time to discover how to better the Bill and what changes needed to be made. Two, the regulations would be clearer".*

103. The 7 May 2024 NCOP meeting report (attached above as FA13) similarly explained the inclusion of clause 68 as follows:

> *"[The majority of] members supported this proposed amendment as they viewed the Bill as temporary and transitional due to its significant impact on procurement across the three spheres of government and the several outstanding matters that have not been addressed by the legislation."*

104. This indicates that Parliament rushed to get the Bill passed despite having grave concerns about its adequacy. This also indicates that any attempts by civil society to contribute meaningfully to the substance of the Bill was severely undermined by Parliament's intention to simply push the Bill through. Thus, no meaningful contribution could be made in these circumstances.

105. There was no real need for this rush. The passing of the Act was not time-sensitive and necessitated immediately in light of prevailing factual circumstances. As previously stated, the initial development of the Act spanned close to a decade.

106. AmaBhungane respectfully submits that the inference is irresistible that the real reason for the rapid haste with which the Bill was being propelled forward (notwithstanding obvious defects in the Bill and obvious flaws in the public process) was: (i) to enact the Bill prior to the new Parliament being installed after the national elections; (ii) to enact the Bill as part of the ruling party's election campaign.

107. The latter point was suggested by the official opposition, albeit in relation to another Bill passed during the plenary meeting on 16 May 2024. The unrevised Hansard minutes of this meeting note that the Chief Whip for the Democratic Alliance, Mr Baxolile Nodada, made the following comments in relation to the Basic Education Laws Amendment Bill:

> *"[Y]esterday the ANC sacrificed the future of countless generations for cheap electioneering by bulldozing the Basic Education Laws Amendment Bill, Bela to Parliament. Instead of engaging meaningful discussions about the widespread implications of the Bill and the changes made by the National Council of Provinces, the ANC Chairperson, who surely doesn't understand the Bill, refused to follow parliamentary protocol and denies opposition parties the right to include thorough inputs to the changes. She booted me out of the meeting for raising valid concerns, and the ANC majority adopted the Bill full of mistakes without interrogating the final version.*

It seems the closer it gets to 29 May, the more desperate the ANC is to try and convince the public they've looted and undermined for 30 years, that they actually care. But their actions regarding the public participation speak louder than their desperate electioneering attempts." (Emphasis added)

108. This inference is further supported by evidence provided by the President in the case of President of the Republic of South Africa v Speaker of the National Assembly and Others [2025] ZACC 12, paragraphs 8 and 9 of that judgment read as follows:

"[8] It is through this letter that the President's legal advisors became aware of the fact that the interim remedy had lapsed when the period of suspension expired. The President explains that, for a variety of reasons, it took him a long time to take a decision on whether to sign the Bill into law. First, his legal advisors have to do research on each Bill that lands on his table. There is a large number of such Bills. After the research, the advisors then advise the President on the course to take with regard to each Bill. What exacerbated the situation around the time the President received the Bill in issue here is that, since its term was to come to an end leading up to the 2024 elections, Parliament pushed for the enactment of all Bills that were close to fruition on its side by finalising them and forwarding them to the President for signature. That resulted in an unusually high number of bills requiring the President's assent.

[9] The President himself says that he had a number of engagements that he could not get out of, including international travel and paying particular attention to the crisis that involved the widely publicised deaths of children as a result of ingesting foods purchased from "spaza shops". All of this meant that it was only during October 2024 that the President was able to apply his mind to the memorandum of advice that had since been received from his legal advisors. Based on the advice, he concluded that the Bill was unconstitutional as it did not adequately address the defects identified by this Court in AmaBhungane. According to the President, this was so particularly in relation to post-surveillance notification. In November 2024 the President advised the first respondent, the Speaker of the National Assembly, in terms of section 79(1) of the Constitution, of his decision."

109. Notably, these paragraphs provide confirmation of the rushed manner in which a number of bills were passed into law, buttressing the claim that parliament failed to provide meaningful consideration to the Bill before passing it.

110. Even if the purpose were, more innocently, to enact the Bill prior to the new Parliament being installed after the national elections so that the Bill did not lapse, that would not have justified the unreasonably hasty process followed or enacting the Bill in its current defective form. The Bill could have been revived by the new Parliament and the defects could have been addressed before it was enacted (like so many Bills have been in the past).

Second: The majority of submissions were not considered at all

111. Notwithstanding the severely curtailed timeframes for public participation before the National Assembly, 112 written submissions were delivered in response to the invitation to comment. This, again, illustrates the public importance of the Act. As the principles I have set out above make clear:

111.1. The public submissions are material, relevant considerations that were required to be taken into account by both houses of Parliament as well as the President in making their respective decisions in relation to whether to assent to the Bill.

111.2. Parliament has a constitutional duty to carefully consider and deliberate on all submissions and reports received from stakeholders

during the legislative process (and before the President signed the Bill into law). This is especially so where Parliament had expressly been alerted to the fact that the public participation process was woefully inadequate, did not allow for meaningful engagement, and did not resolve the serious constitutional defects identified in the submissions.

112. But, as I have already set out at paragraphs 45 to 60 above, regarding the process before the National Assembly, in relation to the majority of public submissions, detailing serious concerns and constitutional defects with the Act, there is:

112.1. No evidence that the submissions were properly engaged with;

112.2. No explanation given by Treasury, the National Assembly, the NCOP Committee, or the President regarding why the submissions were overlooked.

113. This is fatal to the constitutionality of the Act. It is inconceivable, with respect, that the remaining 80 submissions were properly considered, but there is no written account of those submissions being dealt with.

114. It could hardly be suggested, for instance, that a particular person (or persons) at Treasury, or the National Assembly had read the remaining 80 submissions and took the view that there was nothing of interest whatsoever in them.

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115. In any event, that kind of filtering process would flout the purpose of facilitating public involvement.

115.1. First, the purpose of facilitating public participation is to give effect to participatory democracy so that citizens have a voice in legislation being passed. That is completely undermined if the input from those citizens is belatedly or never properly considered by the lawmakers. If all the submissions received are not fully or properly considered, participants are unable to influence the legislative process, inhibiting the achievement of the purpose of public participation.

115.2. Second, amaBhungane accepts that Parliament has some discretion in relation to how comments from the public should be acted on and whether they flag concerns that need to be addressed in the Bill. But Parliament, at the very least, is required to read them and demonstrate that it properly considered all of the submissions.

115.3. Third, in providing feedback on some comments, Parliament themselves demonstrated that their understanding of reasonable public participation necessitated a system in which feedback on public comments would be provided. To subsequently fail to provide feedback on all public comments received contradicts the standard of reasonableness Parliament's own conduct had established.

115.4. Fourth, to properly facilitate the public participation process, the decision-makers should record those considerations either in oral meetings (which are recorded and publicly available online) or in written documents. Some form of record of each house of Parliament's attitude is necessary in relation to the submissions so that each entity in the respective chain in the legislative process can properly exercise their own discretion in relation to whether (and how) the various public submissions should be addressed. Decision-makers are required to exercise their discretion in the public interest, they plainly cannot do so, if they have not considered the submissions properly or at all.

116. It is no answer for the National Assembly or the NCOP to suggest that the flaw lies only with Treasury. Unless the National Assembly or the NCOP (as the case may be) corrected the flaws made by Treasury in its process of considering the submissions, then that flaw materially infects Parliament's decision-making process.

117. In the present case, the National Assembly did not properly consider approximately 80 of the public submissions because of Treasury's failure to summarise them prior to the National Assembly taking its decisions in respect of the Act.

118. I am advised and aver that the Constitutional Court has made it clear that each house of Parliament has a separate constitutional obligation to facilitate public involvement. Even assuming for the purpose of argument that the NCOP could belatedly cure the fatally flawed process before the National Assembly assented to the Bill, there is no suggestion in the NCOP Committee's meetings that the NCOP considered the 80 submissions that were not looked at, considered, or summarised by Treasury. The NCOP's failure to engage with these submissions means that the views expressed therein could not filter through into the legislative process for proper consideration as is required.

119. There is also no evidence that the National Assembly properly considered all 112 written submissions at any meaningful later stage. And there is no indication or evidence that the President considered the written submissions afresh or the concerns raised in the 24 May 2024 letter before signing the Bill into law on 18 July 2024.

120. AmaBhungane does not suggest that each decision-maker is required at every level to consider every single submission – that is the purpose of summary documents and reports to inform subsequent decision-makers. But I am advised that both Parliament and the President must consider the concerns raised by stakeholders meaningfully and in earnest and engage with such stakeholders to justify the ultimate outcome of the legislative text. That did not happen during this process. Instead, the Act was pushed through to assent without any clear understanding why certain choices were made, and

more importantly, why the concerns raised by amaBhungane and other stakeholders were not infused into the Act.

Fourth: The NCOP Committee noted issues without addressing them

121. I point out that the inadequacies of the public participation process were expressly raised during the process before the NCOP. Parliament's Senior Legal Advisor confirmed that it would be fatal if submissions had been received but not considered. That is precisely what occurred in relation to approximately 80 of the submissions made at the National Assembly stage.

122. The NCOP had a clear remedy in terms of section 76 of the Constitution (which applies to Bills affecting provinces).

122.1. Section 76(1)(a) provides that the NCOP must either (i) pass the Bill; (ii) pass an amended Bill; or (iii) reject the Bill.

122.2. AmaBhungane respectfully submits that the NCOP was obliged to reject the Bill and to suggest that the National Assembly re-consider the Bill in the light of proper consideration of the 80 submissions it failed properly to consider.

123. On 26 April 2024, the NCOP Committee held a virtual meeting to discuss stakeholder submissions on the Bill. The meeting was streamed live and the

recording of the meeting remains available online. The relevant portion of the meeting is at minutes 31:03 to 34:14.

123.1. In summary, Business Unity South Africa (**BUSA**) made a submission to the NCOP Committee, claiming that there was evidence demonstrating that out of all of the public comments received, following the August 2023 invitation by the NCOP Committee, only 36% of these comments had been considered, with 64% of the submissions not having been processed at all. BUSA submitted that this would likely result in the Bill and/or subsequent Act being challenged in the courts. A copy of the summary of the sitting of the NCOP Committee during which this submission was made is attached as **FA23**.

123.2. The Chairperson of the NCOP Committee, Mr Yunis Carrim of the ANC, addressed this query during the meeting of 26 April 2024 (the relevant exchange appears at minute 30:54 of the recording of the meeting):

> *"They [ie. BUSA] say evidence suggests that the public comments received following the National Assembly, only 30% of these were considered of the submissions, 64% not so. This shortcoming will likely be legally challenged based on the precedent set by the Constitutional Court ruling, which invalidated that law, right. Now that was even signed by the President.*
>
> *Frank are you here? Oh good, I mean is this true? That because it's claimed that they only did 36% that it'll go to court and it has been*

done before? Frank, quickly from Parliament's side?"

124. The response from Mr Frank Jenkins, Parliament's Senior Legal Advisor, was as follows:

> *"Chair, the submissions were made to the Committee. I think that's the first thing we need to know. So the critical question is that the Committee get a briefing on it, do they know about the submissions? Did they consider it? It mustn't be a waste of time.*
>
> *The test for public participation and I'm busy with preparing the notes, Chairperson, on that letter. The test is whether persons had a meaningful opportunity to make [an] impact so the measures Parliament must take is reasonable. So considering that we received those amount of submissions, as far as my memory helps me, the Standing Committee required that Treasury brief them on the public submissions and respond to those public submissions. The public submissions, of course, not all of those were made verbally a lot of it was just in writing.*
>
> *So the question is really were the members aware of what's happening in those public submissions and did they respond to those? So my understanding from National Treasury is that they did look at all the submissions, but they could just specifically reply to that the smaller percentage or the 36% or whatever. And that, later on, they looked at it again but I don't think the Bill was still in the NA then and they might have dealt with it in the NCOP.*
>
> *It is important Chair and it is correct, the submission is correct, that if the National Assembly doesn't look at the submissions they don't consider those, there's an issue. The NCOP must look at what is submitted to it, as well as what the Provinces has done, and then depending on the impact, the importance of that legislation, Parliament must take measures to allow these people to make the submission. So my view is that the opportunity was, it was there, it was created, whether the members are fully aware of all the submissions is another question and Chair it really depends on the facts of a situation whether someone will be successful in court or not. Courts have recognised that urgency and time is something Parliament can take into account, but – on its own – urgency and the cost of public participation on its own cannot be used to override the Constitutional obligations to have public involvement. I'll stop there,*

Chair."

125. AmaBhungane respectfully submits, first, that Mr Jenkins' understanding was not correct. As I have explained at paragraphs 51 to 57 above, it was absolutely apparent, from the Chairperson's statements in November 2023, when Treasury was presenting its responses to stakeholders, that it was not the case that Treasury had failed only to respond in writing to the comments. The majority of comments simply had not been "considered" or "reviewed" at all.

126. As I have set out, a document reflecting an entirely new Chapter 4, bearing almost no resemblance to its predecessor, was circulated to stakeholders a matter of hours before the meeting. Certain stakeholders had not even had an opportunity to read it: the Treasury's representative attempted to cure this with a read-aloud during the meeting. But what makes this more extraordinary is that the overhaul to Chapter 4 was, according to the statements of Treasury, based on stakeholder comments. I submit that this is simply not possible in circumstances where Treasury had had time to review less than a quarter of the comments.

127. Secondly, and at best for the state respondents, the exchange in any event demonstrates that the written submissions were not properly considered by the National Assembly at a stage when the stakeholders' views had a meaningful chance of influencing the National Assembly's stance on the Bill.

That is fatal to the public participation process conducted by the National Assembly.

128. Mr Jenkins' suggestion that Treasury belatedly "later on, they they [sic] looked at it again." However, Mr Jenkins – quite correctly – recognised that this was not sufficient: "but I don't think the Bill was still in the NA then." The purpose of a summary of the comments is not merely, as a matter of form, to illustrate that all submissions were read. It is to provide assistance to the subsequent decision-makers in the legislative process.

129. Finally, Mr Jenkins refers to "urgency and time" as a factor that Parliament can consider when it is facilitating public involvement. In other words, urgent circumstances, may warrant a more circumscribed public participation process. AmaBhungane agrees that this is correct at the level of legal principle. However, there is no basis alleged, nor any that exists, for passing the Bill urgently without proper consideration of the public comments.

Fifth: The NCOP Committee failed to consider all of the public submissions made before it

130. The list of commentators dealt with in the National Treasury's Comment Matrix Document that summarised the public submissions made before the NCOP also makes it clear that the document was an in-progress document that was being amended as each submission was processed. This is clear from the title

of the document: "240426Annexure APublic Procurement Bill – National Treasury Comment matrix – SeCoF NCOP – 18 March 2024_Added_BUSA_Corruprtion_Watch." (Emphasis added)

131. The addition of the phrase "Added_BUSA_Corruprtion [sic]_Watch" demonstrates that as each submission was considered it was added to the list of commentators in the Comment Matrix Document. The last two submissions listed in the List of Commentators are BUSA and Corruption Watch.

132. This is significant, because the List of Commentators only includes a list of 30 commentators, which had (at that stage) been analysed in the Matrix Document. A copy of this list is attached hereto as **FA24**. In other words, only 30 submissions received proper consideration.

133. But the NCOP Committee Report dated 7 May 2024 expressly stated that 33 submissions were made before the NCOP Committee. The Report states that:

> *"The Committee held public hearings on 23 February 2024 and received a total of 33 submissions. Twelve stakeholders made oral submissions. These are Business Unity South Africa (BUSA), Public Affairs Research Institute (PARI), African Procurement Law Unit (APLU), Joint Strategic Resources (JSR), National Research Foundation (NRF), South African Institute for Chartered Accountants (SAICA), Corruption Watch (CW), Public Service Accountability Monitor (PSAM), the South African Medical Technology Industry Association (SAMED), Congress of South African Trade Unions (COSATU) and Southern African Clothing and Textile Workers Union (SACTWU), Will Power (WP), and the Institute for Race Relations (IRR) Legal NPC.*
>
> *Twenty one written submissions were received from the Solidary*

Trade Union (STU), Construction Industry Development Board (CIDB), Equal Education and Law Centre (EELC) and Equal Education (EE), Pharmaceutical Task Group (PTG), Consumer Goods Council of South Africa (CGCSA), Pharmaceuticals Made in South Africa (PHARMISA), City of Cape Town (CCT), Amabhungane Centre for Investigative Journalism, Health Justice Initiative (HJI), Budget Justice Coalition (BJC) and Imali Yethu Civil Society Coalition for Open Budgets, Construction Sector Charter Council (CSCC), University of Stellenbosch (US) (Venter, Quinot and Scott), Sakeliga (formerly Afribusiness), Webber Wentzel, Eskom, Perishable Products Export Control Board (PPECB), Civil Engineering Group, MEC Wenger, Mr Michael Freema, and Dear South Africa."

134. It follows that the submissions by Will Power, MEC Wenger, Dear South Africa, and Eskom did not receive proper consideration by Treasury or the NCOP Committee.

135. Material changes were introduced late in the process without any proper opportunity for stakeholders to comment

136. As I explain at paragraphs 52 and 53 above, an entirely overhauled Chapter 4 of the Bill was presented to attendees (including interested parties from civil society) at the 17 November 2023 meeting where Treasury presented its responses to comments in the National Assembly.

137. Treasury contended that the content of the new Chapter 4 was, at that point, informed by the written and oral submissions of stakeholders. However, for the reasons I have expounded on above, it is wholly unclear how this possibly can be so, in circumstances where Treasury had not even considered the majority of the submissions received.

138. I am advised that our courts have made clear that amendments made during the parliamentary process trigger a renewed duty of public consultation when those changes are material. In circumstances where a portfolio committee inserted a substantial new provision into a Bill without any public notice or hearings on the change, I am advised that the Constitutional Court held that the late amendment should have been subjected to a public participation process.

139. A failure to involve the public in relation to a material amendment constitutes a failure to facilitate meaningful public involvement in the changes made post that amendment. I submit that the belated introduction of Chapter 4, the extremely truncated timelines for comment throughout the remainder of the parliamentary process, and the limitations placed on both the time afforded for oral submissions and the length of supplementary submissions, did not afford the applicant, or other stakeholders, a reasonable opportunity to comment on Chapter 4 and the other provisions which triggered the concerns of individuals and stakeholders.

CONCLUSION

140. In the circumstances, amaBhungane prays for an order in terms of the Notice of Motion to which this affidavit is annexed.

DEPONENT

SIGNED and SWORN to before me at JOHANNESBURG on this 5th day of August 2025, the deponent having acknowledged that they know and understand the contents of this affidavit, that they have no objection to taking the prescribed oath and that they considers the oath to be binding on their conscience.

COMMISSIONER OF OATHS

Christopher James MacRoberts
Commissioner of Oaths
Practising Attorney RSA
52 Katherine Street
Wierda Valley, Sandton
Johannesburg 2196

LRC
LEGAL RESOURCES CENTRE

JOHANNESBURG/NATIONAL OFFICE
2nd Floor West Wing, Women's Jail,
Constitution Hill, 1 Kotze Sureet,
Braamfontein, Johannesburg, 2001
Tel: +27 11 038 9709
Fax: +27 11 838 4876
info@lrc.org.za

Our Ref: T Moroeng / R Dadoo / C Rankin

TO: **SPEAKER OF THE NATIONAL ASSEMBLY**
OFFICE OF THE STATE ATTORNEY, CAPE TOWN
Tel: 021 441 9200
Email: cobailey@justice.gov.za / imanuel@justice.gov.za
Ref: 698/25/P20

AND TO: **CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES**
OFFICE OF THE STATE ATTORNEY, CAPE TOWN
Tel: 021 441 9200
Email: cobailey@justice.gov.za
Ref: 698/25/P20

AND TO: **PREMIER OF THE WESTERN CAPE GOVERNMENT**
OFFICE OF THE STATE ATTORNEY, CAPE TOWN
Tel: 021 441 9200 / 021 441 9279
Email: lngwenya@justice.gov.za
Ref: 4214/24/Pl 1
C/o OFFICE OF THE STATE ATTORNEY, JOHANNESBURG
Email: sbedrow@justice.gov.za
Ref: Ms S Bedrow

AND TO: **THE CITY OF CAPE TOWN**
CLUVER MARKOTTER ATTORNEYS
Tel: 021 808 5635 / 072 947 7422
Email: brendonh@cluvermarkotter.law / litigation@cluvermarkotter.law
Ref: Mr Brendon Hess/CIT/0189
C/o SWANEPOEL ATTORNEYS
Tel: 011 333 1715
jjswanepoel10@telkomsa.net / roelien@swanepoelattorneys.co.za

AND TO: **SOLIDARITY**
SERFONTEIN, VILJOEN AND SWART
Tel: 012 362 2556
Email: niekie@svslaw.co.za / monique@svslaw.co.za
Ref: Mr Venter/MJ/NS0078

AND TO: **SPEAKER OF THE EASTERN CAPE PROVINCIAL LEGISLATURE**

LRC
LEGAL RESOURCES CENTRE

JOHANNESBURG/NATIONAL OFFICE
2nd Floor West Wing, Women's Jail,
Constitution Hill, 1 Kotze Street,
Braamfontein, Johannesburg, 2001
Tel: +27 11 038 9709
Fax: +27 11 838 4876
info@lrc.org.za

OFFICE OF THE STATE ATTORNEY, EAST LONDON
Tel: 043 706 5100
Email: kmosia@justice.gov.za
Ref: 605/25-P2

AND TO: **SPEAKER OF THE FREE STATE PROVINCIAL LEGISLATURE**
OFFICE OF THE STATE ATTORNEY, CAPE TOWN
Tel: 021 441 9200 / 021 441 9279
Email: imanuel@justice.gov.za
Ref: 961/25/P12
C/o OFFICE OF THE STATE ATTORNEY, JOHANNESBURG

AND TO: **SPEAKER OF THE GAUTENG PROVINCIAL LEGISLATURE**
Email: asanda.makhubalo@gauteng.gov.za / Geert.kruit@gauteng.gov.za /
Speaker@gauteng.gov.za / modikgale@justice.gov.za /
mmobeng@justice.gov.za

AND TO: **SPEAKER OF THE KWAZULU-NATAL PROVINCIAL LEGISLATURE**
GARLICKE AND BOUSFIELD INCORPORATED
Tel: 031 570 5572
Email: philia.magwaza@gb.co.za
Ref: PM/sa
C/o STEPHANIE APROSKIE ATTORNEYS
Email: stephanie@aproskieattorneys.co.za

AND TO: **SPEAKER OF THE LIMPOPO PROVINCIAL LEGISLATURE**
C/o OFFICE OF THE STATE ATTORNEY, POLOWANE
Email: Manakam@limpopoleg.gov.za / mothoas@limpopoleg.gov.za /
mchuene@justice.gov.za / Mphakaj@premier.limpopo.gov.za/
nchabelengm@premier.limpopo.gov.za

AND TO: **SPEAKER OF THE NORTHERN CAPE PROVINCIAL LEGISLATURE**
C/o OFFICE OF THE STATE ATTORNEY, KIMBERLY
Email: pmontwedi@ncpg.gov.za / zmaneli@ncpg.gov.za /
kvictor@ncpg.gov.za / ngcilitshana@justice.gov.za

LEGAL RESOURCES CENTRE

JOHANNESBURG/NATIONAL OFFICE
2nd Floor West Wing, Women's Jail,
Constitution Hill, 1 Kotze Street,
Braamfontein, Johannesburg, 2001
Tel: +27 11 038 9709
Fax: +27 11 838 4876
info@lrc.org.za

AND TO: **SPEAKER OF THE MPUMALANGA PROVINCIAL LEGISLATURE**
OFFICE OF THE STATE ATTORNEY, CAPE TOWN
Tel: 021 441 9200 / 021 441 9279
Email: imanuel@justice.gov.za
Ref: 961/25/P12
C/o OFFICE OF THE STATE ATTORNEY, JOHANNESBURG

AND TO: **SPEAKER OF THE NORTH WEST PROVINCIAL LEGISLATURE**
OFFICE OF THE STATE ATTORNEY, MAHIKENG
Tel: 018 384 02698
Email: mgasemene@nwpg.gov.za / mmotshabi@justice.gov.za /
gbowker@nwpg.gov.za
Ref: Mr. L Matshinyatsimbi.1337/25/P2

AND TO: **SPEAKER OF THE WESTERN CAPE PROVINCIAL LEGISLATURE**
C/o OFFICE OF THE STATE ATTORNEY, CAPE TOWN
Email: ingwenya@justice.gov.za / sbedrow@justice.gov.za

AND TO: **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**
OFFICE OF THE STATE ATTORNEY, CAPE TOWN
Tel: 021 441 9200 / 021 441 9279
Email: imanuel@justice.gov.za
Ref: 961/25/P12
C/o OFFICE OF THE STATE ATTORNEY, JOHANNESBURG

AND TO: **MINISTER OF FINANCE**
C/o OFFICE OF THE STATE ATTORNEY, CAPE TOWN
imanuel@justice.gov.za

22 July 2025

RE: Application in terms of Rule 8 and Rule 10 of the CC Rules – CCT 103/25 Premier of the Western Cape Government v Speaker of the National Assembly & Minister of Finance and CCT 144/25 City of Cape Town v Speaker of the National Assembly & Others

1. We refer to the above two matters under case numbers CCT 103/25 and CCT 144/25 and confirm that we act on behalf of amaBhungane Centre for Investigative Journalism (amaBhungane / our client).

LEGAL RESOURCES CENTRE

JOHANNESBURG/NATIONAL OFFICE
2nd Floor West Wing, Women's Jail,
Constitution Hill, 1 Kotze Street,
Braamfontein, Johannesburg, 2001
Tel: +27 11 038 9709
Fax: +27 11 838 4876
info@lrc.org.za

2. Our client has instructed us to bring an application for leave to intervene in the above two matters in terms of Rule 8 of the Constitutional Court Rules (Rules). Our client has further instructed us to, in the alternative, apply for leave to be admitted as amicus curiae in terms of Rule 10(1). This letter serves as a request for your consent for purposes of Rule 10.

amaBhugane's Interest in the Matter

3. Our client is at the forefront of investigative journalism in public procurement-related corruption and has been, and continues to be, interested in the contents of the Public Procurement Act 28 of 2024 (Act).

4. Our client is of the view that Parliament has failed to comply with its constitutional obligation to facilitate public involvement, as required by sections 59(1)(a) and 72(1)(a) of the Constitution, before passing the Act. Our client's position in this regard arises from its own involvement in the consideration of the Draft Public Procurement Bill before it was tabled in Parliament, its involvement in Parliament's own public participation processes and the concerns it raised as part of a group of stakeholders in a letter sent to both Parliament and the Presidency.

amaBhungane's Submissions

5. If admitted, our client intends to make submissions in support of the relief sought in both applications, which include, but are not limited to:

   5.1. Parliament failed to provide the public with adequate information regarding the Act, and its implementation, in particular, adequate costing of the Act, to allow for a thorough assessment of the potential efficacy and impact of the Act on the existing public procurement environment;

   5.2. The National Assembly's failure to facilitate adequate public participation regarding the material amendments contained in the B18B-2023 version of the Act deprived the public of a meaningful opportunity to influence the legislative process;

   5.3. The quality of the engagement with the submissions made by the public by both the National Assembly and critical members of the National Council of Provinces demonstrated a failure to engage with the submissions with an open mind or at all, thus, undermining the participants' opportunity to meaningfully influence the process;

LEGAL RESOURCES CENTRE

JOHANNESBURG/NATIONAL OFFICE
2nd Floor West Wing, Women's Jail,
Constitution Hill, 1 Kotze Street,
Braamfontein, Johannesburg, 2001
Tel: +27 11 038 9709
Fax: +27 11 838 4876
info@lrc.org.za

5.4. The subject matter of the Act is public procurement in terms of section 217 of the Constitution. It creates the legal framework for public procurement, which is central to public finance, governance and service delivery. It also engages a plethora of further constitutional duties and rights. The Act is accordingly required to create a system that is fit for purpose, and which enhances transparency, accountability, fairness, and effectiveness. Given the subject matter of the Act, Parliament bore a heightened duty to ensure that the process by which it was adopted was itself transparent, fair, and accountable to the public. This it failed to do.

5.5. The process followed by Parliament had a particularly deleterious effect on ordinary members of the public and civil society organisations, whose attempts to participate meaningfully in the process were thwarted.

6. Based on our client's unique experience during the process, it's submissions will assist in demonstrating that Parliament failed to facilitate a reasonable public participation process and, in doing so, failed to give the public a meaningful opportunity to influence the legislative process. Its grounds will be set out more fully in the application it seeks to bring (which seeks relief in terms of Rule 8, and alternatively, Rule 10).

7. amaBhungane has studied the papers filed by the applicants in both matters. While it has not yet been possible for amaBhungane to consider the arguments advanced by the applicants, as heads of argument have yet to be filed, if admitted as amicus, amaBhungane will ensure that its submissions do not repeat, and are distinct, from those already made, and are both relevant and of use to the Constitutional Court.

8. In particular, amaBhungane's submissions will focus on the negative impact of the inadequate process on civil society organisations, and will submit that due to the critically important subject matter of the Bill being considered, Parliament had a heightened duty to ensure that it followed an exemplary process to facilitate proper public participation.

Request

9. We accordingly request the parties' consent for amaBhungane to be admitted as an amicus curiae and to present written and oral submissions to the Court, should the Court not grant us relief in terms of Rule 8.

10. Kindly advise us by Tuesday, 29 July 2025 if your clients consent to amaBhungane being admitted as amicus curiae. The truncated timeline is necessitated by the directions issued by the Court on 14

LEGAL RESOURCES CENTRE

JOHANNESBURG/NATIONAL OFFICE
2nd Floor West Wing, Women's Jail,
Constitution Hill, 1 Kotze Street,
Braamfontein, Johannesburg, 2001
Tel: +27 11 038 9709
Fax: +27 11 838 4876
info@lrc.org.za

July 2025, which require answering affidavits to be filed by Friday, 8 August 2025, thus requiring any further applications to be filed on an urgent basis.

11. We await to hear from you.

Yours sincerely,

LEGAL RESOURCES CENTRE
Per: Tsukudu Moroeng

"FA2"

CLUVER MARKOTTER

Legal Resources Centre
2nd Floor West Wing, Women's Jail
Constitution Hill
1 Kotze Street
Johannesburg

Date: 29 July 2025
Your ref:
Our ref: CIT/0189 | BHS/Bdt
e-mail: brendonh@cluvermarkotter.law

By email: rashaad@lrc.org.za

Dear Mr Dadoo

THE CITY OF CAPE TOWN / THE SPEAKER OF THE NATIONAL ASSEMBLY & 12 OTHERS - CASE NO: CCT 144/25

1. We act for the City of Cape Town ("***the City***"), the applicant under case number CCT 144/25.

2. As requested in your letter of 22 July 2025, the City hereby consents to your client being admitted as *amicus curiae* in terms of Constitutional Court Rule 10.

3. Please confirm receipt.

Yours faithfully

B HESS
CLUVER MARKOTTER INC

Cluver Markotter Building | Mill Street | Stellenbosch | 7600
Also at 70 Main Road | Paarl | 7646
PO Box 12 | Stellenbosch | 7599 | South Africa
Directors
AMJ Melck (Chairman) | L Brink | PA Badenhorst | C Cox | AL de Waal
JM Geyser | SM Geyser | B Hess | PL Hill | OH Kruger | JH Lamprecht | L Pecoraro
S Roberts | L van Niekerk **Executive Consultants** | MM Loubser | MC Wild

Telephone +27(0)21 808 5670
Docex 6 | Stellenbosch | **www.cluvermarkotter.law**
Senior Associates | A Cupido-Woodman | K Peens
Associates | B du Toit | DK Isaacs | CF Petersen | S O'Reilly | C Jansen
CW vd Westhuizen | J Laubscher **Practice Manager** | A Keyter
Cluver Markotter Incorporated | Registration Number 2000/002905/21

Outlook

RE: Premier of the Western Cape Government v Speaker of the National Assembly & Minister of Finance [Case No. CCT103/25] // City of Cape Town v Speaker of the National Assembly & Others [CCT144/25]

From Emaran Nurjehan <NEmaran@justice.gov.za>
Date Fri 01 Aug 2025 12:26
To Claire Rankin <Claire@lrc.org.za>; Ngwenya Lawrence <LNgwenya@justice.gov.za>
Cc Cata Bongi <BCata@justice.gov.za>; Tsukudu Moroeng <tsukudu@lrc.org.za>; Rashaad Dadoo <Rashaad@lrc.org.za>

Dear Ms. Rankin,

The above matter and trailing emails refer.

We hereby acknowledge the letter and confirm that our client has no objection to the Rule 10(1) application for leave to be admitted as amicus curiae.

Kind regards,
Ms. Nurjehan Emaran
Candidate Attorney to Mr M Biko
Office of the State Attorney

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

From: Claire Rankin <Claire@lrc.org.za>
Sent: Friday, 01 August 2025 12:06
To: Ngwenya Lawrence <LNgwenya@Justice.gov.za>
Cc: Cata Bongi <BCata@justice.gov.za>; Emaran Nurjehan <NEmaran@justice.gov.za>; Tsukudu Moroeng <tsukudu@lrc.org.za>; Rashaad Dadoo <Rashaad@lrc.org.za>
Subject: Re: Premier of the Western Cape Government v Speaker of the National Assembly & Minister of Finance [Case No. CCT103/25] // City of Cape Town v Speaker of the National Assembly & Others [CCT144/25]

Good afternoon Mr Ngwenya,

Thank you for relying our correspondence.

Have you received an instruction from your client in response to our letter?

Have a great day further,

Claire Rankin
Candidate Attorney

+27 73 228 6199
+27 46 622 9230
claire@lrc.org.za
www.lrc.org.za
116 High Street, Makhanda, 6139

LRC LEGAL RESOURCES CENTRE

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From: Ngwenya Lawrence <LNgwenya@justice.gov.za>
Sent: Thursday, July 31, 2025 16:50
To: Claire Rankin <Claire@lrc.org.za>
Cc: Cata Bongi <BCata@justice.gov.za>; Emaran Nurjehan <NEmaran@justice.gov.za>; Tsukudu Moroeng <tsukudu@lrc.org.za>; Rashaad Dadoo <Rashaad@lrc.org.za>
Subject: RE: Premier of the Western Cape Government v Speaker of the National Assembly & Minister of Finance [Case No. CCT103/25] // City of Cape Town v Speaker of the National Assembly & Others [CCT144/25]

Dear Sir /Madam

I acknowledge receipt of your email of today's date and confirm that a copy of same is sent to the client department for urgent instructions.

Kind regards

LS Ngwenya

Office of the State Attorney

Cape Town

Tel: 021 – 441 9200

Fax: 021- 421 9364

Fax2Email: 0866422650

E-Mail: Lngwenya@justice.gov.za

Website: www.justice.gov.za

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

From: Claire Rankin <Claire@lrc.org.za>
Sent: Thursday, 31 July 2025 15:53
To: Cata Bongi <BCata@justice.gov.za>; Emaran Nurjehan <NEmaran@justice.gov.za>; Ngwenya Lawrence <LNgwenya@justice.gov.za>
Cc: Tsukudu Moroeng <tsukudu@lrc.org.za>; Rashaad Dadoo <Rashaad@lrc.org.za>
Subject: Fw: Premier of the Western Cape Government v Speaker of the National Assembly & Minister of Finance (Case No. CCT103/25) // City of Cape Town v Speaker of the National Assembly & Others [CCT144/25]

Good afternoon,

The above matter and correspondence below refer.

As requested by Mr Ngwenyana, please find correspondence sent to your office on 22 July 2025 re-attached for your convenience.

Kindly provide us with your client's response by **close of business today, 31 July 2025**.

Have a great day further,

Claire Rankin
Candidate Attorney

+27 73 235 6198
+27 66 622 9220
claire@lrc.org.za
www.lrc.org.za
115 High Street Parkwood 6139

LRC | LEGAL RESOURCES CENTRE

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From: Claire Rankin <Claire@lrc.org.za>
Sent: Thursday, July 31, 2025 13:30
To: LNgwenya@justice.gov.za <LNgwenya@justice.gov.za>; lngwenya@justice.gov.za <lngwenya@justice.gov.za>; sbedrow@justice.gov.za <sbedrow@justice.gov.za>

SL OFJ

Cc: Tsukudu Moroeng <tsukudu@lrc.org.za>; Rashaad Dadoo <Rashaad@lrc.org.za>
Subject: Re: Premier of the Western Cape Government v Speaker of the National Assembly & Minister of Finance [Case No. CCT103/25] // City of Cape Town v Speaker of the National Assembly & Others [CCT144/25]

Good afternoon,

We refer to the above matter and our correspondence dated 22 July 2025, which is re-attached for your convenience.

Kindly provide us with your client's response by no later than **close of business today, 31 July 2025**.

Have a great day further,

Claire Rankin
Candidate Attorney
+27 73 326 6199
+27 66 622 9238
claire@lrc.org.za
www.lrc.org.za
116 Main Street, Makhanda 6139

LRC LEGAL RESOURCES CENTRE

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From: Rashaad Dadoo <Rashaad@lrc.org.za>
Sent: Monday, 28 July 2025 18:06
To: brendonh@cluvermarkotter.law <brendonh@cluvermarkotter.law>; Litigation@cluvermarkotter.law <Litigation@cluvermarkotter.law>; Jjswanepoel10@telkomsa.net <Jjswanepoel10@telkomsa.net>; Roelien@swanepoelattorneys.co.za <Roelien@swanepoelattorneys.co.za>; Imanuel@justice.gov.za <Imanuel@justice.gov.za>; Kmosia@justice.gov.za <Kmosia@justice.gov.za>; asanda.makhubalo@gauteng.gov.za <asanda.makhubalo@gauteng.gov.za>; Geert.kruit@gauteng.gov.za <Geert.kruit@gauteng.gov.za>; Speaker@gauteng.gov.za <Speaker@gauteng.gov.za>; modikgale@justice.gov.za <modikgale@justice.gov.za>; mmobeng@justice.gov.za <mmobeng@justice.gov.za>; philia.magwaza@gb.co.za <philia.magwaza@gb.co.za>; stephanie@aproskieattorneys.co.za <stephanie@aproskieattorneys.co.za>; pmontwedi@ncpg.gov.za <pmontwedi@ncpg.gov.za>; zmaneli@ncpg.gov.za <zmaneli@ncpg.gov.za>; Manakam@limpopoleg.gov.za <Manakam@limpopoleg.gov.za>; kvictor@ncpg.gov.za <kvictor@ncpg.gov.za>; mothoas@limpopoleg.gov.za <mothoas@limpopoleg.gov.za>; ngcilitshana@justice.gov.za <ngcilitshana@justice.gov.za>; mchuene@justice.gov.za <mchuene@justice.gov.za>; mmotshabi@justice.gov.za <mmotshabi@justice.gov.za>; mgasemene@nwpg.gov.za <mgasemene@nwpg.gov.za>; lngwenya@justice.gov.za <lngwenya@justice.gov.za>; gbowker@nwpg.gov.za <gbowker@nwpg.gov.za>; sbedrow@justice.gov.za <sbedrow@justice.gov.za>; Mphakaj@premier.limpopo.gov.za <Mphakaj@premier.limpopo.gov.za>; cobailey@justice.gov.za <cobailey@justice.gov.za>; nchabelengm@premier.limpopo.gov.za <nchabelengm@premier.limpopo.gov.za>
Cc: Tsukudu Moroeng <tsukudu@lrc.org.za>; Claire Rankin <Claire@lrc.org.za>
Subject: Re: Premier of the Western Cape Government v Speaker of the National Assembly & Minister of Finance [Case No. CCT103/25] // City of Cape Town v Speaker of the National Assembly & Others [CCT144/25]

Dear Sir/Madam,

We refer to the above matter and our correspondence attached to the email below.

Kindly provide your respective clients' responses by close of business tomorrow, Tuesday 29 July 2025.

We thank you in advance.

Kind Regards

Rashaad Yusuf Dadoo
Attorney (awaiting admission)| Legal Assistant

+27 82 313 4227
+27 11 038 9709
rashaad@lrc.org.za
www.lrc.org.za
Constitution Hill, 1 Kotze Street, West Wing, Women's Jail,
2nd Floor, Braamfontein, Johannesburg, 2001

From: Rashaad Dadoo <Rashaad@lrc.org.za>
Sent: Tuesday, 22 July 2025 16:53
To: brendonh@cluvermarkotter.law <brendonh@cluvermarkotter.law>; Litigation@cluvermarkotter.law <Litigation@cluvermarkotter.law>; jjswanepoel10@telkomsa.net <jjswanepoel10@telkomsa.net>; Roelien@swanepoelattorneys.co.za <Roelien@swanepoelattorneys.co.za>; Imanuel@justice.gov.za <Imanuel@justice.gov.za>; Kmosia@justice.gov.za <Kmosia@justice.gov.za>; asanda.makhubalo@gauteng.gov.za <asanda.makhubalo@gauteng.gov.za>; Geert.kruit@gauteng.gov.za <Geert.kruit@gauteng.gov.za>; Speaker@gauteng.gov.za <Speaker@gauteng.gov.za>; modikgale@justice.gov.za <modikgale@justice.gov.za>; mmobeng@justice.gov.za <mmobeng@justice.gov.za>; philia.magwaza@gb.co.za <philia.magwaza@gb.co.za>; stephanie@aproskieattorneys.co.za <stephanie@aproskieattorneys.co.za>; pmontwedi@ncpg.gov.za <pmontwedi@ncpg.gov.za>; zmaneli@ncpg.gov.za <zmaneli@ncpg.gov.za>; Manakam@limpopoleg.gov.za <Manakam@limpopoleg.gov.za>; kvictor@ncpg.gov.za <kvictor@ncpg.gov.za>; mothoas@limpopoleg.gov.za <mothoas@limpopoleg.gov.za>; ngcilitshana@justice.gov.za <ngcilitshana@justice.gov.za>; mchuene@justice.gov.za <mchuene@justice.gov.za>; mmotshabi@justice.gov.za <mmotshabi@justice.gov.za>; mgasemene@nwpg.gov.za <mgasemene@nwpg.gov.za>; lngwenya@justice.gov.za <lngwenya@justice.gov.za>; gbowker@nwpg.gov.za <gbowker@nwpg.gov.za>; sbedrow@justice.gov.za <sbedrow@justice.gov.za>; Mphakaj@premier.limpopo.gov.za <Mphakaj@premier.limpopo.gov.za>; cobailey@justice.gov.za <cobailey@justice.gov.za>; nchabelengm@premier.limpopo.gov.za <nchabelengm@premier.limpopo.gov.za>
Cc: Tsukudu Moroeng <tsukudu@lrc.org.za>; Claire Rankin <Claire@lrc.org.za>
Subject: Premier of the Western Cape Government v Speaker of the National Assembly & Minister of Finance [Case No. CCT103/25] // City of Cape Town v Speaker of the National Assembly & Others [CCT144/25]

Dear Sir/Madam,

The above matter refers.

Please see attached hereto correspondence for your attention.

Kindly acknowledge receipt of same while we await your clients' responses by Tuesday, 29 July 2025.

Kind Regards

Rashaad Yusuf Dadoo
Attorney (awaiting admission)| Legal Assistant

+27 82 313 4227
+27 11 038 9709
rashaad@lrc.org.za
www.lrc.org.za
Constitution Hill, 1 Kotze Street, West Wing, Women's Jail,
2nd Floor, Braamfontein, Johannesburg, 2001

"FA4"

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 / Yicarrim@gmail.com
Per email: Yicarrim12@gmail.com
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: tsepanya@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 tsukudu@lrc.org.za.

17. We trust that you find this in order.

Yours faithfully,

Concerned Group of Civil Society Organisations and Individuals

Per: Tsukudu Moroeng

"FA5"

Our ref: TM/PRWG/2024

24 May 2024

TO: The Honourable President Cyril Ramaphosa

Per email: presidentrsa@presidency.gov.za
president@presidency.gov.za
presidency@po.gov.za
malebo@presidency.gov.za
Abram@presidency.gov.za

Dear Honourable President Cyril Ramaphosa,

RE: CONSTITUTIONAL CONCERNS REGARDING THE PUBLIC PROCUREMENT BILL

1. This letter concerns the Public Procurement Bill [B18-2023] (**"Public Procurement Bill" or "Bill"**) that has been approved by Parliament and which was sent to you for assent on 16 May 2024, pursuant to section 79 of the Constitution of the Republic of South Africa, 1996 (**"the Constitution"**).

2. We write to you as a group of individuals and civil society organisations with extensive experience in South African public procurement law and practice. As a group, we have been actively engaged in all stages of the public participation process accompanying the development and processing of the Public Procurement Bill in Parliament and with the National Treasury. This letter is submitted on behalf of the following individuals and organisations:

   2.1. African Procurement Law Unit

   2.2. AmaBhungane Centre for Investigative Journalism

   2.3. Corruption Watch

   2.4. Legal Resources Centre

   2.5. Shaun Scott

2.6. Tabitha Paine

3. This letter follows a previous letter sent to Finance Committee Chairpersons Maswanganyi and Carrim in the National Assembly ("**NA**") and the National Council of Provinces ("**NCOP**") respectively, on 19 April 2024, in which we highlighted similar concerns. The letter is annexed hereto marked "**CG1**". Chairperson of the Select Committee on Finance, Mr Yunus Carrim, responded to our letter on 30 April 2024. This response is annexed hereto marked "**CG2**".

4. In summary, we are of the opinion that there are numerous constitutional issues with the Public Procurement Bill. While we have raised many of these issues consistently through the Bill's public participation process, we do not believe that they have been adequately addressed and resolved by Parliament and National Treasury. Therefore, we are of the opinion that these issues require further careful consideration before you assent to and sign the Bill into law.

5. The importance of this Bill cannot be understated. Section 217 of the Constitution requires public procurement to proceed according to a system which is fair, equitable, transparent, competitive and cost-effective. The centrality of public procurement to public finance, governance and service delivery engages a plethora of further constitutional duties and rights.

6. The effectiveness of the public procurement system is crucial in the realisation of all major public policies, whether it is growing the economy by maintaining and upgrading the rail network, building better lives by acquiring vaccines or school meals, developing critical infrastructure and reducing crime by ensuring uninterrupted construction projects, ensuring that municipalities can deliver basic services, or transforming the economy by supporting emerging businesses. All of these policies, and many more, are critically dependent on the procurement system doing what it is supposed to do - acquiring the goods and services needed for the realisation of policy objectives. Not only does this imply that the new rules for public procurement must be as good as they can be, but it also implies that we cannot afford to have the implementation of the new system undermined by uncertainty and potential constitutional challenges.

7. As matters stand, there is significant uncertainty in the procurement sector under the current legal rules, specifically the Preferential Procurement Regulations, 2022, due to multiple legal challenges currently before the courts that may impact drastically on the

lawfulness of procurement transactions and hence whether the accompanying expenditure was irregular. Understandably, procurement officials and their accounting officers are hesitant to embark on major procurement processes in light of such uncertainty. In our view, it is imperative to avoid a similar scenario under a new Bill.

8. In these circumstances, we think that careful exercise of your powers under section 79 of the Constitution is warranted, and that your office accepts a comprehensive submission of the constitutional concerns before signing the Bill.

9. We wish to highlight the following concerns and hope you will accept our request to submit more comprehensive submissions on these concerns at a later stage, with reference to all the relevant provisions of the Bill and the constitutional authorities.

CONSTITUTIONAL SHORTCOMINGS

Meaning of section 217(1) principles

10. The Preamble of the Bill states that it seeks to give effect to section 217(1) of the Constitution, which provides that public procurement must be conducted in terms of a system which is fair, equitable, transparent, competitive and cost-effective. The Bill itself will serve as the legal foundation of this system. However, after reading the entire Bill, there is no certainty as to what exactly these five principles mean, or in other words, what the system itself must contain in order for it to comply with the five principles. For example, what does a "competitive" public procurement system consist of and which provisions of the Bill will ensure that the procurement system will maintain its competitiveness? It is impossible to answer a question like this without any indication from the Bill itself on what the principles mean. We note the concern that providing such a definition may create constraints in meaning, or that the proper interpretation of the principles must be determined by the courts. However, it is undesirable to wait for the often-lengthy conclusion of litigation on this issue in the Constitutional Court for procuring entities to have certainty on the meaning of these principles and how to apply them in their policies. It appears irrational for Parliament to create legislation giving effect to principles that it has not itself defined.

11. Therefore, it seems that the correct approach would be for Parliament to include a statement of what it understands these principles to mean in the Bill, so that it is clear that

the provisions contained in the Bill are made in light of those definitions and to give effect to them.

Proper interpretation of section 217(3)

12. A key question for the constitutionality of the Bill, is the interpretation of section 217(3) of the Constitution, which sets out Parliament's power to create legislation giving effect to organs of states' use of public procurement for policy purposes as envisaged in section 217(2). Section 217(3) qualifies section 217(2) by limiting the discretion of organs of state under subsection (2) to a framework set out in national legislation. The wording of subsection (3) makes it clear that organs of state are obliged to adhere to the envisaged framework and that organs of state are not allowed to implement any of the approaches mandated in subsection (2) other than in terms of the envisaged framework.

13. The mandate granted to Parliament in section 217(3) is explicitly restricted to the creation of a framework. The word "framework" must thus be interpreted in the context of section 217 to understand the mandate granted to Parliament. Without going into detail here, the ordinary meaning of the word "framework" involves the notion of a basic structure or a skeleton, it does not encompass the whole of the construct, but only part of it. To the framework more content must be added to arrive at the whole. When assessing chapter 4 of the Bill, which purports to set out the framework as envisaged in section 217(3) of the Constitution, the question to be asked is whether it only provides the basic structure of preferential procurement to which procuring institutions must add content in order to arrive at the whole preferential procurement system. When assessing chapter 4 through this lens, and bearing in mind the large number of matters to be provided for by the Minister of Finance in regulations, it seems that very little, if anything, is left to procuring institutions to add in order to arrive at the whole preferential procurement system. Simply put, chapter 4, along with the regulations to be made under it, contains the whole of the preferential procurement system. It thus goes far beyond creating only a framework to which procuring institutions must add content. In this respect, chapter 4 thus falls foul of section 217(3) of the Constitution.

14. A clear understanding of what these principles require is essential to ensure their realisation in the procurement process. The various actors, such as procuring institutions and the Public Procurement Office, who are afforded broad discretionary powers under the Bill are expected to use their discretion in a manner that aligns with these principles. To do so, they need adequate guidance regarding what such principles mean and what

they may require. Consequently, it is important that the Bill provides them with adequate guidance in unpacking these core principles contained in section 217(1) from the onset.

15. It would also not be adequate to wait for regulations to provide clarity on these principles. Regulations may take time to craft, leaving individuals with little guidance in the interim. Furthermore, regulations or instructions issued in terms of the Bill themselves need to be guided by a clear delineation of these principles.

Independence of the Public Procurement Office

16. The Public Procurement Office ("**PPO**") established by the Public Procurement Bill is expected to perform an important oversight role in the public procurement process. However, the ability of the Office to discharge this regulatory responsibility effectively and without fear, favor or prejudice as required by the Bill is significantly compromised by the operational role the PPO is also expected to play under the Bill. It appears that the Bill vests a mixture of both operational, oversight, investigative and regulatory functions. Examples include the following:

16.1. Power to maintain databases to facilitate the implementation of the Act (section 5);

16.2. Power to determine standard bid documents (section 24);

16.3. Power to develop an e-procurement system (section 28);

16.4. Power to investigate non-compliance with the Act (section 44);

16.5. Power to enter and search premises (section 55).

17. While we accept that the PPO will play a critical role in respect to operational and oversight functions, we believe that it will not be able to effectively fulfill its investigative and regulatory functions as an institution housed within National Treasury (itself, a procuring institution). We also accept that powers such as those granted by section 55 of the Bill are critical oversight mechanisms, and the fact that the power is exercised by a body within the control of a procuring entity itself and the Minister as executive authority, raises doubts about whether it can execute these powers effectively. The same applies to its investigative powers under section 44 of the Bill. The PPO is unlikely to exercise such

powers in instances where political forces have resulted in non-compliance with the Bill and so those same forces may be used to prevent the PPO from exercising its investigative powers effectively.

18. We note that section 216 of the Constitution mandates National Treasury to prescribe uniform treasury norms and standards and that National Treasury has pointed to this power as justification for situating the PPO within National Treasury. However, many the powers granted to the PPO and especially the oversight and enforcement powers such as those listed in sections 44 and 55, cannot be justified as exercising the power set out in section 216 of the Constitution.

19. The Bill fails to ensure the PPO is vested with adequate institutional independence to enable it to discharge its regulatory and investigative functions. The obvious solution to this would be for the PPO to retain its operational (and section 216) powers and functions, and for its investigative and search powers to be exercised by an independent body (institution, office or person). Provision can be made within the Bill to set up this independent body, by including provisions which safeguard its independence.

20. In summary, absence of such institutional independence, along with many of the extreme and broad discretionary powers afforded to the PPO are of concern. This includes its broad discretion to determine when non-compliance with the Bill is to be investigated, when pertinent information regarding compliance with the Bill should be provided to law enforcement agencies and other regulatory institutions, and its broad power to enter and search both public and private premises.

Access to the Tribunal by parties outside of procurement process

21. The Public Procurement Bill's limitation on who can bring complaints and allegations of non-compliance with the Bill before the Tribunal significantly curtails access to the Tribunal, further limiting the constitutional right of *everyone* to approach independent tribunals or forums for the resolution of a dispute where appropriate. Despite the baseline assumption evident in the Bill, bidders are not the only individuals who may have complaints regarding the awarding of a tender by procuring institutions and who may wish to approach the Tribunal for recourse. The absence of provisions allowing such parties to approach the Tribunal may mean that these parties are forced to approach the courts for judicial review as a means of enforcing their rights to administrative justice under section 33 of the Constitution. We are concerned that this differentiated treatment of persons in

relation to the enforcement of the right to administrative justice in the context of public procurement cannot be constitutionally justified. A proposed solution is to include provisions to allow parties other than bidders to bring matters to the Tribunal.

Chapter 4 and Preferential Procurement

22. The chapter on Preferential Procurement, Chapter 4, provides for a range of mechanisms to achieve equity in public procurement. In other words, it provides for the use of preferential procurement as a policy tool, *inter alia* to uplift historically disadvantaged persons - a goal which all concerned organisations fully support. The default position is that South Africa is an unequal country, and that specific and robust mechanisms for transformation must be included in legislation where legally possible. The wording of sections 217(1) to (3) of the Constitution allow for this. However, what sections 217(1) to (3) of the Constitution do not expressly allow is for mechanisms giving effect to equity to trump mechanisms to give effect to the other four principles and vice versa. Ultimately, the public procurement system must achieve an appropriate balance between the five principles.

23. The main concern with Chapter 4 is that there is no link between equity in section 217(1) and section 9 of the Constitution and Chapter 4 because there is no available definition of equity in the context of the Bill. Chapter 4 is also the only chapter that expressly gives effect to the principle of equity, therefore implying an emphasis on equity from Parliament. While we accept this approach in substance (for transformation), the design (or form) adopted by the Bill to achieve this is constitutionally problematic because the legal basis for this emphasis, and the mechanisms adopted in Chapter 4 to give effect to this emphasis, (for example, through set-asides, prequalification, and subcontracting) is not set out in the Bill.

24. The proposed solution is for the Bill to define equity so that there is a clear link between section 217(1) and the mechanisms adopted in Chapter 4.

General rationality concerns

25. Due to the failures in service and goods delivery that have been caused by the fragmented legal framework, the Bill recognises that it needs to consolidate and simplify the regulatory instruments governing procurement as its core purpose. The Preamble to the Bill states as follows:

25.1. "***AND RECOGNISING*** *that legislation regulating procurement by organs of state is fragmented and legislation regulating preferential procurement constraints justified advancement of persons or categories of persons*" and;

25.2. "***AND IN ORDER TO*** *create a single framework that regulates public procurement, including preferential procurement, by all organs of state*".

26. Despite this, a key feature of the Bill is that it leaves the substance of many provisions of the Bill to regulations and instructions to be issued by the Minister and PPO respectively. This means that it is likely that a plethora of regulations or instructions will be issued, unless the National Treasury issues a single document for "regulations" and a single document for "instructions" (which is unlikely). This possibility is clearly contrary to the main purpose of the Bill, perpetuates the current fragmented system, and is plainly irrational. Furthermore, following revisions made by the NCOP, instructions from National Treasury will only be binding on national and provincial organs of state and pertinently not municipalities; National Treasury can only issue circulars in respect of municipal procurement, which will only be binding and applicable to procurement by those municipalities whose councils adopted such circulars. The effect is that the fragmentation between levels of government (national and provincial on the one hand and local on the other) will remain as well as potential fragmentation across the local government procurement landscape with different municipalities adopting different circulars. The solution is either:

26.1. to ensure that there is a limited number of documents which will contain the regulations and instructions; or

26.2. that the details to be included in the regulations and instructions, to make the relevant provisions operational, are included in the Bill itself.

27. The ultimate goal is to avoid legal complexity, fragmentation, incoherence and associated operational rigidities and disruptions caused by allowing National Treasury to create too many legal instruments outside of the Bill.

General vagueness concerns

OPS

28. Many clauses in the Bill afford various actors in the public procurement process, such as the PPO or procuring institutions, broad and far-reaching discretion. While there is nothing inherently wrong with discretionary powers, the powers granted by the Bill are impermissibly vague, and vested in administrative officials with no substantive guidance. The vagueness of most of these provisions opens them up to a challenge under the principle of legality as an incident of the rule of law. Alternatively, the exercise of this broad discretion may be challenged because of the negative impact it could have on the rights and interests of affected persons. Many of these discretionary powers also do not currently fall to be further guided by regulations, as many of them flow from provisions where the need for future regulations are not contemplated.

29. Various aspects of the search and seizure powers granted to the Public Procurement Office are also impermissibly broad, and in stark contradiction to established principles underpinning the constitutional permissible search and seizure powers. Several of these issues may constitute a direct infringement of various constitutional rights. Others reveal a lack of rationality between the purpose of sections 216 and 217 and the provisions contained in the Bill.

REQUEST

30. We believe that upon engagement with the Bill, in light of these and other constitutional shortcomings, it is possible that you and your office will have reservations on the constitutionality of the Bill. We hope your office will provide us with an opportunity to submit a comprehensive document on the constitutional shortcomings, as we believe it will help inform your decision on whether to sign the Bill or refer it back to the National Assembly. Simply put, we request an opportunity to provide you with further information we believe will assist in the exercise of your powers under section 79 of the Constitution.

31. Our core intention is for you, as the President, to assent to a Bill that is constitutionally sound. It is also to avoid constitutional challenges post-assent, because these challenges will cause major uncertainty and disruption to the procurement system, as we are now seeing in respect to the Preferential Procurement Regulations of 2022. It is best for these issues to be resolved now instead of being left to be ironed out by the courts after lengthy and costly litigation.

32. We recognise that the section 79 process has remained largely unformalised in procedure since the adoption of the Constitution. However, this should not be an impediment to

accept further detailed submissions before signing the Bill or referring it to the National Assembly to reconsider.

33. If, after considering our further detailed submissions, you decide to refer the Bill back to the National Assembly with the explicit mandate of considering constitutional shortcomings, this will aid in the swifter creation of viable and effective constitutionally-sound procurement legislation. As stated above, this will help avoid litigation that will delay the implementation of the Act and the introduction of a new procurement system, which South Africa desperately needs.

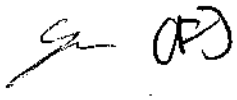
34. As a collective, we hope to see the implementation of the Bill and many of its important innovations as soon as practically possible. However, this should not come at the cost of ensuring that the Bill which is eventually implemented is constitutionally sound and fit for purpose.

35. We are available to provide further input or support to your office on any of the issues outlined above pre-and-post assent of the Bill. Your office is welcome to contact us on tsukudu@lrc.org.za and claire@lrc.org.za.

Yours faithfully,

Concerned Group of Civil Society Organisations and Individuals

Per: Tsukudu Moroeng



CG1

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 / Yicarrim@gmail.com
Per email: Yicarrim12@gmail.com
Per email: nmanqweni@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: tsepanya@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:

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    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 tsukudu@lrc.org.za.

17. We trust that you find this in order.

Yours faithfully,

Concerned Group of Civil Society Organisations and Individuals

Per: Tsukudu Moroeng

CG2

PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

NATIONAL COUNCIL OF PROVINCES
PO Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2425/29 Fax: 27 (21) 403 2221
www.parliament.gov.za

30 April 2024

The Concerned Group of Civil Society Organisations and Individuals
Per: Tsukudu Moroeng
Email: tsukudu@lrc.org.za

Dear Mr Moroeng

Concerns regarding the Public Procurement Bill and Public Participation

1. Thank you for your letter regarding the above matter. You need not have any reservations about writing to us, obviously. That is your right. It's part of public participation. And we welcome it.

2. Of course, we recognise that you are a formidable, very technically competent set of stakeholders, and we appreciate your contribution to the Bill so far.

3. Your letter was discussed at length in our meeting of Tuesday, 26 April 2024, at which some of you were present. This letter is meant to complement that discussion. The discussion took place shortly after 10:00 for about 70 minutes, I think. You can, if you want, watch the relevant proceedings of the committee meeting on YouTube. (The link is https://www.youtube.com/watch?v=THmD--5W8fg)

4. Attached to this letter is the Legal Services Unit's overview from Adv Frank Jenkins on the issues on public participation and some constitutional issues. This letter has to be read in conjunction with Adv Jenkins' overview.

5. We cannot comment on the public participation process in the Standing Committee of Finance (SCoF). None of us was present at their meetings. So, I wasn't commenting on the SCoF process specifically in saying something like there were "flaws in the National Assembly's public participation process". I was trying to refer generally to the Bill being tabled in the NA towards the end of the 6th term of Parliament and if it had come earlier there may been time for more public participation. But Adv Jenkins was present in all the SCoF meetings – and I refer you to his comments. He does not find the public participation process to be flawed. Normally, civil society stakeholders complain that Parliament does

not carry out its oversight and legislative roles effectively. SCoF made changes to the Bill. That is its right.

6. In respect of the constitutional matters you raise, Adv Jenkins did respond to this at the end of the meeting which considered the report on the engagements between stakeholders and National Treasury (NT) between 8 and 10 April. He took this further at the 26 April meeting. We do not see the need for a workshop on constitutional issues. Nor does he. As already pointed out in the Committee, as MPs, we are not constitutional experts, and we rely on Parliament's Legal Services Unit to assist us in that regard. It is their responsibility to ensure that amendments a committee makes to a Bill are constitutionally sound. As it is, this bill is regarded as constitutionally sound by NT's lawyers, the State Law Advisor and Parliaments Legal Services Unit. However, ultimately, it's for a court to decide on this matter. And it seems that one or other party is likely to take the Bill to court.

7. There have been several amendments made to the Bill in the SeCOF process. Many of these flow from the submissions made by you and other stakeholders.

8. The Committee believes that there are definite financial implications to this bill and has expressed its concerns to NT, as we will in our report to Parliament too.

9. We have reservations about the extent to which this Bill provides for regulations by the Minister. But we understand the practical and other reasons for this as explained by NT. Importantly, these regulations have to be gazetted for public comment and are also required to be tabled in Parliament. Moreover, as you well know, regulations that go beyond the framework of an Act are illegal and can be contested in a court.

10. We have the fullest regard for Nedlac and the negotiations and other processes that take place there. It helps if Bills have been processed through Nedlac because they usually come with a degree of consensus or at least a sense of what the differences are between the parties. While Nedlac plays a very important role, it is Parliament, as you well know, that ultimately decides on Bills, taking into account what was decided during the Nedlac process.

11. Our processing of this Bill has followed the usual process, except that we have given far more attention to it than to other Bills, and we asked for a further process of consultation between yourselves and NT. As usual, we receive a briefing on the bill; then have public hearings where we engage with your submissions; then comes NT's response to your submissions, after which you reply to what NT says and then we engage with both yourselves and NT. We had the further process of your engagements with NT between 8 and 10 April, and

when the report was brought to Parliament, we had further engagements with yourselves and NT. It is usually after having heard the stakeholders and NT – all sides - that the committee begins to shape its views. Which is exactly what we have been doing since the committee stage began on this Bill. And you are free to attend meetings or catch up on its proceedings through YouTube. Moreover, our views will be expressed in the amendments that are being processed. If all goes well, we will have processed the amendments by Thursday or Friday this week. We hope to send you the Bill with the amendments by Friday evening for you to send your comments by noon on Monday (6 May 2024). We know that some of you will argue it is too brief a period for you to comment. I'm afraid that's the best we can do. Some of you have been engaging with this Bill over several years, including when it was first gazetted for comment and in the Nedlac process and since, including through the SCoF process. As you might know, we are not obliged in terms of Parliament's rules and norms on processing legislation to take further comments from you beyond the engagements we have already had with you, subject to the standard of reasonableness. We will consider your responses to the amendments at our meeting of 7 May. Some of you want to overhaul the entire bill, we understand, but we are not in support of that. So, we would strongly recommend that you send your comments on the amendments in a brief, precise form and if you want to offer any alternative wording, kindly do so. Ultimately, it is for Parliament, not NT, to decide on these amendments and that is exactly what will happen.

12. Should you want to see the amendments as we process them, you're welcome to contact our Acting Secretary, Estelle Grunewald, at egrunewald@parliament.gov.za and she'll forward you the Bill.

13. We do not understand what you mean when you suggest that you have not engaged directly with the Committee and only with NT. We DID engage directly with you during the public hearings and the response of NT to your submissions, and also when NT presented the report on its 8-10 April engagements with you.

14. We are not sure either how the Committee is meant to come to its views before we complete the consultation process set out in paragraph 11. Oh, we certainly have our views – very decisive ones, as anybody following the proceedings of our recent meetings will know. And you will see them in the amendments to the Bill and in our report to Parliament.

15. We are clear that further consideration needs to be given to this Bill and in our report to Parliament, we will refer to this bill as a "first phase" Bill and are to recommend that within a reasonable period – possibly two years - the Bill be reviewed, including through a Nedlac process, and any appropriate amendments, preferably that are consensually agreed, be brought to Parliament.

16. While we have to take your views seriously, you also have to respect Parliament, and we have to guard against "co-governing" by civil society organisations, as some seem to teether towards wanting to do. We are not suggesting that you are collectively seeking to do this, but you have to accept that Parliament has the final say on a Bill, even if its committees err at times.

17. Of course, while you hold to the views you do, you are not the only stakeholders, as you know. Other stakeholders have very different views, and we have to take into account their views too, as we have done.

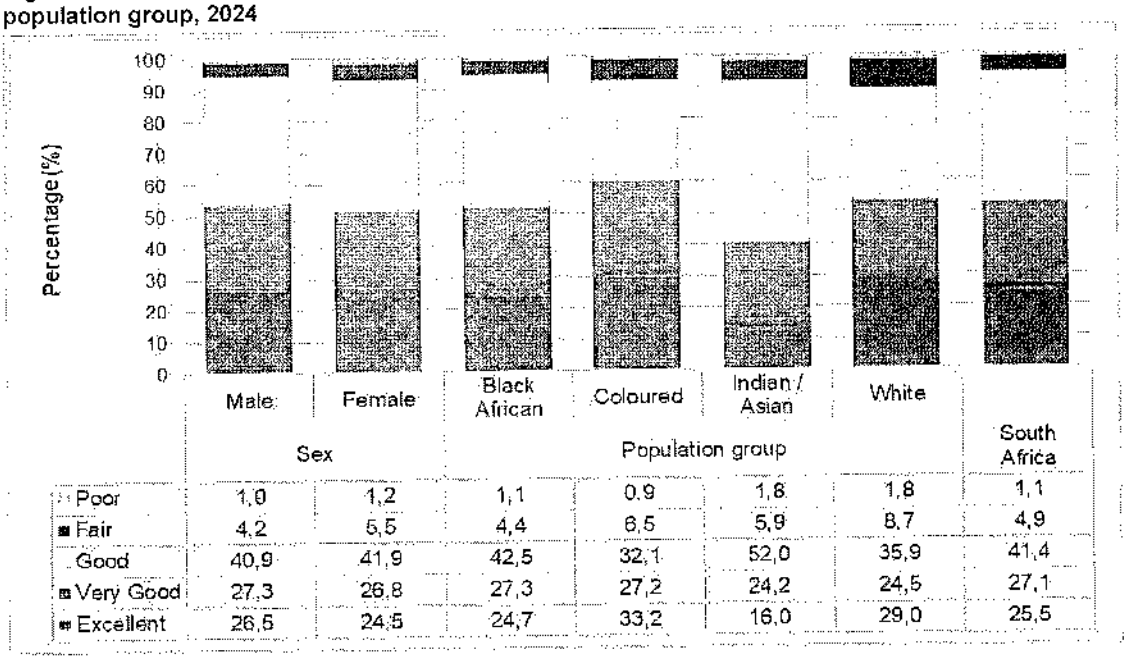
18. Our Committee takes you seriously and has applied its mind to your submissions. In fact, since 2019 this is the Bill that we have spent the longest hours on. According to our committee secretary, Nkululeko Mangweni, we have spent 31 hours on the Bill so far. We have allocated another 14 hours on the Bill until 7 May, though it doesn't seem to me, given where we're at, that we will need all that time. In case you're unaware, unlike in the National Assembly, where the members that serve in the Finance and Appropriations committees are different, in the NCOP, because of the limited number of MPs, the same members serve in both committees. And we have also had to and have to process Bills in the Appropriations Committee. In short, the time spent so far and the time still to be spent this Bill until 7 May in itself says much. More than any other words in this reply.

Once again, we thank you for your letter and wish you well.

Yours sincerely

Yunus Carrim MP
Chairperson: Select Committee on Finance
NCOP

Figure 5.1 – Percentage (%) distribution of self-reported health status of individuals by sex and population group, 2024

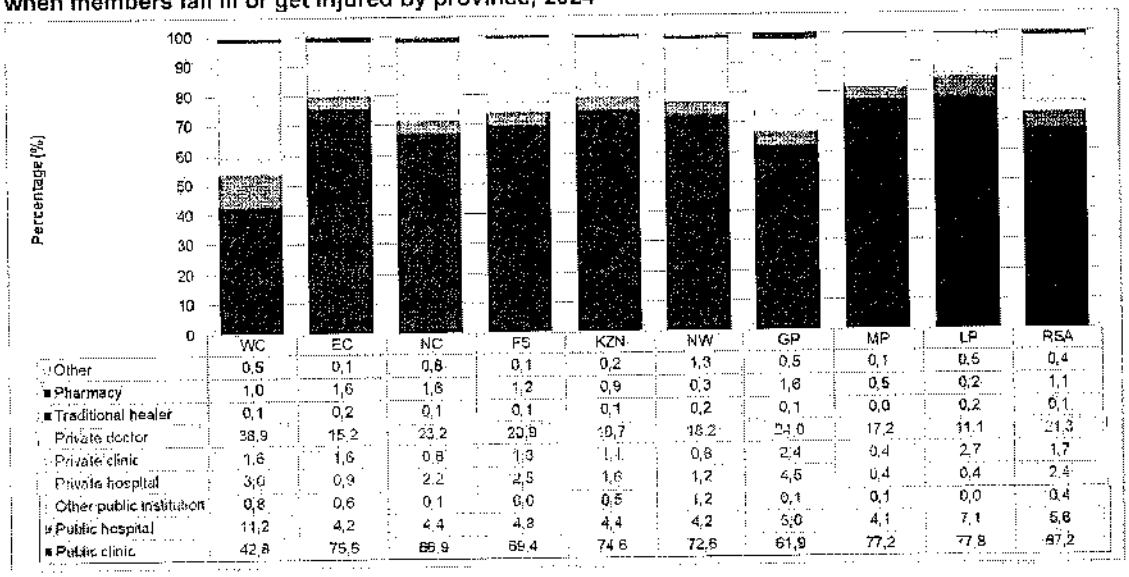


	Male	Female	Black African	Coloured	Indian / Asian	White	South Africa
Poor	1,0	1,2	1,1	0,9	1,8	1,8	1,1
Fair	4,2	5,5	4,4	6,5	5,9	8,7	4,9
Good	40,9	41,9	42,5	32,1	52,0	35,9	41,4
Very Good	27,3	26,8	27,3	27,2	24,2	24,5	27,1
Excellent	26,6	24,5	24,7	33,2	16,0	29,0	25,5

The type of healthcare facility consulted by household members is influenced by factors such as households' proximity to facilities as well as personal preferences based on factors such as affordability and the perceived quality of services.

Figure 5.2 presents the type of healthcare facility that households generally visit first when household members fall ill or have accidents. Nationally, 73,1% of households said that they would first go to public clinics, hospitals or other public institutions, while 25,3% of households said that they would first consult a private doctor, private clinic or hospital. The use of public health facilities was least common in Western Cape (54,8%) and Gauteng (67,0%), and most common in Limpopo (84,9%), Mpumalanga (81,4%) and Eastern Cape (80,4%).

Figure 5.2 – Percentage (%) distribution of the type of health-care facility consulted first by households when members fall ill or get injured by province, 2024



	WC	EC	NC	FS	KZN	NW	GP	MP	LP	RSA
Other	0,5	0,1	0,8	0,1	0,2	1,3	0,5	0,1	0,5	0,4
Pharmacy	1,0	1,6	1,6	1,2	0,9	0,3	1,6	0,5	0,2	1,1
Traditional healer	0,1	0,2	0,1	0,1	0,1	0,2	0,1	0,0	0,2	0,1
Private doctor	38,9	15,2	23,2	20,9	19,7	18,2	34,0	17,2	11,1	21,3
Private clinic	1,6	1,6	0,8	1,3	1,1	0,8	2,4	0,4	2,7	1,7
Private hospital	3,0	0,9	2,2	2,5	1,6	1,2	4,5	0,4	0,4	2,4
Other public institution	0,8	0,6	0,1	0,0	0,5	1,2	0,1	0,1	0,0	0,4
Public hospital	11,2	4,2	4,4	4,8	4,4	4,2	5,0	4,1	7,1	5,8
Public clinic	42,8	75,6	66,9	69,4	74,6	72,6	61,9	77,2	77,8	67,2

Educational inequalities are strongly associated with socio-economic (and therefore also racial) inequalities in South Africa.[24, 25] These inequalities are evident from the early years, even before entry into primary school.[17] They are exacerbated by an unequal schooling system,[16, 18] and are difficult to reverse. But early inequalities can be reduced through pre-school exposure to developmentally appropriate activities and programmes that stimulate cognitive development.[23, 26] Evidence suggests that

funds and monitors thousands of private and community-based ELPs in addition to the school-based Grade R classes. The NDP proposes the introduction of a second year of pre-school education, and that both years be made universally accessible to children.[24] It therefore makes sense to monitor enrolment in learning programmes for children in the 5 – 6-year age group.

According to the DBE's administrative data, 768,000 learners were attending Grade R at ordinary schools in early 2022, of

whom 94% were in public (government) schools. Of the 24,000 learners attending pre-Grade R at ordinary schools, just over half (56%) were enrolled in independent schools, while 44% of pre-Grade R learners were at public (government) schools.[28] These would include some private ECD centres which are registered as schools, but would exclude many other independent and unregistered facilities. Government schools are therefore already providing the large bulk of education services for children in Grade R, but not for pre-Grade R.

In 2019, 93% of children (nearly 2.2 million) in the pre-school age group (5 – 6-year-olds) were reported to be attending some kind of educational facility, mostly in Grade R or Grade 1.

Given the inequalities in South Africa, it was also pleasing to see that as access to education increased among 5 – 6-year-olds, the inequalities across races and income quintiles reduced.

The effect of COVID-19 and lockdown on early learning was dramatic: the year 2020 saw a rapid reversal of the gains made over nearly two decades in early learning access for 5 – 6-year-olds. Young children could not attend ELPs during lockdown because of the closure of schools and ECD centres.

Attendance rates rose again after 2020, and by 2022 the pre-lockdown attendance rate had been regained, with 91% of 5 – 6-year-olds reported to be attending learning programmes. The inequalities across income quintiles and races had also reduced.

"EA7"

"FA8"

2. OVERVIEW OF PERFORMANCE

2.1 Service Delivery Environment

SASSA's constitutional mandate is to administer, manage and pay social grants to all eligible people living in South Africa. The social assistance programme makes provision for income support for older persons, people with disabilities and children, including social relief of distress to individuals and households that are experiencing sudden destitution. Social assistance is South Africa's largest safety net against destitution and poverty, and promotes social and financial inclusion.

In South Africa, households are facing a food insecurity crisis. According to Statistics South Africa, the percentage of South Africa's population impacted by moderate food insecurity and the number of people categorised as seriously food insecure were 10.1 million (17.3%), while the number of people with severe food insecurity was 4.1 million (7%) in 2019. Food insecurity is a result of income and affordability levels, with roughly 55.5% of South African households living below the upper-bound poverty line in a state of food insecurity.

Food insecurity was exacerbated by the COVID-19 pandemic, which induced lockdowns that significantly disrupted food supply chains and resulted in the loss of lives and revenue. Data from Statistics South Africa states that around 23.6% of South Africans faced moderate to severe food insecurity in 2020 as a result of COVID-19, while approximately 14.9% experienced severe food insecurity. The pandemic has seriously hindered efforts to achieve South Africa's National Development Plan (NDP) Vision, and the SDGs aim to eliminate hunger by 2030 (Bayant, 2024)[3].

The unemployment rate in South Africa has seen a slight increase from 2022 to 2024. The fourth quarters of 2022 and 2023 remained the same at 32.1%. However, in the first quarter of 2024 (January to March 2024) there was a slight increase to 32.9% (Quarterly Labour Force Survey, 2022, 2023, 2024)[4,5,6]. The increase in unemployment has had an impact on the demand for social grants. South Africa has one of the world's most expansive social grant systems, with approximately 47% of the population relying on a monthly grant. The country's social grant expenditure is relatively large amid persistently high unemployment. The increase in unemployment could potentially lead to an increase in the number of people relying on social grants.

Social grants remain a vital safety net, particularly in the poorest provinces, according to the General Household Survey (2022) report released by Statistics South Africa. Nationally, grants were the second most important source of income (50.2%) for households after salaries (59.7%). Although a larger percentage of households received grants than salaries and wages in the Eastern Cape, Mpumalanga, Limpopo, and Free State, salaries and wages remained the main source of income for the majority of households across all provinces. The percentage of households and persons who benefitted from a social grant has increased from 30.9% in 2019 to 37.0% in 2022 due to the introduction of the special COVID-19 Social Relief of Distress (SRD) grant. The percentage of households that received grants concurrently increased from 30.8% to 49.5% (GHS, 2022)[7].

During the period under review, adverse economic conditions led to more people needing social assistance; hence approximately 1.9 million of social grant applications were processed, 1.7 million of which were approved. SASSA was also able to increase the number of grants in payments, including grant-in-aid, from 18 829 716 at the end of March 2023 to 19 137 524 at the end of March 2024. This represents an overall growth of 1.63%. The continued rollout of the COVID-19 Special Relief Grant to individuals aged 18 – 59 who are unemployed and have no income played a central role in protecting individuals and households against the loss of income due to the serious implications of the COVID-19 pandemic. For the period 01 April 2023 to 31 March 2024, an accumulative 174 833 768 COVID-19 SRD grant applications were processed, with a monthly average of approximately 14.5 million.

3 Bayant, E. at al., 2024. Food systems approach: Reversing the trajectory of food insecurity in Africa, Journal for Inclusive Public Policy. Available at: (https://www.inclusivesociety.org.za/post/food-systems) (Accessed: 17 May 2024).

4 South Africa. Statistics South Africa. 2022. Quarterly Labour Force Survey (QLFS) Q4:2022. Available at: https://www.statssa.gov.za/publications/P0211/Presentation%20QLFS%20Q4%202022.pdf (Accessed: 17 May 2024).

5 South Africa. Statistics South Africa. 2023. Quarterly Labour Force Survey (QLFS) Q4:2023. Available at: https://www.statssa.gov.za/publications/P0211/Presentation%20QLFS%20Q4%202023.pdf (Accessed: 17 May 2024).

6 South Africa. Statistics South Africa. 2024. Quarterly Labour Force Survey (QLFS) Q1:2024. Available at: https://www.statssa.gov.za/publications/P0211/Presentation%20QLFS%20Q1%202024.pdf (Accessed: 17 May 2024).

7 South Africa. Statistics South Africa. 2022. General Household Survey 2021. Available at: https://www.statssa.gov.za/publications/P0318/P03182021.pdf (Accessed: 17 May 2024).

PMG PARLIAMENTARY MONITORING GROUP

"FA9"

Public Procurement Bill: National Treasury briefing

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Finance Standing Committee

05 September 2023

Chairperson: Mr J Maswanganyi (ANC)

Meeting Summary

Video

The Standing Committee on Finance was briefed by National Treasury on the recently tabled Public Procurement Bill.

The Committee was told that the purpose of the Bill was to regulate public procurement and to prescribe a framework within which preferential procurement must be implemented. Furthermore, it intends to resolve the current lack of clarity on the public procurement regime in South Africa, which is currently fragmented as there are several laws that regulate procurement across the public administration.

Some Members were left confused by the Bill, as they felt that it did not have any clear objectives. They suggested that the Bill should have clearly defined transformation objectives and obligations, with an emphasis on price being the primary determinant of who can provide services for the State.

Members further stressed that the State should do all that it can to pay a premium for goods and services procured from historically disadvantaged groups so as to stimulate economic growth in the country.

Members further asked about the dispute resolution mechanism in the Bill and sought clarity on how the Bill created transparency in public procurement processes across all levels of government

The Chairperson informed the Committee that he had received correspondence from stakeholders to postpone next week's scheduled public hearings on the Bill. A response would be sent to the stakeholders to indicate that the hearings would proceed.

Meeting report

The Chairperson welcomed everyone.

Mr Masualle's apology was noted.

Thereafter, he handed over to officials from the NT to present the Public Procurement Bill to Members.

Briefing by National Treasury (NT)

Ms Mendoe Ntswahlana (Chief Procurement Officer at NT) and Mr Willie Mathebula (Chief Director: Supply Chain Management Policy, Norms, and Standards at NT) made the briefing.

Members were informed that the presentation would provide some context on the Bill, but mainly focus on the progress of the Bill thus far, given that the department had previously presented the Bill to them in May of this year.

The purpose of the Bill, he outlined, was to regulate public procurement and to prescribe a framework within which preferential procurement must be implemented. The public procurement regime in South Africa is currently fragmented as there are several laws that regulate procurement across the public administration. This has resulted in confusion as different procurement rules apply for different organs of state.

Following the December 2014 Cabinet directive for NT to accelerate the modernisation of public procurement system through a legal framework that introduces broader policy reforms, NT developed a conceptual framework for a draft Public Procurement Bill for discussions with stakeholders. NT engaged with stakeholders at national, provincial, and local spheres of government including professional bodies in auditing and accounting to obtain ideas, consider the pros and cons of policy proposals, and obtain consensus on the strategic intent of the Bill. A draft Bill was prepared. A Socio-economic Impact Assessment (SEIA) was completed and NT obtained a preliminary opinion from the Office of the Chief State Law Advisor. Cabinet approved the Bill in February 2020 for publication for public comment for a period of three months. The comment period was extended to June 2020. NT assessed more than 4000 submissions received and a revised Bill was prepared. NT also considered recommendations of the Judicial Commission Of Inquiry Into Allegations Of State Capture, Corruption And Fraud (Zondo Commission), the President's responses to Parliament thereto, and the Constitutional Court judgement with regards to the 2017 Preferential Procurement Regulations.

The Bill was submitted for engagement at Nedlac (National Economic Development and Labour Council) on 13 April 2022. The Nedlac Public Finance and Monetary Policy Chamber in collaboration with Industry Chamber established a task team comprised of Government, Business, and Labour. The task team held 15 sittings from 6 May 2022 to 7 October 2022. The actual deliberations on the Bill commenced on 2 June 2022. In addition to these engagements, there were outside discussions held between social partners for further alignment on key issues. The task team reviewed the Bill focusing on thematic areas in accordance with the chapters of the Bill. The final Nedlac report was signed on 25 October 2022 and submitted to the Minister of Finance. The Bill has been legally vetted by the OCSLA and issued with a preliminary opinion for the Cabinet process. The Presidency also issued a SEIA certificate, subject to consultation with FOSAD (Forum of the South African Directors-General) before submission for Cabinet's consideration. FOSAD engagement was conducted on 4 and 8 May 2023. Cabinet approved the Bill on 10 May 2023 to be introduced to Parliament. The Bill was tabled in Parliament on 30 June 2023.

The Bill aims to: determine general procurement requirements; provide for a preferential procurement framework; establish a Public Procurement Office within National Treasury and define its functions; define the functions of provincial treasuries; define the functions of procuring institutions; provide for measures to ensure the integrity of procurement process including access to procurement processes and information; provide for the power to prescribe different methods of procurement and bidding process; use of technology in procurement; provide for dispute resolution mechanisms; enable regulations among others to have different prescripts for different types of procurement and provide for the repeal and amendment of certain laws.

The presentation also looked at the arrangement of chapters in the Bill and gave an overview of key provisions.

(See Presentation)

Discussion

Mr F Shivambu (EFF) said he was struggling to understand the proposed legislation presented to the Committee. The Bill, he felt, should have clearly defined transformation objectives and obligations, with an emphasis on price being the primary determinate of who can provide services for the State. He asked if this would be included in the Bill. If it would not be, there would be no changes to the structure of the economy as the historically empowered business elite would always have a strategic and permanent advantage over others.

Two, he outlined that the EFF has in its elections manifesto, and on other occasions, emphasised that procurement by the State should be an instrument to promote localisation and that it should be stated in the legislation that certain goods and services that the State procures, inclusive of professional services, must be local, or a threshold should be implemented. This would enhance and stimulate real economic activity – which he believed was not present in the Bill.

Both the EFF and the ANC discussed in 2019 the benefits of state-led localisation of goods and services for the South African economy. He proposed that the Bill look into the content of these discussions and that the Committee have further deliberations on the Bill.

Three, he wondered why the NT did not clearly state which provisions of the Public Procurement Act (PPA) that it wanted to amend. All in all, he thought that the drafting of the Bill was poorly done.

Dr D George (DA) mentioned that it was well-known that corruption within the country, particularly in public procurement, remained a serious problem and it seemed that the Bill's proposed solution to this was to centralise public procurement. As such, he asked what mechanisms would be put in place to ensure that the envisaged PPO would be held to account, given the powers that it will be given and the fact that it will have to oversee procurement in all three levels of the government. Further to that, he asked why the recommendation made by the business community on whistleblowers was not taken into account by the Bill.

Two, he asked what the role of Provincial Treasuries (PT) would be in relation to the PPO as it had not been mentioned in the Bill.

Three, he asked where quality, price, and efficiency were featured in the Bill. Placing focus on all three was important because the country's fiscus has been under strain for some time, making it difficult to release funds to provide services to the people.

Mr M Manyi (EFF) said that he did not understand the purpose of the Committee meeting because the Bill ignored critical aspects of the National Development Plan(NDP), one of which was the recommendation to build and improve the capacity of the State so as to restart economic activity in the country. Instead, the implementation of the Bill would lead to the outsourcing of the State's capacity. In other words, he went on, the NT was requesting the Committee to actively undermine the NDP. What should rather be discussed in the meeting, he advised, was how the State should aim to build capacity within itself so that it can provide services to the people.

After that, he asked what the purpose of the Bill was, because it had no clear objectives. Furthermore, no context was provided by officials from the NT on what the key issues with the Preferential Procurement Policy Framework Act(PPPFA) were. The real reason why the PPPFA failed, he stressed, was because it placed too much emphasis on Section 217 (1) of the Constitution and very little on Section 217 (2) – which speaks to the empowerment of historically disadvantaged groups. As a result of the 80/20, 90/10 preferential policy, those groups did not have economies of scale to compete on an equal scale with established business players who particularly benefited from the Apartheid government.

Another issue he had with the Bill was that it proposed too many changes to the current legislation, and it unnecessarily re-worded certain sections. For instance, it has changed the 80/20, 90/10 preference point system to 'value for money', which he thought meant the same thing. No empowerment to historically disadvantaged groups would be brought by this change of words, he stressed.

He then asked why the Bill had barely touched on localisation. He agreed that the Committee had to hold further discussions on the Bill and that it should be re-worked by the department because, in its current form, it would not bring about meaningful change in the economy. The Bill, he added, should not be supported by the Committee.

Ms P Abraham (ANC) indicated that the ANC could not question the Bill as it had questioned its content when it was previously presented to the Committee. Thereafter, she mentioned that she would pose several clarity-seeking questions to the department.

One, she asked how the Bill sought to create transparency in public procurement processes across all three levels of government.

Two, she asked if it would not be more appropriate for the Bill to refer to younger people as the youth and not as children.

Three, while she was pleased with the fact that the Bill includes a dispute resolution mechanism, she wondered what the process would be to ensure that disputes are resolved.

Four, she asked whether the Bill set out a process for lifestyle audits to be conducted on State officials. If so, how then would public officials be held accountable for unethical and corrupt practices?

Five, she asked what the proposed timelines for the implementation of the Bill were.

Six, she asked what would be the outcomes and benefits of the Bill's implementation.

The Chairperson said the manner in which people who are considered politically exposed (because they are related to political officials) were treated was wrong in the country. He questioned why relatives of Members of Parliament were not able to conduct business with the State given that the Members are not involved in the supply chain management (SCM) processes. This was prejudicing their relatives, he added.

Then he asked how much capacity the proposed public procurement tribunal would have to conduct reviews, as court cases taken for review are currently dealt with in a space of three years at times.

He agreed with other Members who felt that the Bill needed to be clearer on the empowerment objectives, especially as this was central to the struggle for liberation in the country.

He recommended that the Bill make a provision for a law of preferential procurement rather than having the Minister having to first discuss it with the Ministers of Trade, Industry, and Competition; Small Business; Women, Youth and People with Disabilities (PWD), and any other affected by the draft regulations; before doing so. He sought clarity on what was meant by this provision (Clause 17 of the Bill). All the loopholes in the current legislation on empowerment should be closed so that it cannot be taken to court.

Mr Shivambu took issue with the view that the Bill could not be questioned as it had been previously presented to the Committee. All Members, as public representatives, carried the right to question the effects of a particular piece of legislation.

The Chairperson told Members that the Committee had received letters from stakeholders to postpone the date for the public hearings. He asked National Treasury to clarify some of the concerns raised in the letters.

Mr Mathebula, in response to the questions on localisation and value for money, said that Chapter Four of the Bill makes provision to draft a policy for categories of preference in the allocation of contracts and the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination. It also refers to the Broad-Based Black Economic Empowerment (BBBEE) Act of 2003.

The policy envisaged in this Chapter must include one or more preference point systems and thresholds. In other words, the 90/10, 80/20 requirements will be done away with because the PPPFA is being repealed through the Bill. Localisation and industrialisation are also provided for in this Chapter, he said. The format of both will be properly clarified in the regulations.

He explained that the presentation had incorrectly referred to the youth as children.

Regarding the recommendation that the Bill make a provision for the law of preferential procurement rather than having the Minister having to discuss it first with other Ministers, he mentioned that once adopted, a range of regulations would be enacted by the executive that will address this. However, the department noted the suggested provision.

In response to the concerns regarding the retention of the 80/20, 90/10 preferential point system, he indicated that this has been subject to debate in the country, with the NT committing to resolving the issues in the PPPFA; hence the Act is now being repealed.

On the point raised of why NT did not clearly state which provisions of the Public Procurement Act it wanted to amend, he said that the schedule in the presentation clearly showed the pieces of legislation that would be amended or repealed, these are (among others): the National Suppliers Procurement Act (which will be repealed), the Housing Act (which will be amended), the National Water Act (which will be amended), the SITA Act (which will be amended).

Referring to the question on the recommendation made by the business community not taken into account in the Bill on whistleblowers, he indicated that the NT was not opposed to whistleblowing, rather it disagreed on whether the Bill was the correct piece of legislation where whistleblowing should be provided for. In line with its belief that corruption cuts across divisions in government departments and not only in SCM, the NT made the suggestion to the Department of Justice (DoJ) that the Protected Disclosure Act should include this provision – this Act falls under the DoJ.

During debates at Nedlac, the NT discussed whether it wanted to incentivise people to blow the whistle on alleged corruption. One of the proposals made by labour was that a whistleblower be paid R100 000 for every successfully prosecuted incident. The NT was opposed to this and argued that reporting corruption or any mischief is a moral obligation.

In response to the question on what the role of PTs would be in relation to the PPO, he remarked that their role has been clarified in Chapter Two of the Bill.

Answering the concerns raised on value for money, he said that the State should strive to achieve value for money and transformation at the same time.

Referring to the question of what mechanisms would be put in place to ensure that the envisaged PPO would be held to account, he explained that the Bill spoke to measures that will deal with corruption, one of which is collaboration between the PPO and law enforcement agencies.

Ms Ntswahlana, responding to the question on how the Bill sought to create transparency in public procurement processes across all levels of government, outlined that Chapter Two of the Bill does state that PPO must, in accordance with the Bill, develop and implement measures to ensure transparency.

Ms Emple van Schoor (Chief Director: Legislation at the NT) said that the regulations that will be drafted by the Minister will give him/her and the PPO certain powers to issue out instructions and the procurement policy, similar to the Public Finance Management Act (PFMA) and Municipal Finance Management Act (MFMA).

Regarding the question of why relatives of Members of Parliament were not able to conduct business with the state, she explained that the Bill did not use the term politically exposed persons, rather, it refers to certain people who are automatically excluded from tendering, such as officials in the bureaucracy and their relatives. There is no prohibition for public office bearers' relatives to participate in the bidding of tenders.

There is a provision where an institution must identify the family members to ensure that there is no undue influence, but no preclusion.

In response to the question on the dispute resolution mechanisms in the Bill, she highlighted that the first point of call is that a particular institution may reconsider a decision to award a tender; if the tenderer is not satisfied they can take the matter up to the tribunal. There is a timeline prescribed for the tribunal to consider the dispute.

Regarding the capacity of the procurement policy tribunal, she stated that it was difficult to say how many appeal reviews would be received by the tribunal. Nevertheless, unlike the court, review processes will be expedited in the tribunal, she added.

There is a provision to make the public procurement transparent to the public, but this will be covered in the regulations.

On whether the Bill set out a process for lifestyle audits to be conducted in the State, she explained that there is a limited provision in Regulation 58 that provides for lifestyle audits for automatically excluded persons and relatives of officials. The NT believed that the lifestyle audits for officials in the SCM should be dealt with in employment legislation, through the assistance of the Department of Public Service and Administration.

Once the Bill is implemented, she went on, the NT will have to develop the regulations required as well as the applicable instructions. One of the areas that should have priority is Chapter Four, given the lack of regulations in the PPPFA that address empowerment.

Mr Manyi highlighted that the NT did not respond adequately to his questions on the outsourcing of the capacity of the state and the value for money. The Bill, he added, does not provide a premium for empowerment.

Dr George asked how the PPO would impact the role of the NT and PTs in monitoring public procurement.

Mr Shivambu mentioned that there are certain functions of the State that do not need an external service provider like cleaning and security services, the repairing of potholes, and the building of bridges which do not require technical skills. The legislation should state that the following sectors are not due for procurement, he stressed.

In areas where it is not advisable or possible for the State to carry out those functions internally then the intention should be transformative and aimed at localisation, industrialisation, and the sustainable creation of jobs in the country because at present it seems that the State went on tender for all things.

Mr Manyi pointed out that the legislation must be clear on set-asides, so as to give effect to empowerment objectives.

Value for money was a reformulation of the 90/10 and 80/20 preferential point system, which perpetuated white monopoly capital. The Bill, he recommended, should focus on what the allowable premium was. Further to that, he called for discussions around this to take place.

He recommended that the Act must supersede the Companies Act.

He wondered how the BBBEE sector codes would be affected by the Bill's intention to supersede all other public procurement legislation.

Mr Mathebula indicated that the department took note of the points made on the need to capacitate the State to carry out its functions internally, however, it will not be possible to place the provision in the Bill to regulate what services should be outsourced.

Regarding the concern on value for money and the BBBEE sector codes, he assured the Committee that the department would consider the points made.

In response to the recommendations made on the premium, he stated that the PPPFA prescribes a maximum premium of 11.1% for 90/10, and 25% for 80/20 – there is a threshold of what tenders apply to both. Given that the department will be getting rid of the PPPFA, it will have to specify in its subsequent regulations what premium the State would be willing to pay.

Ms Ntswahlana added that Chapter Two was quite detailed on the different categories of procurement and procuring institutions.

Chapter Three speaks to what should be done in a bid committee where an official is found to be a relative of the bidder.

Value for money, she added, will go further than the principle of procuring an item at the best possible price.

The Chairperson pointed out that the Bill was initiated in 2014 and went through various forums before being tabled in Parliament on 30 June 2023. The Committee put out an adverfor written submissions and public hearings were scheduled for next week. A response will be provided to the stakeholders who argued that the public hearings should be delayed. He emphasised that the Bill was now the responsibility of the Committee and it would deliberate and make changes where necessary.

The Committee Secretary said that the Committee would hold a physical meeting the following day.

The meeting was adjourned.

amaBhungane
Centre for Investigative Journalism

The Media Mill, 7 Quince Street, Milpark, Johannesburg 2092
+27 10 493 3320
admin@amabhungane.org
www.amabhungane.org
@amaBhungane
facebook.com/amaBhungane

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SUBMISSIONS ON PUBLIC PROCUREMENT BILL, 2023

Introduction

1. The amaBhungane Centre for Investigative Journalism welcomes the opportunity to make written submissions on the **Public Procurement Bill, 2023**.

2. AmaBhungane is an independent, non-profit company founded in 2009 to develop investigative journalism so as to promote free, capable and worthy media and open, accountable, just democracy.

3. AmaBhungane takes seriously its role as an active member of South African society, and has advocated for improvement to information and freedom of expression laws since 2010. We recognise the importance of freedom of expression and access to information, and of how transparent and accountable government is necessary to serve the country's citizens.

4. As investigative journalists we have witnessed the realities of corruption – how it occurs and its massive impact on the citizens of South Africa. Many of our investigations have been into procurement-related corruption, and so we have developed a clear understanding of how the weaknesses in the procurement system have facilitated its abuse and how the utter lack of accountability has ensured this corruption has become systemic.

5. Our submissions focus on the fundamental weaknesses in the Bill. We believe it is an insufficiently detailed law, which would delegate far too much decision-making power to the executive and which fails to introduce truly robust anti-corruption mechanisms. On these topics, we submit that a significant re-working of the Bill be undertaken.

6. We also believe that the Bill fails to introduce a transparency regime necessary to give effect to the constitutional obligation for government to 'provide effective, transparent, accountable and coherent government'[1] and the principle of public

[1] Section 41(1)(c) of the Constitution.

administration that 'transparency must be fostered by providing the public with timely, accessible and accurate information.'[2] On this topic, we submit that textual amendments can bring the Bill's provisions into line with the Constitution and international best practice.

7. We appreciate the opportunity to make these submissions.

8. We do however note our disappointment and concern at the short time period the public was given to prepare submissions. This Bill is a vitally important one because of the role public procurement can play in economic development and transformation, and of how it is uniquely vulnerable to corruption. The issue of public procurement is also technically complex. The three weeks the public was given to prepare their submissions was insufficient to enable all interested parties to conduct thorough research, consult with experts in different fields, and liaise with like-minded organisations and individuals. It is also particularly concerning that the oral submissions are scheduled for the day after the written submissions are due. This means it is practically impossible for the members of the committee to read the written submissions in preparation for the oral presentations.

9. This Bill deserves thorough consideration and deliberation. It should not be rushed through the Parliamentary process without the opportunity for legislators to engage thoroughly with the issues and the public submissions.

Fragmentation

10. The preamble to the Bill recognises that 'legislation regulating procurement by organs of state is fragmented'. This is because procurement has been regulated by a number of different pieces of legislation, regulations to those laws, and numerous instructions notes issued by National Treasury. This fragmentation has had practical and ethical consequences. It has led to poor adherence to the rules and confusion resulting from the large number of legal instruments containing different and sometimes inconsistent obligations. This resulted in inefficiency and over-spending, and the complexity of the processes and obligations made it difficult to monitor and so easy to abuse.

[2] Section 195(1)(g) of the Constitution.

11. The Zondo Commission report described this fragmentation – what Judge Zondo saw as 'difficulties in interpreting the legislative mosaic' – as an 'intractable problem'.[3]

12. Despite its recognition of the problem, the structure of the Bill risks recreating that same fragmentation by creating a procurement system governed by regulation and instruction.

13. There are two main problems with this:

    a. In respect of regulations, it abdicates primary law-making power to the executive, which contradicts the principles of representative and participative democracy; and
    b. In respect, primarily, of instructions, it is not practical to have so many responsibilities conferred on the Minister and the PPO as it will create that problematic fragmentation we have now and the PPO is not being capacitated to take on this workload.

14. In leaving so much to regulation, the Bill fails to **establish** a procurement system. Regulations will design and establish procurement methods; the processes for bid specification, invitation, submission, opening, evaluation, adjudication and award of bids; the bid committee system; the disclosure of procurement information and the use of technology. These are some of the most fundamental components of procurement.

15. The fundamentals of a procurement system must be set out in legislation. This ensures that the design of the system is subject to parliamentary consideration and public participation. It also ensures that the system is stable and not subject to political pressures or policy whims; it is far easier to change processes governed by regulation than to amend statutory processes.

16. As Parliament, you have the primary constitutional obligation to make law. There is multi-party deliberation in the parliamentary process and it must involve meaningful public participation. This ensures that all voices are heard and considered and that lawmakers are able to learn from experts and real-world experience of the issues being considered. Denying the public the opportunity to participate in the substantive design of the procurement system is anti-democratic.

[3] Zondo Commission Report, Part 1 Vol 3, p.796.

17. Regulations and other subordinate legislation clearly have their place in law. But they must not be used as substitutes for primary legislation; they should be used to provide guidance on the implementation of that primary legislation.

18. An additional concern is that, because of the significant decision-making left to regulations, it is impossible to understand how the Bill will work in practice in the absence of those regulations. Members of Parliament and of the public are therefore not able to truly understand the impact of the Bill which means that any deliberations or submissions are made half-blind.

19. On the practical level, leaving so much to regulation and instruction – by the Minister, the PPO and provincial treasures – risks creating a new proliferation of subordinate legislation.

20. We have seen that Treasury issues a high number of instructions, and if this is allowed to continue, the confusion and inconsistencies that exist in our present system will be recreated.

21. Provincial treasuries are empowered to issue binding instructions for procuring entities within their province as long as they are not inconsistent with National Treasury instructions. This means similar procuring entities in different provinces may have different obligations which could cause confusion and an inconsistency in standards.

22. National Treasury justified this system on the need for flexibility. They said that empowering the Minister to regulate procurement methods and systems ensures that appropriate methods and processes can be designed for the vastly different types of goods and services that need to be procured. This flexibility is overblown, and does not represent international best practice.

23. International best practice is that methods and procedures for procurement be included in legislation rather than subordinate legislation. The United Nations Commission on International Trade Law (UNCITRAL) prepared a model procurement in law in 2011. This model law provides guidance on how procurement should be statutorily regulated.

24. For example, Article 27 concerns methods of procurement and states:

    1. *The procuring entity may conduct procurement by means of:*
        a) *Open tendering;*

b) *Restricted tendering;*
c) *Request of quotations;*
d) *Request for proposals without negotiation;*
e) *Two-state tendering;*
f) *Request for proposals with dialogue;*
g) *Request for proposals with consecutive negotiations;*
h) *Competitive negotiations;*
i) *Electronic reverse auction; and*
j) *Single-source procurement.*

25. The following article states that open tendering is the default, and that the use of any other method must be justified.

26. The model law then sets out in detail the specific circumstances under which another method of procurement can be used, and provides comprehensive guidelines and requires that any use of those other methods be justified.

27. For example, Article 32 concerns the 'Conditions for use of a framework agreement procedure'. It states:

> 1. *A procuring entity may engage in a framework agreement procedure in accordance with chapter VII of this Law where it determines that:*
>   a. *The need for the subject matter of the procurement is expected to arise on an indefinite or repeated basis during a given period of time; or*
>   b. *By virtue of the nature of the subject matter of the procurement, the need for that subject matter may arise on an urgent basis during a given period of time.*
> 2. *The procuring entity shall include in the record required under article 25 of this Law a statement of the reasons and circumstances upon which it relied to justify the use of a framework agreement procedure and the type of framework agreement selected.*

28. The model law also provides guidance on the language to be used and information to be included in bid documents. For example, Article 10(4) states:

> *To the extent practicable, the description of the subject matter of the procurement shall be objective, functional and generic. It shall set out the relevant technical, quality and performance characteristics of that subject matter. There shall be no requirement for or reference to a particular*

trademark or trade name, patent, design or type, specific origin or producer unless there is no sufficiently precise or intelligible way of describing the characteristics of the subject matter of the procurement and provided that words such as "or equivalent" are included.

29. It also includes an example of a provision to regulate preferential procurement. Article 11, titled 'Rules concerning evaluation criteria and procedures', sets out the criteria that may be used by procuring entities. Subsection 3(b) provides the detail on the nature of the preferential criteria that may be considered by procurement officials, and then refers only the 'margin of preference' to regulations.

In addition to the criteria set out in paragraph 2 of this article, the evaluation criteria may include: ... A margin of preference for the benefit of domestic suppliers or contractors or for domestically produced goods, or any other preference, if authorized or required by the procurement regulations or other provisions of law of this State. The margin of preference shall be calculated in accordance with the procurement regulations.

30. The model law is instructive in understanding the level of detail required in legislation. For example, Article 14 address 'Rules concerning the manner, place, and deadline for presenting applications to pre-quality or applications for pre-selection or for presenting submissions', and states that

If the procuring entity issues a clarification or modification of the prequalification, pre-selection or solicitation documents, it shall, prior to the applicable deadline for presenting applications to pre-qualify or for preselection or for presenting submissions, extend the deadline if necessary or as required under paragraph 3 of article 15 of this Law in order to afford suppliers or contractors sufficient time to take the clarification or modification into account in their applications or submissions.

31. The International Monetary Fund assessed the South African Bill in June 2023 and noted the failures of the Bill to firmly establish policy in the legislation. It stated that:

A comparison with the UNCITRAL model procurement law suggests that the bill leaves many important procurement areas to be specified by regulation such as, the definition of procurement methods (including for preferential procurement) and circumstances for use, and the

standardization of transparency standards among other areas covered in the general provisions. This risks exposing the procurement system to excessive regulatory discretion and insufficient public scrutiny of changes in key areas.[4]

32. In summary, leaving so much fundamental decision-making and regulation to the Minister, and national and provincial treasuries risks creating a system that is unstable and unclear, and which is liable to ad-hoc change based on prevailing political priorities.

33. The Bill's failure to provide the necessary detail to provide practical guidance to procuring officials and firmly establish the policy underpinning procurement in South Africa renders it fundamentally inappropriate to serve as the 'single framework' to regulate public procurement. It requires significant redrafting.

34. The last concern with the excessive responsibility assigned to the PPO is capacity. National Treasury is extremely under-staffed and there is no commitment to increase its capacity from a resource and expertise perspective. If the Bill seeks to improve the existing system, it is illogical to assign significant decision-making power to an under-capacitated entity. With so much required from the PPO the likelihood of achieving a stable, efficient and effective system is low.

Policy Direction

35. The Bill fails to address how procuring entities should balance the – sometimes competing – requirements of a procurement system in section 217 of the Constitution. This section requires that procurement take place through a system that is fair, equitable, transparent, competitive and cost-effective.

36. Judge Zondo emphasised the importance of value-for-money in public procurement. He stated:

the failure to identify the primary intention of the Constitution is unhelpful and it has negative repercussions when this delicate and complex choice has to be made, by default, by the procuring official ... the primary national interest is best served when the government derives the maximum value-

[4] *Public Procurement in South Africa: Issues and Reform Options*, the IMF, 6 June 2023.

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for-money in the procurement process and procurement officials should be so advised.[5]

37. This also reflects the focus on value-for-money in the National Development Plan. In the chapter on *Building a Development State*, the NDP states:

> *Ensure procurement systems deliver value for money. The state's ability to purchase what it needs on time at the right quality and for the right price is central to its ability to deliver on its priorities. Public-sector procurement expenditure also needs to be used to drive national priorities such as localisation and economic transformation. Procurement systems tend to focus on procedural compliance rather than value for money, and place an excessive burden on weak support functions.*

The plan focuses on proposals which will help the country design a procurement system that is better able to deliver value for money, while minimising the scope for corruption.

38. However, there is nothing in the Bill to stipulate that procuring entities' decisions must be informed by the need for cost-effectiveness and does not include any guidance on when other priorities – such as fairness and the advancement of certain categories of persons.

39. The Bill deals with preferential procurement in one provision, section 17. This provision defers all substantive decision-making to the Minister. It is not clear that this deference to regulation will meet the constitutional requirement that national legislation be implemented to give effect to preferential procurement.

Combatting Corruption

40. It is not controversial to say that procurement is seen as a vehicle to wealth accumulation and that the existing system has been unable to prevent the rampant corruption.

41. About the existing system, Judge Zondo highlighted the lack of accountability.

> *The absence of accountability makes the system unworkable, corrupts those who operate within that system and establishes and embeds criminal*

[5] Part 1 Vol 3, p. 796-797.

relationships involving commercial entities and public officials and, implicates political party funding.[6]

42. There are some aspects of the integrity and accountability provisions in the Bill that could be strengthened through textual amendment:
    a. The category of automatically excluded persons in section 13(1)(b) should be expanded to include office bearers of political parties.
    b. In section 16, where the PPO is empowered to set periods of debarment, there should be a statutory limit.

43. However, there is a far more fundamental and fatal weakness in the Bill's ability to create a truly accountable and corruption-resilient procurement system – that the PPO is given all oversight, monitoring and accountability responsibility. This means there is no independent accountability mechanism and it is unclear that the PPO will be able to conduct these responsibilities effectively given that it is already severely under-capacitated.

44. Judge Zondo recommended the 'establishment of a single, multifunctional, properly resourced and independent anti-corruption authority with a mandate to confront the abuses inherent in the present system'.[7] Zondo emphasised that independence requires that the body be 'free from political oversight' and that it be 'independent in the full and untrammeled sense, i.e. that they are subject only to the Constitution and the Law'.[8] This then requires that the officials responsible for monitoring and accountability functions are not appointed through government, and that the accountability body be adequately staffed.[9]

45. The system of monitoring, oversight and accountability in the Bill is not significantly different from the existing system. Judge Zondo identified two primary accountability mechanisms in the existing system – both of which were ineffectual. Accounting officers of procuring entities provided internal oversight, which Zondo identified as being problematic because of the lack of independence. The Auditor General of South Africa did provide some external monitoring, but as Judge Zondo highlighted, the fact that it was unable to hold corrupt officials and departments to account brought into questions its suitability as a true accountability mechanism.

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[6] Part 1 Vol 3, p. 835.
[7] Part 1 Vol 3, p. 837.
[8] Part 1 Vol 3, p. 841.
[9] Part 1 Vol 3, p. 841.

46. The depth and breadth of procurement corruption uncovered in the Zondo Commission is proof of the inability of the system to prevent, identify, and hold accountable instances of corruption.

47. At a procuring entity level, accountability is enforced by the accounting officers. Section 21 of the Bill obliges accounting officers to take various measures to 'prevent abuse of procurement system.' While these obligations are vital, and must be kept in legislation regulating procurement, they are not sufficient. The accounting officers must have the powers, capacity and responsibility to monitor non-compliance within their own entity.

48. The problem is at the next level up. The Bill's next layer of accountability is the PPO, which is tasked with monitoring and oversight under sections 5, 50 and 55.

49. Section 5(g) requires the PPO to 'monitor and oversee the implementation of this Act'. This would include overseeing the accounting officers' performance in fulfilling their obligations under section 21.

50. Section 50, titled 'Investigation by Public Procurement Office' states:

> *(1) The Public Procurement Office may, if requested by the relevant treasury, a procuring institution or on its own initiative, investigate any alleged non-compliance with this Act other than an alleged commission of an offence, referred to in section 55.*
> *(2) The Public Procurement Office must, if an investigation in terms of subsection (1) indicates—*
> *a. non-compliance with this Act—*
> *i. instruct the procuring institution to take steps to stop or prevent the non-compliance; and*
> *ii. direct that appropriate action be taken against the official responsible for the non-compliance; and*
> *b. an alleged commission of an offence, referred to in section 55, refer the matter to the relevant law enforcement body.*
> *(3) Where a procuring institution is required to act in terms of subsection (2), the procuring institution must, as required by the Public Procurement Office, report on the progress made.*

51. Section 55 creates criminal offences for knowingly providing false information; interfering with or exerting undue influence over a procurement official; opening

any bid without authorisation; conniving or colluding to commit corrupt, fraudulent, collusive, coercive or obstructive acts; and causing the loss of public assets or funds due to willful or grossly negligent conduct in implementing the Act.

52. The PPO plays ***the*** central role in identifying any offences under section 55. Although it is required to refer any alleged commission of these offences to the relevant law enforcement body it identifies through its investigations, the lack of automatic access to procurement information for law enforcement means that the PPO is the only body that is statutorily empowered to conduct real monitoring to identify those offences.

53. Section 29 stipulates that information can only be made available to law enforcement 'at the initiative of the Public Procurement Office, the relevant provincial treasury or the request of an authorised official of the entity' *and* when the PPO or provincial treasury 'reasonably believes such information is required to investigate suspected unlawful activity or is in the public interest to provide such information'.

54. The PPO therefore acts as a gatekeeper to access to procurement information for law enforcement. It is illogical to restrict law enforcement access to information that may contain evidence of criminal offences.

55. The accountability mechanisms in the Bill are therefore:

    a. Accounting officers of procuring entities;
    b. The PPO;
    c. Law enforcement.

56. This hierarchy of accountability failed to prevent the rampant corruption we have seen within our existing system. It is inconceivable that the drafters have not learnt from these failures to implement a stronger and more independent monitoring and accountability system.

57. The Bill does establish a Tribunal. However, the concern with the Tribunal established in the Bill is its lack of independence, as all members are appointed by the Minister. This disregards Judge Zondo's warning to keep appointments of accountability officials out of the hands of government.

58. There are numerous international examples the drafters could have drawn on to introduce an innovative approach to combat corruption in procurement.

59. For example:

a. The Netherlands has a procurement-specific extra-judicial review body, the Commission of Procurement Experts. This is an impartial and independent body which, although it cannot issue binding judgments, has been designed to address procurement-related complaints speedily and effectively.[10]
b. Colombia has created formalised citizen oversight mechanisms called *Veedurius Ciudadanas* which are informed of all public procurement processes and can chose whether or not to actively participate in that process. The country also has a Procurement Observatory which reviews and advises procuring entities in their design of tender documents and how to ensure competitive processes.[11]
c. Mexico has a system of social witnesses to all public procurement processes above a certain threshold. These social witnesses are NGOs and individuals who have applied for this status and been appointed by the Ministry of Public Administration through a public tender process. The Ministry evaluates the witnesses' performance and maintains a database of suitable witnesses.[12]
d. Brazil has a Public Spending Observatory which is responsible for real-time identification of and sanctioning of corruption in procurement. The Observatory facilitates the cross-checking of government databases to identify red flags which are then investigated.[13]
e. Peru and Germany have created specialized procurement tribunals to adjudicate on pre-award and contractual disputes.[14]
f. Argentina has a National Procurement Office and an Anti-corruption Office. Although part of the Department of Justice, the Anti-corruption Office is able to intervene in procurement processes and identify problems in specific processes and in the system as a whole. The Anti-corruption Office can then work with the Procurement Office to strengthen the operation of the system.[15]

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[10] *Public Procurement Monitoring Report of the Netherlands,* Ministry of Economic Affairs and Climate Policy, April 2021.
[11] *How can we legislate for open contracting?,* The Open Contracting Partnership, 2021.
[12] *Compendium of Good Practices for Integrity in Public* Procurement, OECD, 2014, p. 28.
[13] *Compendium of Good Practices for Integrity in Public* Procurement, OECD, 2014, p. 26.
[14] *Public Procurement in South Africa: Issues and Reform Options,* the IMF, 6 June 2023.
[15] *Compendium of Good Practices for Integrity in Public* Procurement, OECD, 2014, p. 28-29.

g. The OECD recommends that 'to ensure an impartial review, an independent body with the power to enforces its decisions should rule on procurement decisions and provide adequate remedies'[16]

60. These examples illustrate the possibility of innovative approaches to government and external monitoring and accountability. The Bill's lack of imagination in designing accountability mechanisms is disappointing given the clear evidence of the vulnerability of procurement to corruption.

61. Another concern with locating all accountability mechanisms within the PPO is the lack of expertise National Treasury officials have in forensic investigations of criminal conduct. Regulation of procurement requires a vastly different skill set to identifying and investigating corrupt procurement practices.

62. Given the severe under-resourcing of the department, it is unlikely that there will be sufficient experts within the PPO to conduct the type of monitoring that will be required across all procuring entities.

63. In his conclusion on the lack of accountability in procurement, Judge Zondo stressed that the '[a]bsence of a robust, detailed and intrusive monitoring of the system undoubtably facilitates corruption and inefficiency and helps to mask abuse'.[17] He added that it was concerning that "the legislative design makes no proper provision for an effective monitoring function".[18]

64. It is even more concerning that a new, post-State Capture and post-Zondo legislative design still does not provide for effective monitoring.

Transparency and Access

65. Despite the inclusion of transparency and access clauses in the Bill, there are still some significant weaknesses in the transparency system it creates. These weaknesses are not unsurmountable, and can be addressed through the addition of clauses and amendment of existing ones.

66. Section 27 concerns disclosure of procurement information. It obliges the PPO to determine the requirements for disclosure and sets out the minimum categories of information that must be covered in the PPO's instruction.

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[16] *OECD Principles for Integrity in Public Procurement*, OECD, 2009.

[17] Part 1 Vol 3, p. 835.

[18] Part 1 Vol 3, p. 828.

67. Subsections 2(iii) and (iv) are welcome in that they stipulate that all company information – including beneficial ownership – for every bidder and the 'date, reasons for and value of an award' be disclosed.

68. However, the range of information that should be disclosed should not be limited to the bid and award phases. Although subsection 2(v) does require that the *contract* be disclosed, there is additional information that should be included.

69. The Open Contracting Partnership – the global non-profit organisation that established and advocates for a global norm of open and transparent procurement systems – recommends that information from all five phases of procurement be disclosed. The phases are: planning; tender; award; contract and implementation.

70. Section 27 should therefore be amended to include the requirement to disclose annual procurement plans and details about the financial and physical implementation of the contract.

71. The most concerning aspect of section 27 is subsection 3 which excludes from the disclosure obligations 'confidential information'. The type of information included within the category of confidential information is impermissibly broad.

72. The Open Contracting Partnership has highlighted the dangers of an over-reliance on 'commercial confidentiality' within procurement legislation. It has commented that "[v]ague confidentiality provisions also have a chilling effect on public disclosure where public authorities tend to redact information by default which harms markets, service delivery, and public trust."[19]

73. In a 'mythbusting' document, the Open Contracting Partnership reported on its research in 20 countries which interviewed 70 experts. The research demonstrated that there were virtually "no examples of commercial harm to companies from disclosing contracting information and a multitude of benefits, including improved competition and public probity".[20] It made five main recommendations on the disclosure of commercial information: "disclosure should involve minimal redaction", "all information that is not legitimately sensitive should be disclosed unredacted", "a clear and detailed public

[19] *How can we legislate for open contracting?,* The Open Contracting Partnership, 2021, p. 25.
[20] *How can we legislate for open contracting?,* The Open Contracting Partnership, 2021, p. 25.

justification for redactions should be provided", "it should be stated how long/what period of time the information is considered sensitive", and "withheld information should be disclosed the moment it ceases to be sensitive".[21]

74. Section 27(3) of the Bill demonstrates an overly deferential approach to commercial confidentiality, and serves to dramatically curtail the transparency commitments in the legislation.

75. Section 27(2)(b)(ii)(cc) does state that only confidential information be severed from disclosed documents. However, we recommend that this be strengthened by adding the clarifier 'legitimately sensitive', so that it reads: 'that the information referred to in paragraph (a) be published as quickly as possible ... in a format that ... if it contains legitimately sensitive confidential information, only that information is severed.'

76. Section 27(3) should also include a 'public interest override' to permit the disclose of even legitimately sensitive commercial information if doing so is in the public interest.

77. Section 27 should also include a requirement that the information that had been redacted be disclosed as soon as it is no longer 'legitimately sensitive'.

78. Section 27's deference to the Protection of Personal Information Act (POPIA) is also problematic. POPIA has an extremely broad definition of 'personal information', and conferring confidentiality on all information defined as 'personal' under POPIA for the purposes of procurement transparency is both illegitimate and unnecessary.

79. The Open Contracting Partnership has 'busted the myth' that because there is personal data in procurement documents they cannot be disclosed. It stressed that '[d]isclosing some personal data is important for transparency in the procurement process and to prevent fraud'.[22]

80. The Bill should reflect a weighing up of the importance of transparency in procurement and protection of personal information. As the Open Contracting Partnership explained, 'certain personal data can be disclosed without endangering people's privacy and safety'.[23] The Bill should not confer blanket

[21] *How can we legislate for open contracting?*, The Open Contracting Partnership, 2021, p. 25.
[22] Open Contracting Partnership, *Mythbusting Confidentiality in Public Procurement*, 2018, p. 6.
[23] Open Contracting Partnership, *Mythbusting Confidentiality in Public Procurement*, 2018, p. 6.

confidentiality on all personal information as this does not serve the interests of procurement transparency and serves to privilege the protection of personal information that is not 'legitimately sensitive' in the procurement sense.

81. Section 26 concerns measures for the public, media and civil society to access procurement processes, scrutinise procurement and – for high-value or complex procurement – monitor it. The existence of this provision is welcome, but its structure threatens to water-down its benefits.

82. The PPO should not be the entity responsible for determining these measures. This is another example of a provision that should establish the measures within the legislation or, at the minimum, set out clear guidelines for the PPO's determination of those measures.

83. The limitation of the ability to monitor procurement to 'high-value or complex procurement' should be removed. The wording of the provision is unclear, but it could be read as meaning that monitoring these types of procurement is necessary because it is only these types of procurement that 'entail significant risks of mismanagement and corruption'. It is incontrovertible that low-value procurement is vulnerable to corruption, and restricting enhanced monitoring to high-value and complex forms of procurement risks making low-value procurement being seen as an even more appealing route to corrupt wealth accumulation.

84. We accept that there is the risk of abuse of the civil society monitoring system by unscrupulous suppliers or interest groups. However, the solution to this is not to permit limitations of access but rather to provide strong guardrails in the legislation to prevent any abuse.

85. Section 26 should therefore set out the way in which this access, scrutiny and monitoring should be regulated, and very clear and narrow situations in which this access could be restricted. It cannot be up to the PPO to establish the boundaries for this access.

CONCLUSION

86. At the heart of the Bill's weakness is its failure to confront the realities and lessons of the State Capture era and beyond - for instance the shameful abuse of emergency procurement during Covid-19.

87. The State is seen by elites of every hue as a soft target and the primary vehicle for self-enrichment (whether or not this is dressed up as 'empowerment') and with little regard for impact of such an approach on the objective of a capable State.

88. That would suggest that the Bill should do its utmost to limit inappropriate discretion and provide clear policy choices and rules. Instead, Treasury has presented a flawed Bill - particularly in regard to section 17 which provides for a Preferential Procurement regime that is chaotically permissive - presumably because confronting elite accumulation is politically unpalatable.

89. What was evident from much of the discussion in Parliament is how preoccupied many MP were with the size of 'empowerment premium' and who gets to benefit from it (including the family members of MPs) without any consideration as to how the premium is allocated (which is the source of much clientilism, patronage, corruption and disfunction) or paid, which is mostly by the majority in the form of poor delivery, excessive prices and corruption.

90. The poor and the State that should serve them deserve better.

Public Procurement Bill

Standing Committee on Finance

13 September 2023

Caroline James

"FA11"

AmaBhungane Centre for Investigative Journalism

The depth of procurement-related corruption and inefficiency requires an **innovative approach** to solving the problems that have been identified in the system.

The Bill tweaks the existing system in ways that may make marginal differences but are **insufficient** to establish a system that can be cost-effective, transformative and resilient to corruption.

Our Key Concerns

- Continuing fragmentation
- Policy abdication
- Corruption risks
- Lack of entrenched transparency and access rights

Continuing Fragmentation

The Bill – primary legislation – does not **establish** a procurement system

- There are no procurement methods
- There are no procedures
- There is no detail given to transformation imperatives

This is a problem because:

- It is **not democratic** – regulations and instructions don't allow for multi-party deliberation and public participation
- It is **not stable** – it allows for changes to rules on political whims
- It is **not practical** – there will be too many legal instruments regulating procurement
  - ❖ Judge Zondo's '**intractable problem**'

Continuing Fragmentation

Recommendations

- We should be guided by international examples, and the UNCITRAL's Model Law
- We need government commitment to resourcing and capacitating the PPO

Policy Abdication

- There is nothing to guide how to balance the different priorities of cost-effectiveness and transformation
- The NDP and the Zondo Commission have emphasized value-for-money BUT we also need transformation
- The Bill – and not regulations – must establish how to balance these imperatives

Policy Abdication

Recommendation

- The Bill must provide the framework for preferential procurement – section 17 needs to be expanded on
- It is for Parliament, not the executive, to make the policy decisions on preferential procurement

Corruption Risks

- The ability to access, scrutinize and monitor procurement is constrained
  - Law enforcement can only access information through the PPO
    - This must be changed to allow them to proactively and continuously monitor procurement
  - There are no formal citizen monitoring mechanisms
  - Access, scrutiny and monitoring can be limited by the PPO to certain procurements of a specific value and category

Corruption Risks

- We need **innovation**!
  - Colombia has formalized citizen oversight mechanisms and a Procurement Observatory
  - Mexico has social witnesses
  - Brazil has a Public Spending Observatory which is responsible for real-time identification and sanctioning of corruption in procurement

Transparency and Access not Entrenched

- We need transparency at **all** stages of procurement
  - Planning | Tender | Award | Contract | Implementation

- **Commercial information** being protected
  - Only 'legitimately sensitive' commercial information should be confidential
  - All non-disclosure of information has to be specifically justified
  - Personal information should not automatically be confidential
  - There must be a public interest override.

Conclusion

The Bill fails to address all the evidence of procurement **inefficiency**, failure to **transform** the economy and a failure to limit and punish **corruption**.

We need **innovation** – more transparency and monitoring and less confusion and deferral to the executive

PMG PARLIAMENTARY MONITORING GROUP

"FA12"

Public Procurement Bill: National Treasury response to public submissions & stakeholder input

This premium content has been made freely available

Finance Standing Committee

17 November 2023

Chairperson: Mr J Maswanganyi (ANC)

Meeting Summary

Tracking the Public Procurement Bill in Parliament

The Standing Committee of Finance convened virtually for a briefing by National Treasury on its responses to public submissions on the Public Procurement Bill. Stakeholders were also afforded an opportunity to give input.

National Treasury reported that the revised Chapter 4 on preferential procurement attracted a fair amount of criticism from stakeholders. The chapter outlined a broad framework for preferential procurement based on a preference point system, set asides for particular categories of persons and subcontracting based on a prescribed minimum percentage. The framework was described as inadequate and the effectiveness of the use of procurement for empowerment purposes was criticised. The focus on price or the value-for-money requirement was considered to be ill-conceived. The provisions appeared to be similar to the Public Procurement Policy Framework Act (PPPFA) provisions which had prompted the revision of the law. National Treasury was requested to reconsider the revised provisions and to ensure a transparent process. National Treasury advised that the process would become more strategic and outcome-orientated. The Committee will be updated accordingly in the next session.

Concerns were raised about the legitimacy of the process based on reports that only 20% of the submissions had been responded to. Additionally, stakeholders overwhelmingly expressed disappointment about the limited time that was allowed for their input during the meeting and requested an opportunity to make further written submissions. The time constraints did not provide adequate opportunity to meaningfully respond to the proposed provisions. National Treasury acknowledged that it was unable to thoroughly respond to all submissions received due to time constraints.

The Committee resolved to schedule a special meeting with National Treasury for Friday, 24 November 2023, to deal with outstanding issues and matters raised by stakeholders.

Meeting report

The Chairperson remarked that National Treasury (NT) would be responding to the oral comments made in the public hearings and the written submissions received from stakeholders and Members of the Committee. The Committee received and distributed the comprehensive response from National Treasury on issues raised by stakeholders. The Bill is crucial for the people of South Africa.

National Treasury response

Ms Mendo Ntswahlana, Chief Procurement Officer, NT, apologised for the absence of the Director-General who might be joining the meeting later. The presentation included the preferential procurement framework as outlined in Chapter 4 of the Bill.

Mr Willie Mathebula, Chief Director: Supply Chain Management Policy and Legal, NT, presented. National Treasury's response emanated from the public hearings that were conducted on 12nd 13 September 2023. A large number of submissions were received. National Treasury tried to respond to as many submissions possible, given the time limitations. A comment matrix was compiled and some of the issues were summarised in a report, including Chapter 4, which would be separately presented. A list of all the stakeholders was also compiled and included in the pack of documents that were sent to the Committee Secretary the previous day. He apologised for the late submission of the documents.

The submissions were assessed based on the Constitution and government policy objectives. Certain amendments were made for the consideration of the Committee. The overarching themes emanating from the submissions involved changes to the following key aspects:

Chapter 1 Definitions

Immediate family member was redefined to mean, the spouse, civil partner, children and stepchildren, and parents and siblings.

Transformation was included in clause 1 to mean, the process of change that seeks to redress the imbalances of the past, including the achievement of socioeconomic objectives.

Value-for-money was removed from clause 1 and replaced with the efficient, effective, and economic use of resources in clause 2 of the Bill to retain consistency between the Bill and section 195 of the Constitution.

Chapter 2 Public Procurement Office, Provincial Treasuries, and Procuring Institutions
Stakeholders raised concerns about the location and independence of the PPO within National Treasury. No solution is offered other than it is provided for in the Bill.

Chapter 3 Procurement Integrity, Prohibition of certain Practices and Debarment
Amendments to the Protected Disclosures Act were proposed to enhance the provisions for the protection of whistleblowers.

A proposal was made to avoid automatic exclusion of leaders of political parties and family members.

An amendment to clause 16(1) was proposed to authorise procuring institutions to take responsibility for debarment and the PPO to retain the register.

Chapter 4 Preferential Procurement
Stakeholders argued that Chapter 4 does not represent the framework envisaged in section 217(3) of the Constitution. National Treasury is of the view that Parliament should determine the level of discretion it affords to organs of state to develop their own policies or depart from national policy.

Chapter 5 General Procurement Requirements
Stakeholders wanted the Bill to be extended to the private sector and not to be limited to the public sector. A separate, detailed framework has been suggested that should be discussed separately.

Chapter 6 Dispute Resolution
Concerns were raised about the independence and impartiality of the Tribunal. National Treasury proposed that internal dispute resolution mechanisms should first be exhausted to expedite the process.

Mr Mathebula said he would await guidance from the Chairperson on how to deal with Chapter 4 in the Bill, i.e. the chapter on preferential procurement.

The Chairperson requested Mr Mathebula to summarise Chapter 4 to have it on record that stakeholders were briefed. The matter should not be dealt with under a veil of secrecy.

Mr Mathebula, started reading Chapter 4 from a document in his possession but was interrupted and requested to present the document that he was reading from for the benefit of Members.

Mr M Manyi (EFF) proposed that the Committee adopt the proposal by National Treasury to have a separate presentation on Chapter 4 because it was too complex and Mr Mathebula was having a challenge in presenting the document. He suggested that the matter be dealt with in the following week to allow the Bill to be properly processed.

Mr G Masualle (ANC) said it would be in the best interest of the stakeholders who are part of this session to work through Chapter 4. The stakeholders should be allowed the opportunity to comment on the information shared in this session.

The Chairperson agreed that the official should summarise Chapter 4 vocally for the benefit of the stakeholders and the public because it was a crucial chapter. He understood Mr Manyi's concern but it should be on record that National Treasury responded to issues raised by stakeholders.

Mr Manyi said he understood that National Treasury wanted to have a proper discussion on Chapter 4 because it was so complex. He proposed that Chapter 4 should be left as Part B of the discussion for a later date. Dealing with the information at this stage would not do justice to Chapter 4. Stakeholders should be invited to participate in Part B of the discussion. It would not be correct to force National Treasury to work through the information if they are not prepared.

The Chairperson said in terms of the rules, the parliamentary process needed to be adhered to. National Treasury was responding to issues raised by stakeholders and the Committee. This was the correct platform to cover all the issues. Members should have an understanding of what is contained in the documents because it had been distributed earlier. He called on the official to briefly summarise the information and allow stakeholders and Members to comment.

Mr Mathebula said clause 18 of the framework deals with set-asides for preferential procurement. Procuring institutions may set aside a bid to accommodate categories of people listed in subsection (3) according to the prescribed thresholds and conditions. A provision is also made for subcontracting. Clause 19 regulates pre-qualification criteria for preferential procurement. Clause 22 deals with the designation of sectors for local production. The intention is to confer the powers to the relevant Minister in cooperation with the Minister of Finance. Clause 23 provides for measures for sustainable development and clause 24 provides for contracting conditions. The Chapter provides for beneficiation measures and innovation, job creation and labour absorption, and the development of small enterprises within particular geographical areas.

(See Presentation)

Civil society response

The Chairperson allowed each participant two minutes to comment. He requested that they focus on critical issues and not feel prejudiced when he stopped them after the two minutes had been exhausted.

Prof Annamaria La Chimia, from the African Procurement Law Unit (APLU), was pleased that explicit preference has been given to women in Chapter 4. However, she was disappointed that no specific mention was made of the possibility of collecting gender-specific data in clause 25. This opportunity should not be missed. The Bill should make reference to it. It was important the Bill signals that the composition of the Tribunal for Dispute Resolution should be representative of society or it has to be diverse. She asked if there were any plans to address these two issues. She did not note any mention of violence against women in the Bill and said the clause on due diligence should have made reference to violence against women. She wanted to know if further opportunity would be granted to consider the revised amendments.

Ms Elizabeth Jansen van Rensburg, representing the Mining Equipment Manufacturers of South Africa (MEMSA), said due to time constraints MEMSA might follow up with a written response. The redraft of Chapter 4 is a key concern. The inclusion of the designation for local content as an instrument is welcomed. It will have a positive impact on local manufacturing and thereby create employment. MEMSA was concerned that host industries might lose market share if the existing designations under the PPPF were not kept in place. She asked that existing designations should be retained because it would impact the entire supply chain. She noted that the number of local manufacturers is limited to three. She proposed that two local manufacturers might be sufficient for specialised categories of equipment because the local market would only sustain two manufacturers. For example, MEMSA had gone through a long process for the designation of two local manufacturers of yellow metal equipment which required vast research. Such designations are always subject to review and could be withdrawn if found to be leading to a monopoly situation. She sought clarity on some of the wording in clause 22, e.g. locally produced goods versus locally manufactured goods. The pre-qualification criteria in clause 19 where one or more need to apply, e.g. a percentage to a small enterprise with a specific ownership structure, creates an opportunity for abuse of the procurement process. Chapter 6 compels aggrieved parties to exhaust internal processes with the aim of expediting the process. It is noted that internal processes could be lengthy or be subjected to corruption. She sought clarity on what is meant by exhausting internal processes and asked for time limits to expedite the process.

Mr Stephen Woodhall, from the RSA Cluster Group, was interested in the announcement about other different evaluations from 60/40 up to 90/10. It was important to keep matters as simple as possible and come up with mechanisms without getting into too complex detail because of the rules. He recommended different ways of doing evaluations, e.g. by taking the profit portion out of local procurement discussions and considering the real value add portions. This would give the ability to get back to basics and make sure what is needed for a particular purchase. The socioeconomic reference in Chapter 4 should provide for the development of all kinds of businesses to ensure that South Africa is competitive. It does not work to load pricing to accommodate previously disadvantaged businesses. Businesses are selling into global markets but companies are constrained by having to meet many hurdles despite the competitive markets that they are serving. The assessment should focus on quality and price. Performance might be a key issue in some instances but this would require a discussion. The existing process is disabled due to deviations outside the system. Alternative opportunities might be considered to give an evaluation of the type of companies that need to be accommodated and allow industries to do a self-evaluation of companies that they could work with. Supplier development is becoming vital and is equally important in state-owned companies as in small businesses because it would not work if jobs were given to companies that do not have the capabilities.

Adv Ntshiluba said she needed more time to dissect the information provided to give an educated opinion. She was concerned about clause 3(a) in Chapter 4 read together with the clause on pre-qualification because it might exclude Military Veterans. She urged that Military Veterans be included in the designated groups. She suggested that strategic issues should be lifted above technical issues. It is not helpful to have capabilities that belong to three Ministries and only one is consulted. She suggested that all three Ministries must be consulted, e.g. as in the case of the Military Veterans Act with various provisions across different sectors. She was concerned that the ICT system, which contains sensitive information, is being used as a one-stop shop but it did not receive particular attention in the Bill. She requested more time to provide an educated opinion.

Dr Ncedo Mkondweni, Technologist at MBSA Consulting, was concerned about the set aside clause which stipulates that procuring institutions 'may' set aside a bid to accommodate categories of previously disadvantaged people. The wording should change to 'must' instead of 'may'. The functionality in the previous legislation makes provision for bids to not be unreasonably restrictive. He noted that it does not appear in the Bill and was concerned that some state agencies might use the functionality for gatekeeping. He asked for functionality to be defined and included in the Bill because it was protecting the abuse of functionality for gatekeeping as a gatekeeping tool for service providers. Complimentary goals were introduced but it is unclear how the goals are to be determined. He welcomed the definition of transformation and the redefinition of value-for-money requirements.

Mr Simon Eppel, the COSATU representative, said the time was not enough to make meaningful comments. Written comments will be provided in the following week. He noted that only 20% of stakeholder comments had been considered to date which raised concerns about the integrity of the process and the extent to which stakeholder participation is being considered. The addition of the local content designation in clause 22 is welcomed. However, it is unclear how it would work in practice because it was still not a pre-qualification criterion. He stated that it must be a pre-qualification criterion and it must apply to all contracts. He supported MEMSA's insights that in some instances it might be useful to have fewer than three competitors in the market. For example, it would not have

been possible to have vaccines during COVID-19 under these rules because we only had one manufacturer. Although the intention is clear about competition, it is not practical in all instances. COSATU was concerned about the watering down of the clause on political interference and the removal of politically exposed people. Clause 14 no longer empowers officials to refuse instructions that are inconsistent with legislation. He noted there is still no national disclosure mechanism in the Bill to expose politically connected people in the tender market. It is a challenge that the Bill still does not contain whistleblower provisions. It is unclear where the responsibility for procurement development lies. Some of the changes are weakening the centralised powers of the public procurement office (PPO) to intervene and overturn bad tenders. The decentralisation of the allocation of debarment powers is a major concern.

Prof Ron Grace, from the National Research Foundation (NRF), said National Treasury had not received their submission because it was excluded from what had been provided. The few hours that were granted to comment on the responses from National Treasury were highly inadequate. He would comment on issues from memory but would need an additional two minutes later in the programme to comment on other issues. He suggested that innovation be elevated to a preference category which had been ignored in the high-level presentation of National Treasury. In the scope of what constitutes procurement, National Treasury did not consider the NRF's recommendation that asset and contract management be excluded from the scope and that it should be changed in line with international practices. The major section on checks and balances had been ignored. A number of substantial recommendations were made. Critical definitions are missing from the Bill while others are defective, e.g. the definition of innovation is excluded and the definition of strategic procurement is fundamentally flawed and out of line with normal or academic practice. It needs to be in line with a standard definition. The recommendation to consider the Kenya Model has not been addressed. Emergencies had not been removed as recommended. Deviations should be done by the appropriate organ of state. He proposed that National Treasury formally acknowledge receipt of the written 60-page presentation and respond to each of the points made. He requested the right to respond to National Treasury comments and to submit it to Parliament. He requested a clarification of the process to provide written submissions at a later stage.

Ms Caroline James, representing Amabhungane, echoed previous comments about having only two minutes to respond and receiving the documents late. It places difficulty on stakeholders to respond meaningfully. She asked for an opportunity to submit a written submission and analyse the feedback from National Treasury to examine how the information had been incorporated. She appreciated that Amabhungane's submission had been incorporated in National Treasury's response document but comments from other stakeholders had not been considered. She was concerned that only about 20% of submissions had been considered because it raised concerns about whether the process had been meaningfully followed. The proposal of having the information set up in regulation mode had been partly considered but public participation in drafting regulations, as set out in various transparency measures, does not seem to be enshrined in the Bill. The recognition of transparency around the drafting of regulations is welcomed but it should be formally included in the Bill. It is concerning that the weaknesses highlighted in the Bill had been further weakened, e.g. the exclusion of the automatically excluded people and other measures to ensure that the system is strongly able to respond to corruption.

Ms Motlatsi Komote, representing Corruption Watch, said the time was not sufficient to engage with the proposals and responses from National Treasury. She requested an opportunity to make a written submission. She raised concerns about the centralisation of power to National Treasury because it creates a gap in effective checks and balances. The position of the PPO within National Treasury is of concern as it affects independence and the ability for impartial oversight. The dispute resolution mechanisms should be tightened. It is reported that National Treasury did not have time to consider all of the 112 submissions made. She sought clarity on the process to engage with the rest of the submissions. She called for the automatic exclusion of politically exposed persons. The absence of this mechanism was undermining transparency, accountability, and anti-corruption. A decisive decision about automatic exclusions must be made.

Mr Gabriel Crouse, representing the South African Institute of Race Relations (SAIRR), requested an opportunity to make a written submission given the time constraints. The connection between the existing procurement framework and state capture as articulated by the Zondo Commission appeared not to have been recognised. The kind of preferential procurement fixated on race contributed to ambiguity and confusion and the inability to account for and therefore, incentivise rent-seeking. This is not being addressed. He noted with great alarm the 70/30 and 60/40 price compromise, increasing the premium for non-value-added considerations. Chapter 4 was going in the wrong direction. He noted the provision that the Bill has no power to consider any instance of procurement. But the power does exist in the term equitable distribution. The Constitution refers to equitable distribution across provinces and does not mention race. Non-racialism and value-add are being violated. This is a scheme whereby the rich get richer while poor South Africans of all races are left behind. No reference is made about how much preferential procurement has already cost the fiscus and how much it is expected to cost under the new dispensation which would render it procedurally unworkable in terms of Constitutional requirements for transparency. There is also no mention of how much the extra BBBEE premium would amount to which is a violation of transparency as stipulated in section 216 of the Constitution. Given the lack of transparency, it is not surprising that money goes missing.

The Chairperson noted the DG had joined the meeting and called on him to comment.

Dr Duncan Pieterse, DG, NT, replied that he had been following the proceedings closely and would consult with the team on taking matters forward. He had another meeting to attend and asked to be excused.

The Chairperson said the team would advise the DG on what had been agreed upon in terms of processing the Bill.

Ms Nicqui Galaktiou, from the International Women's Forum of South Africa (IWFSA), supported the other organisations in terms of the

time afforded to consider the documents and the need to make further written comments on what National Treasury had provided. The IWFSA focuses on women's involvement in black-owned businesses. She did not believe that their submission had been considered nor was the amendment to clause 18 of Chapter 4 sufficiently explained. The review team did not agree that the provision for preferential procurement was not discretionary. This was not dealing with the fact that black women-owned businesses continue to remain an option in terms of the wording in clause 18. Nothing had been done about the commitment made by the President to set aside 40% of procurement for women-owned businesses in a bid to achieve equality. Clause 18 in its current form does not mean that a percentage would be given to black women-owned businesses which meant that the IWFSA submission had been completely ignored. More time was needed to discuss the failure to give the required attention to all submissions.

Ms Motlatsi Komote, representing the Budget Justice Coalition (BJC), noted the risk of the PPO being undermined by pure provision of shared services. The Zondo Commission made recommendations about the need for independence and specialised oversight mechanisms. This critical part was still missing from the Bill. She found it problematic that provisions that should have been incorporated in the draft Bill are being left to regulations. Some definitions require further clarification to avoid any misinterpretation. Matters of conflict of interest must be decisively dealt with. If not, it would deepen the lack of transparency and the high levels of corruption. She requested the opportunity to make further written submissions.

Mr Dumisani Mphafa, of the Black Business Council (BBC), welcomed the changes to Chapter 4. Although some of the changes were not satisfactory, the framework is in place and the provisions are much more progressive. The provision of complimentary goals should be clearly defined to avoid any ambiguity. The BBC was satisfied with the preference point system and saw no need to change the terminology. The word 'may' in clause 18 was problematic from the perspective of the BBC due to the experience with procuring institutions that would be reluctant to comply if it remains an option. The onus should be on the procuring institution to demonstrate where the set aside is not feasible. The Bill lacks strategic intent in terms of driving the socioeconomic objective in the country, especially regarding industrialisation. The government does not appear to be using its fiscal power to enforce industrialisation. The procurement officer should be able to publish procurement reports in the interest of transparency, for example, to indicate the BEE and set aside spending. Where the principles of procurement spending are not complied with, procurement officers must be able to implement measures to correct the misapplication of the law. He would appreciate the opportunity to make further submissions.

Prof Geo Quinot, on behalf of the APLU, echoed the previous comments that the time given since National Treasury provided the responses was inadequate specifically with reference to the Constitutional Court judgment on public participation in legislative processes. Parliament should give due consideration to the parameters within which consultation must take place. He urged the Committee to provide further opportunity to consider the feedback. The APLU was extremely concerned that, based on the documents provided, selective attention was paid to a small number of submissions. National Treasury did not comment on the APLU submission which was raising concerns that it had not been considered. Far too much is being left to regulation. He urged the Committee and Parliament to seriously consider the role of the executive in the law-making process. It was inadequate to allow the executive broad decision-making powers by way of regulation within the parameters of this Bill. He addressed the empowerment dimension of Chapter 4 as set out in clauses 17 to 21. The APLU noted with great alarm that these provisions were a cut-and-paste of the PPPFA provisions which prompted the law revision that the Committee is currently engaged in. The inadequacy of those rules necessitated the review of the Bill. This would result in a repeat of the struggles of the past 23 years and the many court cases that undermined the use of procurement for empowerment purposes. He had serious concerns about whether Chapter 4 could be viewed as a framework. Many of the provisions could be described as a set of rules. It is unclear how the different mechanisms would work in practice. The difference between a set aside in section 18 and pre-qualification in section 19 is unclear. Both result in the preservation of a contract for a particular category of people. It is also unclear whether the preferences in section 20 are mandatory or optional. The structure and system of subcontracting in section 21 is unclear. In terms of the methodology, using price as the only criterion is problematic. It has been documented worldwide that using price to award tenders is a very bad idea because it will not result in value-for-money. He urged the Committee to allow stakeholders adequate opportunity to respond to the comments.

Adv Lufuno Khorommbi represented Orizur Consulting Enterprises (OCE) which specialises in cyber law, ICT security, and public sector ICT procurement. She believed there should be a second draft of the Bill to ensure completeness and consideration of the written input provided. The Bill does not indicate how it would integrate the fragmented regulatory framework. She proposed that the Bill must provide for methodologies and strategies for managing subcontracting to ensure that it is not a paper exercise but a reality. A further proposal is made to include a subsection that would guard against piracy and provide guidelines to this effect. Most small businesses in the ICT space, experience challenges and do not get access to the 30% set aside provided for in the Bill. In terms of designation, the term 'may' suggests an optional exercise. There must be an intention to develop own content and prioritise localisation. The Bill does not sufficiently address the issues of innovation and development in the manner that it is understood in the industry. Information from the perspective of OCE would be submitted in writing. The organisation had developed a system but is unable to bring it to the government due to the lack of support for innovation. The Bill does not provide equal economic inclusion to progress from a paper-based exercise to a space where economic inclusion is promoted.

Mr Francis Chemaly, on behalf of the Group of Construction and Engineering, expressed the same concerns about time constraints as previous participants. He agreed that far too much is left to regulation. Projects of size and scale require uniformity and predictability in the market. The market is capital intensive and the lack of predictability would scare investors and the industry would decay further until all infrastructure is built by foreigners. Sections 19 to 21 of Chapter 4 appear to be confusing and need more time to be fully understood. The present draft is inadequate to serve as a solid foundation to grow the economy.

Ms Phelisa Nkomo said her organisation wanted to make sure that the Bill impacts transformation as intended. She argued that the Bill is not gender-responsive because it does not recognise the 40% set aside that the President had announced. Economic

transformation has to be driven by government and public procurement is an important lever to drive economic transformation. Her organisation supports the practice notes that are issued by National Treasury but it should be subjected to public participation as it is sometimes autocratic. She is concerned about the silence on the issue of whistleblowing considering the experience of the Zondo Commission and the nature of corruption. The use of price as the only criterion to approve any business opportunity is fundamentally flawed. South Africa had declined to 19% of industrial capacity, meaning that so many things are being imported. The issue of assembly versus manufacturing needs clarification. Manufacturing needs to be prioritised because it is unsustainable to be an assembly economy. The issue of gender-based violence should be classified to afford women, who have been subjected to violence, the opportunity to benefit from the set aside provision. Any public procurement policy that applies a one-size-fits-all criterion, is problematic. The Bill needs to create space for municipalities to participate in local procurement activities. The local procurement policies must be used to build local resilient economies and government is a critical partner in this regard.

Ms Mahadi Buthelezi, represented the Women's Economic Assembly (WEA), which was birthed from the NSP. She concurred with Ms Nkomo that the 40% procurement is not clear in the Bill. It is important that the Bill clearly specifies previously disadvantaged persons. She did not notice any mention in the Bill about persons living with disabilities and would want it to be included in the Bill.

Discussion

Ms M Mabiletsa (ANC) said the concept of small enterprises owned by black women should be defined. Businesses that continue to grow should not be considered small enterprises. Most subcontracting companies are owned by women, but this was not mentioned in the presentation. She asked if consideration would be given to Military Veterans who are entrepreneurs.

Mr G Masualle found it worrisome that only 20% of the public submissions had been responded to. He sought clarity on how responses to the remaining submissions would be remedied. He was concerned that allowing voices to be ignored could place doubt on the legitimacy of the process. He agreed that the Committee should allow for reflection on Chapter 4.

Mr J De Villiers (DA) said the idea of public participation is to allow everyone a fair chance of a response to their submissions. The time being granted to stakeholders was not complying with the public participation standard. To ensure transparency, National Treasury should respond to all submissions.

Mr Manyi thanked stakeholders for prioritising the opportunity to observe how their submissions are being dealt with. He suggested that stakeholders were being short-changed and should be allowed another round for feedback. He sympathised with the women's group that took the President seriously about the 40% participation for women-owned businesses and said the women were conned by the President. He should have issued a directive to National Treasury if he was serious about the matter. It was unfair to expect National Treasury to respond to public utterances. He stated that the definition of transformation in the presentation omitted important issues of demographic representation as stipulated in the Constitution, i.e. the judiciary, Chapter 9 institutions, and public administration should be broadly representative of all South Africans. National Treasury was missing the point by focusing on price as a major consideration. He suggested that the value-for-money proposition must be removed. The Bill was referring to further regulations although stakeholders had made it clear that more regulations were not what was needed because it resulted in matters being postponed. Businesses that did not embrace transformation should not be allowed to do business with the state, which was consistent with existing legislation. Procurement regulations should be dealing with both the public and private sectors. National Treasury did not have the competence to interpret the law and the Constitution, and their interpretation was not binding. The matter should be taken to court for proper interpretation. The Construction Industry Development Board (CIDB) was not creating uniformity and should not be allowed to continue operating in its current form. The purpose of Chapter 4 is to advance transformation. He agreed that the word 'may' in section 18(1) should be replaced with 'must'. He found the formulation in section 19 (1) about the minimum level of compliance problematic. Businesses should not be allowed to continue doing things that are inconsistent with legislation. He regarded the preferential point system as an introduction of the PPPFA through the backdoor. He suggested that Prof Quinot could assist with the proper formulation of the provisions.

The Chairperson said the women's organisations were representing their constituencies and their submissions should be respected. He called on Mr Manyi to apologise for stating that women have been conned by the President because it was undermining the input of women.

Mr Manyi replied that it must be on record that the President lied when he said 40% women representation would happen. The women took his word and had high hopes. This was the truth and not political correctness.

The Chairperson disagreed and said Mr Manyi was undermining the intelligence of women. Mr Manyi was asked to reflect on his statements.

Mr G Skosana (ANC) said the Bill was long overdue and had been in the making for a long time in the Sixth Parliament. He urged National Treasury to provide the means for considering all submissions. Chapter 4 sought to remedy some defects and concerns raised by some stakeholders. The Bill deals with the prevention of corruption and the aspect of transformation. It was the responsibility of the Committee to ensure that these two goals were met. It was unfortunate that the country was still dealing with the challenges of an unequal society. Everyone should be able to opportunities that they deserve. He welcomed that set asides for preferential procurement for specific categories of persons. He proposed that section 18 of Chapter 4 must be reviewed to strengthen the wording to ensure enforceability and that previously disadvantaged people benefit from the provisions. The Bill should be explicit on transformation. The value-for-money provision and transformation should not be mutually exclusive. He did not see the need to remove it from the Bill. The Bill was silent on consequence management for non-adherence to the expectations of the Bill. The Bill

should be explicit on the actions that would be imposed against non-complying institutions. It was important that the private sector is also regulated in terms of procurement, but the matter should be dealt with separately. This Bill should be passed before the end of this term therefore the processes to conclude this Bill should proceed.

Ms P Abraham (ANC) appreciated the wisdom of the input from stakeholders. It was critical to understand that when the President has spoken, the task lies with the Department to interpret his statements. The processing of the Bill is allowing the stakeholders the opportunity to hold the Department to account. National Treasury must ensure that what the President had outlined, finds interpretation in legislation. Efforts to ensure transformation should be deliberate. The transformation of the economy will be the legacy of this Bill. She appreciated the serious efforts of the government and the President in placing women and previously disadvantaged people at the centre of economic activity. She drew attention to a proposal by one of the stakeholders for a workshop to be arranged to ensure that everyone was on the same page about the steps that would guarantee that transformation takes place. The redrafting of Chapter 4 was critical to outline how procurement should be dealt with at the local government level.

National Treasury response

Mr Mathebula welcomed the comments from the stakeholders and Members. Due to time constraints, it was not possible to thoroughly respond to all the submissions. He sought guidance from the Committee on how to complete the responses to the remaining submissions. He called on the stakeholders to consult the comment matrix before following up with National Treasury. He undertook to relook the gaps in the legislation as pointed out by the stakeholders and the Committee.

Adv Emple van Schoor, Chief Director: Legislation, NT, agreed that all submissions should be considered. She asked how much time would be allowed to consider the remaining submissions.

Ms Ntswahlana, said it was important for stakeholders to view the comment matrix provided. The value-for-money provision is focused on obtaining the best possible outcome for procurement activities. But National Treasury would be unpacking the provision once more and consider the efficient, effective, and economic use of resources. The process will become more strategic and outcome-orientated. The Committee will be updated in the next session. She took note of the proposed transformation workshop and sought guidance from the Committee in this regard.

Chairperson's closing remarks

The Chairperson thanked Members for their clarity-seeking questions and stakeholders for their constructive input. He proposed that a special meeting with National Treasury should be scheduled for Friday, 24 November 2023, to deal with outstanding issues. He asked stakeholders to bear in mind that the government will not agree 100% with the submissions. National Treasury would consider the submissions and Parliament would process the Bill. The Committee will be considering the Bill on a clause-by-clause basis from 28 to 29 November 2023, the report will thereafter be adopted and then tabled in Parliament.

The meeting was adjourned.

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Public Procurement Bill: National Treasury response to public submissions & stakeholder input

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Finance Standing Committee

24 November 2023

Chairperson: Mr J Maswanganyi (ANC)

Meeting Summary

Video

The Standing Committee of Finance convened virtually for a briefing by National Treasury on their responses to public comments on the Public Procurement Bill. The meeting was a continuation of the previous session in response to additional issues and concerns raised by stakeholders.

The major concern related to the constitutionality of Chapter 4 on preferential procurement. The changes made by National Treasury since the last meeting were appreciated although it was argued that more work was needed to create a conducive environment for the implementation of the Bill. Some stakeholders welcomed the progressive nature of the provisions in terms of using the public purse for transformation purposes and to seek redress for the imbalances of the past. Others argued that Chapter 4 was deviating from the principles of a fair, equitable, and competitive procurement system as envisaged in the Constitution which requires these values to be reflected in law. The lack of objective criteria, as argued by some stakeholders, will subject Chapter 4 to court challenges and a further delay in economic development and job creation.

The Committee assured stakeholders that their contributions would be considered during the following steps in the process. The Legal Team was tasked to ensure that all legal requirements have been met. The processing of the Bill will continue on Tuesday and Wednesday, 28 to 29 November 2023.

Meeting report

The Chairperson apologised for having connectivity challenges and requested Ms Abraham to chair the meeting.

Ms P Abraham (ANC) called on National Treasury to proceed with the presentation.

National Treasury response
Mr Willie Mathebula, Chief Director, Supply Chain Management Policy and Legal, NT, sought guidance on how to approach the presentation because only some of the slides were updated from what was presented the previous week. He wanted to know if he should start from the beginning or focus on the parts that would be of interest to the meeting.

Ms Abraham advised him to deal with issues of interest. The stakeholders were ready to hear about the issues that were raised in the previous meeting.

Mr G Masualle (ANC) said National Treasury had indicated that they were unable to review all the submissions in the time available to them. This gave the impression that not all submissions were attended to. He wanted National Treasury to respond to the matter at the outset so that any presentation is premised on their acknowledgement that they have corrected the omission on their part. Thereafter the discussion on the approach to be followed can proceed.

Mr Mathebula replied that National Treasury had noted the comments from stakeholders and Members of the Committee to review al the submissions received. The last four days have been used to try to catch up on submissions that were not previously considered. Although progress was made, it was not possible to review all stakeholder comments due to the volume of the submissions. The Minister might want to appraise the Committee on the matter. Subsequent to last week's meeting, additional written comments were received which further increased the number of submissions.

The Chairperson said the crux of the matter was that unending submissions cannot be allowed. She called on the official to proceed with the presentation.

Mr Mathebula said the pack of documents submitted to the Committee included an updated comment matrix with an updated report on public comments, a revised version of Chapter 4, and the list of stakeholders. He gave an account of proposed changes to some of the issues and others that remained unchanged. The proposed changes are captured under the heading 'additional comment'.

Chapter 1 Definitions
Immediate family member was redefined to mean, the spouse, civil partner, children and stepchildren, and parents and siblings.

Transformation was included in clause 1 to mean, the process of change that seeks to redress the imbalances of the past, including the achievement of socioeconomic objectives.

Value-for-money was removed from clause 1 and replaced with the efficient, effective, and economic use of resources in clause 2 of the Bill to retain consistency between the Bill and section 195 of the Constitution.

Chapter 2 Public Procurement Office, Provincial Treasuries, and Procuring Institutions
Stakeholders raised concerns about the location and independence of the PPO within National Treasury. No solution is offered other than it is provided for in the Bill.

Additional comment
The Bill provides for regulations to be published. The public will have an opportunity to comment.

Chapter 3 Procurement Integrity, Prohibition of certain Practices and Debarment
Amendments to the Protected Disclosures Act (PDA) was proposed to enhance the provisions for the protection of whistleblowers.

Additional comment
National Treasury is of the opinion that support for whistleblowers will be accommodated in other pieces of legislation.

A proposal was made to avoid automatic exclusion of leaders of political parties and family members.

Additional comment
The clause has far-reaching implications considering the nature of extended and blended families. National Treasury suggested that the disclosure of conflict of interest would be critical to counter corrupt intentions. It is proposed that clause 13 be amended to stipulate the automatic exclusion of officials in Provincial Legislatures and Parliament from submitting tenders to the state.

An amendment to clause 16(1) was proposed to authorise procuring institutions to take responsibility for debarment and the PPO to retain the register.

Chapter 4 Preferential Procurement
Stakeholders argued that Chapter 4 does not represent the framework envisaged in section 217(3) of the Constitution. National Treasury is of the view that Parliament should determine the level of discretion it affords to organs of state to develop their own policies or depart from national policy.

Additional comment
National Treasury proposed that Parliament develops a compulsory framework for procuring institutions to develop their own policies.

Chapter 5 General Procurement Requirements
Stakeholders wanted the Bill to be extended to the private sector and not to be limited to the public sector. A separate, detailed framework has been suggested that should be discussed separately.

Additional comment
National Treasury would be taking a legal opinion on the extension of the Bill to the private sector.

Chapter 6 Dispute Resolution
Concerns were raised about the independence and impartiality of the Tribunal. National Treasury proposed that internal dispute resolution mechanisms should first be exhausted to expedite the process.

Chapter 7 General Provisions
The most consistent view raised in this chapter related to clause 51 about the PPOs power to enter and search premiss. Concerns were raised that the PPO was given unfettered powers. He assured the Committee that the power conferred to the PPO in clause 51 is not for criminal investigation but for purposes of compliance. This matter was raised last week and also in the follow up submissions. Clause 54 deals with officials who take decision in good faith and who should not be subjected to any criminal prosecution. A rewording of the clause was proposed to extend beyond criminal prosecution by including civil prosecution. Stakeholders found the grounds for exemptions too narrow. National Treasury proposed that the clause about deviation grounds, i.e. clause 57(1)(c) and (d) be moved to exemptions under clause 56. The heading of clause 57 must be changed from 'Departures' to 'Deviation'.

The role of the CIDB was questioned in last week's meeting. An amendment was proposed to align the CIDB Act to this Bill. The activities of the CIDB should be subjected to the Public Procurement Bill before the Committee.

Mr Mathebula advised stakeholders to consult the Comment Matrix for detailed responses.

Ms Abraham said it was evident that National Treasury had considered the proposals of the various stakeholders. More than 112 stakeholders showed an interest in the Bill. The Committee commended National Treasury for their commitment to listen to stakeholders to the extent possible and what is allowed in terms of the law. She allowed each stakeholder a two-minute intervention.

Civil society response

Ms Natashia Soopal, representing the South African Institute of Chartered Accountants (SAICA), was unsure whether the SAICA responses had been analysed. No changes to the issue of accountability have been noted. In terms of section 13 of the Constitution, National Treasury is mandated to exercise accountability and transparency when managing public finances. The two issues of accountability that are hampering legislation from a procurement perspective are the lack of consequence management and monitoring. The monitoring of legislation usually does not take place and as a result, there is no implementation or accountability by the responsible institution. SAICA recommended that the monitoring of legislation should be a dedicated function. The proposed Bill provides for National Treasury to promote the standardisation of procurement. SAICA proposed that National Treasury promotes and monitors standardisation in the implementation of the proposed Bill. SAICA acknowledged the need for procuring institutions to implement consequence management but the Bill should provide for the implementation of consequence management. Some of the missing definitions that need to be considered include the meaning of control where individuals with a controlling interest are excluded. Control should be defined in terms of the Companies Act or the accounting standards.

Mr Steve Jardine, on behalf of the RSA Cluster Group, said a definition of unfair discrimination was needed. The Bill in its current form will be facing some constitutional challenges. It is understood companies should operate as good businesses and uplift people in their areas. To this end, it was important to stimulate the economy and create jobs. The government should look at incentives to stimulate growth. Local government should be able to buy locally. Mechanisms are needed to elevate businesses from local, to municipal, to district, and national government. The support of the government is needed to assist local companies to thrive. It is important to consider industrial preferences. There was a lot of grids for the Minister to attend to, e.g. when one manufacturer did not have sufficient capacity to fulfill an order at the correct local content level. His mandate was to convey the preference of the RSA Cluster Group that all preferences should be chopped and the open market should be supported.

Ms Elizabeth Jansen van Vuuren, on behalf of the Mining Equipment Manufacturers of South Africa (MEMSA), focused on the importance of foregrounding preferential procurement of locally manufactured and produced goods. Transformation was happening in this industry and should be encouraged. The manufacturing industry was facing a crisis of job losses. Industrialisation will not happen if local content is not specified where feasible for the purpose of public procurement tenders. A response was not given to MEMSA proposal when it was raised previously. In terms of the proposal, she argued that it was fully justifiable for the minimum number of local manufactures to not be limited to three where there is sufficient motivation and research based on a proper understanding of the industry. Products might be designated even if there are fewer than three local manufacturers. In certain industries, the local market without designation can only sustain the growth of one or two manufacturers with designation. This would open the door for more manufacturers to enter the expanded market and allow new and existing manufacturers to prove their international competitiveness. The minimum of three manufacturers should only apply unless justified by the nature of the industry and the potential benefit of boosting the local market, subject to revision if evidence of abuse is proven. The designation should be reviewed regularly. In addition to national designation, she proposed that local and provincial governments retain the ability to self-designate. Technical specification should not exclude local manufacturers. If found to be the case, then there should be recourse.

Prof Jonathan Klaaren, from the Joint Strategic Resource (JSR) group, said the JSR had not had the opportunity to fully view the changes. The most significant change was the detail on provincial procurement in Chapter 4. The JSR remained concerned about the challenges of implementation. Two gaps were noted, i.e. National Treasury did not respond to the reasoning about independence. Sharing the rationale and reasoning would be helpful because it forms part of the debate. He furthermore argued that it was not the most appropriate route to place all aspects of whistleblowing in the Protected Disclosures Act. There is a clear policy case to incentivise whistleblowing in the Public Procurement Bill. He noted some significant undertakings by National Treasury for changes in the Bill, i.e. the enforcement of and compliance to the Bill in the anti-corruption sense. Clauses 51 and 52 provide for investigative powers of the PPO for compliance rather than criminal purposes. The JSR supported the undertaking to review Clause 51 with law enforcement agencies.

Mr Sanele Khomo welcomed the work by National Treasury but he noticed that some of the comments of practitioners were not addressed, e.g. the establishment of the PPO at the Provincial Treasury level. Feedback in this regard would be appreciated. He proposed that the definition of 'blacks' should be specific to avoid the challenges when dealing with issues of empowerment. Procurement thresholds, if determined by the Minister, could seriously delay service delivery. Municipal regulations still have a R200 000 threshold which has not changed in 20 years. He was concerned about the impact of delays in regulations. It would be preferable for the PPO to issue instructions. The establishment of procurement units was missing from the Bill. He proposed that procurement units should be under the direct supervision of the accounting officer and not the CFO due address the misalignment in the reporting line.

Dr Ron Watermeyer said the Constitutional Court had directed that section 217 be read with sections 195 and 33. The procurement system is required to embrace the principles of a fair, transparent, equitable, and competitive procurement system. The preferential procurement system should promote the effective, efficient, and economic use of resources in an accountable, ethical, and developmental manner and enable lawful and reasonable administrative action. Chapter 4 deviated from the principles of a fair, equitable, and competitive system. He asked if there was a limit to the mandate for the deviation and how unfairness could be accommodated. He acknowledged the quantum leap in preferential treatment but it might have a potential higher cost premium. By opting for the lowest tender price, the reasonableness, unfairness, and effectiveness should not be undermined. The National

Development Plan (NDP) 2030 warned that excessive cost increases would undermine growth and employment. Missing from the Bill is the PPPFA and the 2017 regulations that the tender must be awarded to the bidder with the highest points unless the criteria justify the award to another tender. The Act provides separate regulations for goods and services within the construction industry. He proposed that the policy principles for procurement be embedded in primary legislation and a provision be included to award the tender to the bidder who scored the highest points. Objective criteria must be included to link back to section 195 (3) of the Constitution which requires that those values be reflected in law. This would strengthen the position to move forward with Chapter 4 without court challenges. The approach to evaluating tenders would be different depending on the sector and procurement types. The detail in Chapter 4 should be reduced to allow the regulations to deal with the specifics of a particular type of procurement. National Treasury would be in a stronger position to defend Chapter 4 by eliminating the argument of captive markets and set asides and linking it to the benchmark of being market-related and including other objective criteria.

Mr Ryan Brunette, representing the Public Affairs Research Institute (PARI), was concerned that control provisions were being eroded. The erosions were not justified. The framework was a positive development but required a bit more substance. Chapter 4 needed more work to avoid legal challenges. The government should enable the use of functionality as adjudication criteria within the point system but the new version of Chapter 4 seemed to reverse back the criteria. A number of the PARI concerns were not addressed, e.g. transparency would be elaborated in provisions rather than instructions as proposed.

Mr Ncedo Mkondweni commended National Treasury for the amendments and for incorporating the proposed changes. He requested that section 19 as it relates to functionality be reviewed. State organs are known for using functionality as gatekeeping. If not changed, the issue of functionality would result in the same position as under the PPPFA. He cited the SANRAL case where hours of work were used under functionality. If the minimum threshold is not met, the process will not proceed. Previous regulations stipulated that functionality must not be too low to compromise quality.

Mr Matthew Parks, on behalf of COSATU and NEHAWU, supported the Bill and asked that the remaining issues be resolved. The Bill, with all its weaknesses, should pass. He appreciated the need to pass the Bill before the end of the Sixth Parliament and proposed that National Treasury presents a supplementary Bill after the elections to resolve the remaining concerns of stakeholders. Key areas that could be adjusted in the remaining term of this Parliament include the provision for a central published online registry of politically exposed persons to debar persons from participating in tenders at local government institutions. Additionally, the PPO should have the ability to override illegal tenders. Localisation is critical for creating local jobs and businesses but it was not elevated in the Bill. He proposed that localisation should be a pre-qualification criterion and procuring institutions should seek consent from the Minister. He advocated for whistleblowing to be incentivised and rewarded within public procurement regulations which was different from protection under the Protected Disclosure Act.

Prof Ron Grace, from the National Research Foundation (NRF), was grateful that the NRF comments and written submissions had now been integrated into the consolidated submission document. He sought clarity about when National Treasury would be able to review the remaining 80% of the submissions. He proposed that comments about the minimum criteria for consultation be considered. He differed from National Treasury that the number of instructions would be limited because in order to give effect to the Bill would require numerous instructions. National Treasury had not seriously considered the contributions made by the leading public procurement law unit on the continent, i.e. the African Procurement Law Unit (APLU). He believed there should be an objective criteria provision in the Bill, similar to what was contained in the PPPFA.

Ms Caroline James, of Amabhungane, sought confirmation from National Treasury that all submissions would be addressed and the timeline attached to this task. The focus of the Bill is to create a system that is resilient to corruption seemed to have been watered down. She implored National Treasury to ensure that an anti-corruption system is created. She echoed the concerns about whistle-blowers not receiving protection. No response was given for the reason for locating the PPO within National Treasury. She remained concerned about the watering down of automatic exclusions because the system is not strong enough to rely on the conflict-of-interest principle to prevent corruption.

Mr Gabriel Crouse, from the South African Institute of Race Relations (SAIRR), drew attention to the report in which some stakeholders emphasised that Chapter 4 was not sufficiently directed to redress black businesses from unfair discrimination. He was concerned that the SAIRR submission on this matter was not mentioned in the report. He argued that Chapter 4 was not sufficiently directed to address the historically disadvantaged because it was not sufficiently addressing the provision of value-for-money. The lack of value-for-money procurement and the lack of redress for the previously disadvantaged are one and the same issue. The public interest is best served by the principle of value-for-money business. He pleaded that the argument be reflected on and acknowledged even if National Treasury did not agree that value-for-money procurement was benefitting poor people. He asked for a reflection on the notion of equitable, as set out in section 217 in the Constitution, as a requirement for the Bill instead of imposing racial preferences. He stated that National Treasury did not have the budget for race preference procurement. The Committee was obliged to allow National Treasury to explain how much race preferencing was costing the fiscus and how much extra it would cost once the Bill was passed.

A representative of the Budget Justice Coalition (BJC) said his questions had been addressed and he would forfeit his two minutes to other colleagues. He noted National Treasury's responses to the comments.

Mr Dumisani Mphafa, of the Black Business Council (BBC), acknowledged the difficult balancing act that National Treasury had to make to accommodate all the submissions. He accepted that not all comments would be considered. He appreciated the progressive stance taken in Chapter 4 and assured National Treasury that there would be no court challenges. The previous challenges related to

provisions that did not meet constitutional muster. This was not the case with the revised Chapter. There was nothing wrong with addressing the vestiges of apartheid. The public purse should be used for the advancement of everyone in the country. The strategic nature of the Bill as it relates to infrastructure procurement was lacking. Large infrastructure procurement should not be transactional considering the challenges of projects that have been collapsing. The design of infrastructure projects should be incorporated in the Bill. There should be a commitment that suppliers would support development when procuring high-value projects. Large suppliers have the responsibility to support development of local suppliers. These aspects have not been accommodated in the Bill.

Ms Linda Maqoma, representing the Association for the Advancement of Black Accountants of South Africa (ABASA), welcomed the responses from National Treasury but was concerned about the pricing element. Pricing should be linked to the development of small businesses to be able to compete. If not considered, the opportunity for empowerment and to grow the economy might be missed. She was hoping that the SAICA submission on accountability would be considered to ensure that the environment is conducive for the implementation of the Bill.

Mr Clint Koopman, of the South African Black Allied &Technical Careers Organisation (SABTACO), thanked National Treasury for their efforts to ensure that all voices are heard. He focused on the reference to set asides in Chapter 4 and the indication that it would be based on price only. There might be various levels of transformation and consideration should be given to applying preferencing within set asides. He reminded the meeting that the PPPFA was failing black people which was the reason for this Bill. The documents provided by National Treasury made reference to a premium that is paid which led to the questioning of BEE as a fair representation of transformation. In the construction sector, more than 99% are level four participants, more than 90% are on level two and above, and more than 60% are on level one and above. These figures represented the performance of the class of 2023. Since most of the participants are at levels one and two, the price premium being paid for preferencing was almost negligible. He did not believe that the BBBEE scorecard was a true representation of transformation in the country. The Bill is emphasising the dependence on BEE legislation to respond to the outcry of the public. Subject to comments made, Chapter 4 is a good attempt but Parliament needs to instruct National Treasury to start the review process of the Construction Sector Charter.

Adv Lufuno Khorommbi, who represented Orizur Consulting Enterprises (OCE), said the Bill was not aligned with existing legislation. The Bill was not adequately providing for localisation and redress of the past as stipulated in the Constitution. The integration with the BEE Act and the Bill was unclear. The NDP principles have not been incorporated in the Bill as they relate to the establishment of the anti-corruption system and zero tolerance for corruption. The Bill does not sufficiently provide for oversight as envisaged in the NDP and it is unclear how the Tender Compliance Monitoring Office would be empowered. The principles of the ICT SETA are embedded in the Information Security Standards and other regulatory frameworks. However, the integration thereof within the Bill was unclear. She requested that the principles of localisation be embedded in Chapter 4 and for the alignment to other legal frameworks to be emphasised. She proposed that a workshop be held with all stakeholders to resolve outstanding issues considering that National Treasury had been constrained in addressing the large volume of comments.

Mr Francis Chemaly, on behalf of the Group of Construction and Engineering Companies, said all their issues had not suitably been addressed. He was concerned that the process was premature considering that National Treasury was under pressure to consider all comments and to draft legislation for this important Bill. He argued that devolving power through regulations would remove consistency for larger projects on a national level which will make it impossible for national players to strategically align to government processes. Chapter 4 is open to manipulation and corruption, and inhibitive as opposed to enhancing economic growth and transformation. Although the Bill had been improved, the ambiguity between clauses 19 and 24 remained. The unlimited set asides in clause 18 did not make sense. He proposed that Parliament put specific criteria in the Act and not leave it to the Minister or officials to decide. Chapter 4 in its current form was unconstitutional and would unfortunately be challenged in court. He implored Parliament and National Treasury to consider the Bill carefully and to develop a framework that would be implementable to enhance economic growth.

Ms Phelisa Nkomo, from the National Strategic Plan on Gender-Based Violence and Femicide Pillar 5 (NSP), said the Bill did not clearly indicate the type of economic challenges that it was attempting to address. Public procurement is an important lever to drive transformation and address issues of racial exclusion. The industrial capacity of the country declined to 19%. People who are supporting the Bill are likely to import all the products that they need and consequently, South Africa would become an assembly economy. The industrial and manufacturing capacities would be destroyed if public policy is not used to develop industrial capacity. The Bill was vague on gender responsivity. To this end, the use of 'may' in the Bill must be replaced by 'must'. The Bill was largely based on transactional procurement. The use of price as the primary criteria to award tenders was problematic. Any de-industrialised economy needs to pay a premium. Part of the premium is to allow localisation and empower small businesses to compete within their own local municipalities. This Bill would place additional requirements on small businesses. Previously disadvantaged people would remain on the periphery. The Bill was silent on gender-based violence although it is a critical issue in the country. Access to economic opportunities for women with abusive partners remains a concern.

Discussion

Mr G Skosana (ANC) welcomed the presentation as the continuation of the previous meeting in response to issues raised by stakeholders. National Treasury had done well to respond to the stakeholders. National Treasury is expected to respond and not necessarily agree with the comments made by stakeholders. The Committee will have the opportunity to review the matters raised and the responses. He noted some changes were made to clarify vagueness and tighten some of the loose screws. The Bill would be open to different interpretations and abuse if the loose screws are not tightened. He sought clarity about the use of the phrases to redress the 'imbalances' of the past and the 'injustices' of the past. Considering the history of the country, he felt 'injustices' was a more appropriate word to use because it carries more weight. The exclusion of the term 'previous spouse' in the definition of family

members was a step in the right direction. He welcomed the replacement of the term 'value-for-money' with 'efficient, effective and economic use of resources' and stated that both are not mutually exclusive to transformation. He asked if the debarring of boards would affect directors or the company. He proposed that a clause be added to debar directors from public procurement. He noted a significant improvement from the previous version of Chapter 4. This will prevent loopholes that might lead to different interpretations. The Committee was not the final arbiter of the Bill and would consider the comments before the Bill was presented to the National Assembly.

The Chairperson commended National Treasury officials for working under pressure to compile the responses. Public servants are often condemned and not commended for their good work. He sought clarity about the definitions of 'local content' and 'localisation'. The Committee made recommendations about localisation in the previous framework. He asked if the understanding of the concept was still the same. It would be difficult for South Africa to participate in the global market if other countries insert clauses that might limit access to international markets. He asked for the term 'previously disadvantaged' to be properly defined and stated that procurement was well defined in the Constitution.

Ms M Mabiletsa (ANC) asked if National Treasury would be developing regulations for the set aside targets. She proposed the inclusion of a provision for the Minister to set the targets. She questioned why prequalification for small businesses as a category was included but medium businesses were excluded. Set asides for all small businesses should be based on a prescribed threshold. Preferential procurement should focus on small businesses.

Ms Abraham said all stakeholders wanted to know if National Treasury had considered their proposals. It is not the intention of the Committee to oppose ideas. Many stakeholders have indicated that price should not be the only consideration. It would be empowering for National Treasury to state what they were unable to do given the time constraints.

Chairperson's closing remarks

The Chairperson thanked Members for their participation and stakeholders for their constructive input. Given that the process would proceed to the next step, it was important for National Treasury to liaise with the Legal Team to ensure that all legal requirements have been satisfied. A report must be submitted to explain the origin of the process, workshops that were held, who attended the public hearings, and how many public hearings were held. National Treasury must demonstrate that public comments were considered and should include a chapter in the report on consultations with various departments, provincial governments, and other organs of state. The Legal Team and the Secretariat must compile a report reflecting the process from the time when the Minister tabled the Bill and including whether Parliament has adequately consulted the public. The report was important and needed to form part of the report that must be submitted to the National Assembly. The processing of the Bill will continue on Tuesday and Wednesday, 28 to 29 November 2023.

The meeting was adjourned.

"FA14"

PMG PARLIAMENTARY MONITORING GROUP

Public Procurement Bill: National Treasury briefing

NCOP Finance

06 February 2024

Chairperson: Mr Y Carrim (ANC, KwaZulu-Natal)

Meeting Summary

Video

In a virtual meeting, the Select Committee on Finance received a presentation on the Public Procurement Bill from National Treasury to be fully briefed in preparation for the forthcoming public hearings. Where general questions on constitutional and legal issues could be raised, the Committee would seek expert advice to ensure the Bill's alignment with constitutional and legislative provisions. *The Public Procurement Bill, which was introduced in the National Assembly on 30 June 2023, aims to create a single framework to regulate public procurement by all state organs.*

In discussion, a Member highlighted the imperative of efficient governance for effective transformation, advocating for procurement policies to be focused on value for money, rather than preferential treatment. He criticised the current broad-based black economic empowerment (B-BBEE) model, proposing a shift towards sustainable development goals and prioritising price and efficiency in procurement decisions to benefit society at large.

Addressing concerns over public participation timelines, the Chairperson assured Members of ongoing negotiations with the National Assembly, and stressed the importance of adhering to constitutional and legislative requirements. He cautioned against politicising the Bill, and urged a balanced approach to empowerment and efficiency.

Another Member expressed moral objections to the Bill, decrying preferential treatment based on race and its adverse impact on governance and economic growth. He warned against perpetuating apartheid-era divisions, and called for merit-based opportunities.

A Limpopo legislature representative echoed concerns over divisive procurement policies, citing their detrimental effects on economic growth and job creation. She urged collaboration between the public and private sectors, and emphasised the need for productive synergies to address poverty and inequality.

Another Member underscored the importance of capacity-building initiatives as outlined in the National Development Plan, which advocated localised procurement strategies to stimulate economic growth and create jobs. Another member emphasised the need for a comprehensive review of the Bill's legal and constitutional compliance, urging provinces to scrutinise its provisions and ensure alignment with transformation goals. She called for inclusive procurement policies that empowered historically disadvantaged individuals and promoted economic participation.

In response, the Chairperson urged Members to focus on the concrete provisions of the Bill, rather than polarising the debate. He emphasised the need for balanced empowerment measures and called for careful consideration of the implementation capacity at both national and provincial levels. He concluded by urging the National Treasury to provide a summary of relevant court decisions, and to address concerns over implementation capacity. He underscored the Committee's commitment to thorough deliberation within constitutional and legal constraints, emphasising the imperative of efficient governance and inclusive economic transformation.

Meeting report

Public ProcurementBill

Purpose of the Bill
Mr Willie Mathebula, Chief Procurement Officer, National Treasury (NT), said the primary objective of this Bill was to establish a comprehensive regulatory framework governing public procurement processes and practices. It seeks to provide clear guidelines and standards for procurement activities across various government entities. Additionally, the Bill aims to promote transparency, efficiency, and accountability in the procurement process while addressing socio-economic challenges and advancing transformation goals.

Background of the Bill
The Bill was rooted in constitutional imperatives outlined in sections 195, 216, and 217(1) of the Constitution, which mandates the promotion of ethical conduct, effective resource utilisation, and fair, transparent procurement practices in public administration. These constitutional provisions underscore the importance of ensuring that procurement processes are conducted in a manner that upholds the principles of fairness, equity, and accountability.

Over the years, South Africa's public procurement system has been characterised by fragmentation, with different laws governing

various aspects of procurement across different government spheres. This fragmentation has led to confusion and inconsistency in procurement practices, undermining the effectiveness and credibility of the procurement process. In response to these challenges, there was a pressing need for unified legislation that aligned with constitutional principles and effectively addressed the socio-economic imperatives of the country.

Objectives
The objectives of the Bill were multifaceted, aiming to establish uniform Treasury norms and standards for procurement, while also fostering a preferential procurement framework. These objectives aligned with constitutional mandates and sought to ensure the efficient use of public resources, promote ethical conduct, combat corruption, advance transformation objectives, streamline procurement processes, facilitate dispute resolution, and promote innovation and sustainable development.

Applications
Clause 3 of the Bill delineates the scope of its application, extending to various entities, including departments, constitutional institutions, public entities, municipalities, and municipal entities. This broad applicability underscores the comprehensive nature of the legislation and its relevance across different levels and sectors of government.

Further, the extension of Chapter 4, which addresses preferential procurement to Parliament and provincial legislatures, highlights the importance of incorporating preferential procurement principles into legislative bodies' procurement practices.

Public Procurement Office
Chapter Two introduces establishing a dedicated Public Procurement Office within National Treasury, tasked with overseeing procurement activities and ensuring compliance with the provisions of the Bill. Additionally, it outlines the functions of provincial treasuries and mandates all procuring institutions to establish procurement functions within their organisations.

Procurement, integrity and debarment
Chapter Three contains provisions aimed at promoting integrity and transparency in procurement processes. It includes codes of conduct for officials, bidders and suppliers, as well as measures to prevent abuse of the procurement system. The chapter also addresses the debarment of bidders and suppliers found to have engaged in corrupt or fraudulent practices.

Preferential procurement
Chapter Four provides a historical overview of the evolution of preferential procurement policies in South Africa, highlighting the shift from focusing on contract allocation preferences to broader empowerment objectives. It underscores the importance of responsive preferential procurement policies in advancing constitutional mandates and socio-economic transformation goals.

General procurement requirements
Chapter Five outlines general procurement requirements, including procurement systems and methods, Ministerial regulations on procurement thresholds, and measures to promote access to procurement processes and disclosure of procurement information.

Dispute resolution
Establishing a Public Procurement Tribunal in Chapter Six aims to provide an avenue for bid reconsideration, review, and dispute resolution. This chapter ensures that aggrieved parties have recourse to an independent body for the resolution of procurement-related disputes.

General provisions
Chapter Seven encompasses various general provisions, including measures for investigating procurement-related matters, delegation of powers and duties, criminalisation of misconduct, regulations, amendments, and implementation procedures. It provides a comprehensive framework for effectively enforcing and administrating the Bill's provisions.

See attached for full presentation

Discussion

The Chairperson told Mr Mathebula not to sound too apologetic, because he had had a long Bill to take the Committee through and had done so competently. The presentation was barely over an hour. He reminded the Committee Members that they would receive a further briefing on this Bill, and that this was only the first brief. Members of the National Council of Provinces (NCOP) Committee looked at the Bill more closely as they neared the public hearings. This was an initial attempt at understanding the broad principles and major provisions. He said Mr Mathebula had taken the Committee further than that and concretely dealt with specific things. On the constitutional legal issues, general questions could be raised by the Committee, but it would have to get expert advice from Members in Parliament on the constitutional and legal provisions, and whether the Bill met them. These things were quite technical, but the Members could raise general questions. If possible, he suggested looking at the policy issues for now and get additional legal opinion afterwards on whether the Bill met constitutional and legislative requirements. The National Assembly (NA) had already done this, but the Committee's role was to review this.

Mr W Aucamp (DA, Northern Cape) said that if there was to be a speedy transformation, government should be well-run in an efficient manner. Government's purpose should be to provide opportunities for those who could not do so for themselves. By doing its job effectively, government would achieve its desired outcomes. Unfortunately, this was not the case, as could be seen. If the government

interfered with the system by implementing cadre deployment and preferential procurement that was not based on value for money and made the government inefficient and expensive, it would benefit only a few cadres and already rich business owners. This would occur at the expense of people who could not help themselves.

He thought it was very important for the final goals and desired outcomes to be looked at. Public procurement accounted for a significant portion of government expenditure -- it was nearly R1 trillion and approximately 22% of South Africa's gross domestic product (GDP). It presented a crucial opportunity for the government to address socio-economic challenges by incentivising companies to engage in behaviour that would contribute towards its goals. Government could not operate on its own -- it had to obtain public-private partnerships. It needed to apply a whole-of-society approach. The Democratic Alliance (DA) believed it needed to involve private companies and give them targets they could implement instead of forcing things onto them.

The DA believed that broad-based black economic empowerment (B-BBEE) should be scrapped and replaced with a sustainable development model. The B-BBEE was rooted in a concept of trickle-down redress and had proven ineffective in promoting economic inclusion. Currently, it benefits a political minority, well-connected and already wealthy people. It excluded the majority of South Africans meant to benefit from it. The DA believed that it should be eliminated and there should be an amendment to the Preferential Procurement Policy Framework that incorporated companies to contribute to a range of these sustainable development goals (SDGs). The primary factors needed to be price and efficiency, which had to remain the pivotal role in government procurement decisions. Prioritising the lowest cost and most effective delivery of government services would ultimately benefit those who relied on these services and uplift society as a whole.

This was unlike what had been seen over the last three decades, where public services had been neglected due to a huge amount of contracts that were not effected or finalised as intended. At the end of the day, it was the people on the ground that suffered. In many instances, it was mainly because of people appointed to do jobs but did not have the capabilities to do them. The DA believed that a broad-based society approach had to be applied. This was where companies were incentivised to provide certain services to communities, and put them back into their communities, instead of the government being forceful on what needed to happen, which would continue creating a richer elite society, and services to people at the ground level would be ineffective.

He mentioned that there was no water in places like Mokala in the Northern Cape. A company had been contracted to install taps there, but there was no water. Amongst the several reasons for this was that it was a cadre-deployed contract that was involved. The people at the ground level still did not have those services. There were several examples of this.

What would be the public participation process, and when would they be able to address the provinces on this? He wanted some timelines.

The Chairperson asked Members to stick to four minutes when speaking. The Committee would have to negotiate with the NA on the last question. He was dealing with the Speaker. The Committee was not going to do anything stupid, like telling the Constitutional Court it did not care what it said. The Committee would abide by its rulings. Yesterday, he had spent four hours drafting letters and changing them because of constraints. The Committee was in the hands of the Chairperson of the House and the Speaker. He thought the negotiating would be finalised by Friday.

He had been around for a very long time, and people often brought up processes because they were opposed to a particular viewpoint. In this case, there were two opposing imperatives. The majority party needed to get this Bill through because it was part of its election manifesto, so it wanted to do it as quickly as possible. The opposition parties opposed this Bill, so they would create stumbling blocks like going to court, to prevent this from happening. This was so they could tell the public they had stopped the Bill and should be voted for in the upcoming elections. This was politics. He was the Chairperson of the Committee -- he was not there as an ANC Member. He would put on his ANC hat later when he responded to Mr Aucamp, but right now, he was the Chairperson. There were constitutional and legislative prescripts. The Committee was in the good hands of Adv Frank Jenkins, Senior Parliamentary Legal Adviser, and would consult with him on every detail drafted from the politicians' side, so Mr Aucamp would receive a reply. However, he would not get it today -- it could not be done -- and he could speak to the Chairperson offline if he wanted. He asked the Committee not to bring up that topic -- there was no need, and there was nothing more he could do than what he already had done.

Mr S du Toit (FF+, North West) said it was obvious the Freedom Front Plus (FF+) did not support this Bill. He had a moral obligation to oppose it because of its contents, and the fact that people were being given opportunities based on skin colour and not qualification. It had been seen where B-BBEE had brought South Africa, and what the results of this had been and still affected all government institutions like Eskom and municipalities daily. South Africa was feeling and living the detrimental effects of the cadre deployment taking place. Exorbitant prices were being paid for goods and services, and the government wanted to further legislate this.

He said that Mr Aucamp had touched on most of the points he wanted to raise, but this would be engaged further. South Africa needed quality products and service delivery from qualified individuals, irrespective of their race. Mr Mathebula had referred to apartheid in his presentation, as he knew it would happen, but did they realise that what they were currently doing was reverse apartheid? People were being denied opportunities in the country. The bulk of South Africans who were ANC supporters bore the brunt of labour restrictions, although it was being promoted as something meant to benefit them. This was not the case -- it was only the few who benefited from B-BBEE. Taking preferential procurement further with stricter regulations would lead to more poverty, unemployment, and corruption.

It was unfortunate that over the last 30 years, government had not learnt that enforcing and implementing restrictions and putting

legislation like this in place was detrimental to the country. It formed part of the ruling party's manifesto, making this matter a political one, which was a cheap way of campaigning because people did not benefit from it.

The Chairperson said he had not said what Mr Du Toit thought he had said. He had referred to all parties, including opposition parties and the majority party, like in any democracy. South Africa was a healthy democracy. The DA and FF+ were also opposing the Bill for political reasons.

Ms E Wilson (DA, Limpopo Provincial Legislature) said she was covered by Mr Aucamp and Mr Du Toit. The South African economy could grow only by creating productive synergies between the public and private sectors. This was known by the Members of the Committee. However, throughout its tenure, the ANC government had implemented a progressively racially divisive procurement framework. This resulted in the enrichment of a few elite cadres and created increased unemployment. South Africa was at its worst poverty levels, and inequality was rife. The insistence on continuing B-BBEE policies had led to miserable failure. It facilitated the rise of tenderpreneurs, enhanced systematic corruption, and crowded out the economic growth needed to generate jobs and alleviate poverty. She urged the Committee to visit Limpopo so she could prove what the system had done and how the province had collapsed.

Mr M Moletsane (EFF, Free State) said he wanted to believe that the country had a National Development Plan (NDP) in place. The intention of this was to build the capacity of the state. Today, Members discussed the sourcing of capacity for the state -- were they not undermining the intentions of the NDP, which was to build the capacity of the state? He thought Members should have discussed how the state could aim to build itself by perhaps imposing the instruments that could be used to localise certain goods to benefit the South African economy and create more jobs.

Ms Q Madlopha (ANC, KwaZulu-Natal Provincial Legislature) thanked the Chairperson and the Committee for sharing this important procurement Bill. She said the concern with the previous Bill was the fact that section 217(1) was the only section used, neglecting sections 217(2) and 217(3). She thought National Treasury had tried to address this in Chapter Four, but the way it dealt with it undermined the preferential procurement policies that were there. She agreed with the Chairperson in saying that National Treasury had covered a lot of the previous concerns. However, it could not be said that it met the legal requirements. It needed to be given to the legal team to review outside of the National Treasury so that Members could understand it. The Bill was rejected by the majority of communities, meaning that nobody had looked at it closely from a legal standpoint. There could not be a bill that looked only at section 217(1), while there were other sections below that dealt with accommodation and trying to transform the economy for the majority of South Africans.

She appreciated that the Chairperson had said the legislatures would be presented with this specific Bill. The legislatures would also be in a position to ask their legal departments to analyse the amended clauses and try to accommodate the submissions that had previously been made. The issue of affirmative action had also happened during the apartheid era. It had affirmed the minority group, but now the majority group, which needed to be involved in the economy, was being discussed. When analysing it, it was not like this was the apartheid government, where people who were not qualified were made managers, and qualified black people were not given any positions. The challenges of the past made by the apartheid government were being discussed here. These challenges were being addressed so everybody could be involved in the South African economy.

There was a section speaking about all the sectors that dealt with procurement, which would be given the same opportunity to accommodate the previously disadvantaged. Was the private sector part of this? She did not think this approach to procurement would transform the economy if the government was the only institution that would be transformed, and the private sector did what it wanted. The collusion and funnelling of billions of rands was done by the business sector, and massive corruption took place. She did not agree with the colleagues who said there would be further corruption, because massive corruption took place when people colluded with one another. This was being done by big businesses and disadvantaged those who were not part of the economy.

If one looked at China and France, one would see that they had identified those who were disadvantaged in their procurement policies, and were motivated to address that matter. In South Africa, it was not about motivation. It was a well-known case that the apartheid government did not allow black people to be part of the economy, let alone business. This happened even in the subjects black people learnt at school, which prevented them from succeeding. They did not allow black people to understand the economy and be part of it. This was what was being spoken of when saying there needed to be transformation and affirmation for those who were not part of the economy before. This Bill covered a lot of concerns. The provinces would look at it closely and understand it now that they had a clear understanding of what was included, especially as Chapters Four and Five outlined what had been amended and the outcome of the courts. She supported the Chairperson in saying the outcomes of the courts on the Bill would assist the provinces when it came to whether it met legal and constitutional requirements.

The Chairperson said the Members should be "cool" about the Bill. It was their early entry into this area, and nobody was rushing into it. There were time constraints, but they were negotiating with the NA. The Committee would have to take the presentation it received from National Treasury. The National Council of Provinces (NCOP) would also do so and go to their respective provinces and take them through it. He wanted to ask National Treasury about some issues the NCOP should consider. He first asked if anybody wanted to speak.

Mr T Xulu (ANC, Finance Chairperson, KZN Legislature) asked if the Committee was commencing with public comments on the Bill on 15 February? Was an isiZulu translation of the Bill available? He asked this because the province wanted to comply effectively with section 118(1)(a) requirements.

Committee needed to see how many of those contracts had been completed successfully. How many of them were not completed successfully, or at all?

Ms Madlopha said she appreciated what had been raised in the meeting about statistics. Apart from how beneficiaries had benefited since the commencement of B-BBEE, the province also wanted to make a comparison of the budget- how much went to those people, and how much went to formal businesses? This was so that the province could look at whether B-BBEE had impacted transformation, and the involvement of the majority of citizens.

The Chairperson said that was what the Committee had meant, and he thanked her for making it clear. He told Mr Aucamp he was not a lawyer, and some of this issue had been in the public domain about whether one could look at the contracts and their confidentiality, etc. He did not know whether the Committee could get that information. He thought between Adv Jenkins and the Members of Parliament, it could be sorted out. He did not know if the Committee could get the full details, but if the law said the Committee could have access, then it would do so. As far as he knew, when looking at empowerment, it would have to look at outcomes. In other words, if someone was given R3 million to deliver a service, did they or did they not deliver it? That was being asked. He thought it was a fair question when asked to look at the contracts. What was one going to know about the contracts? He asked this, because he did not know anything about contracts, and they were very technical things. He suggested letting the lawyers on both sides sort it out.

Mr Mathebula said that, as previously indicated, National Treasury would get the statistics from its system and the DTIC on some of these issues. It would also address the questions asked during his response, so that by 15 February, there could be an isiZulu interpreter to speak about the presentation.

Information on the impact of service delivery could not be made available in the short timeframe as indicated, but National Treasury would also look at the impact of service delivery and which projects had been awarded to whom, and whether they had failed or fulfilled the requirements. It would take time, because procurement happened in various places and it would need to collect that information. It would also look at the budget issues raised, because it was responsible for checking and getting that information. It would check the budget to see how much money went to certain individuals, including groups of other people who had benefited from it.

The Chairperson thanked Mr Mathebula for his responses. The Committee had asked for things in the generic sense, and he knew that what it was now asking for was too much and unreasonable within the limits. He asked a Committee staff member to look for independent assessments of the outcomes of these programmes. Within reasonable limits, the information could be obtained. The aim today was not to dig deeply into the issues that had been covered. The Members should get a feel for the Bill. They would get information from the provinces and have public hearings shortly, and there would be further briefings.

Ms Mendoe Ntswahlana, Head: Chief Procurement Office, National Treasury, referred to the issue of the awarded contracts. As National Treasury had said, its system was a centralised supply database, and it did not have that information, and would communicate that to the Committee. On the execution of the contracts, it would be important. This was because execution happened at the level of various entities and departments. Information on the awarding of contracts was readily available. The system was also able to provide the contracts awarded and the people they were awarded to. Even the provincial treasuries did not have that kind of information. If Members wanted more information, especially if they saw that some of the companies awarded were within certain jurisdictions, they could get it. It should not be a challenge. On the number of executed contracts, one could assume that if a payment was made, it was executed. The provinces would assist in this regard.

Closing remarks

The Chairperson thanked Ms Ntswahlana, and said her input was very helpful. He was not asking for every municipality's decision to implement B-BBEE, but more so in an overall sense. He did not want to give the National Treasury too much to do. Lots of ground had been covered in the meeting.

He drew the Committee's attention to what was in the chat group, where Mr Du Toit had attached an article about how B-BBEE had benefited from state capture and corruption. The Chairperson said that was one of many articles and was a common argument, not just on the opposition's side, but also in some of the ANC's documents and what some leaders had said.

He said the Language Bill of 2012 made it compulsory for each department to translate any state-based documents, and there was a budget for this. He agreed with this -- there was a policy, but no capacity and means to implement it. Another Member in the meeting had said National Treasury did not have to provide the names of the companies, only the statistics, and everyone agreed with this. The statistics would be provided.

There was a meeting taking place on Friday about the current dates of the NA and the NCOP rising. The time constraint in the requirements was six weeks, but he did not make the rules and would have been more lenient if he had the authority. The Western Cape kept asking for more than six weeks, and wanted a week-long extension, but the cycle of the Constitution provided for only six weeks. It was the only province that requested such an extension. The Members would have to ask the Chairperson of the NCOP and the Secretary of Parliament to approve that. He thought this matter would be sorted out by Friday.

The meeting was adjourned.

(See Presentation)

Business Unity South Africa (BUSA) Submission
Mr Chris Campbell (Board Member at BUSA) said the organisation supports having all-encompassing legislation to govern procurement because currently our systems have been fragmented and have fallen short of being able to adequately meet the prescripts of the Constitution, in all of its sub-sections 217 (1), (2) or (3).

He suggested that the Public Procurement Bill be referred back to the NEDLAC Process to strengthen the basis for getting such legislation eventually signed into law. Promulgation of poorly conceived legislation will result in the need for frequent reviewing of sub-ordinate legislation akin to trying to convert a donkey into a prizewinning racehorse.

The NEDLAC Process was rushed through a six-month process, whereas National Treasury had been sitting with the 2022 version for social partners to consider since 2020. Urgency seemed largely premised on closing the gap, left by the Constitutional Court ruling in respect of the Preferential Procurement Regulations of 2017, which is a component that would be addressed in the new Bill, but took very little cognizance of the how in the process of closing that gap, cost-effectiveness and other prescripts of Section 217 (1) could be deliberately driven at a primary legislation level, without prescribing processes which belong in Regulations.

Evidence suggests that of the public comments received following the August 2023 invitation by the National Assembly Standing Committee on Finance, only 36% of these were considered with 64% not having been processed at all; This shortcoming will likely be legally challenged based on the precedent set by the Constitutional Court Ruling in May 2023 which invalidated the Traditional and Khoi-San Leadership Act 3 of 2019, which had been passed by Parliament and even signed off by the President.

If Procurement principles are not well enough defined, for procurement outcomes to be optimised, it is uncertain how much success would be realised in using this as a mechanism for redress as envisaged in Section 217 (2); It is counter-intuitive to hope that accelerating a flawed piece of legislation will produce the expected results sooner when in reality, the legislation will not be able to be effected immediately, exactly because its implementation will be delayed by likely legal challenge.

(See Presentation)

African Procurement Law Unit (APLU) Submission
Prof Geo Quinot (APLU Director and Professor of Law at Stellenbosch University) welcomed the tabling of the Bill because law reform in this area of the law is long overdue and it is important as part of the pursuit of the national development plan given that public procurement is at the heart of the engine room of government.

The Bill is especially welcomed as a long overdue step to consolidating the law on procurement because one of the biggest stumbling blocks in public procurement has been the extreme fragmentation of the law governing procurement. The law was spread out over too many different legal instruments which undermines efficiency because it is too difficult for procurers and suppliers to have a firm grip on the law. The complex web of rules and technicalities enables corruption to thrive. While the Bill is a positive step it does risk future fragmentation. To limit this the Unit proposes setting clear principles in the Bill. Key elements like procurement methods should be defined within the Bill itself and not left to regulations. Also, any delegated powers for regulations should be accompanied by clear parameters and guidelines. Regulations should handle specific details, not all principles.

On preferential procurement, too many key concepts are left open-ended for the Minister to determine such as thresholds and conditions, prescribed criteria, complementary goals, and prescribed conditions to advance sustainable development. The new powers granted to the provincial treasury to issue binding instructions to local government pose another threat to new forms of fragmentation. This opens the door to different approaches to procurement in different provinces.

The Bill needs to be anchored squarely in s217 of the Constitution. The Bill fails to implement the five vital public procurement principles enshrined in s217(1) of the Constitution. This silence leaves officials vulnerable to legal challenges and it hinders the practical application of maximum value for money championed by the Zondo Commission and the President. Specifically, the Bill offers no guidance on navigating tradeoffs between principles like fairness and cost-effectiveness or equity and competitiveness. This lack of clarity weakens the legal ground for designing policies, methods, and criteria further hindering effective procurement. Clear implementation is a major stumbling block to the Bill which many experts including the Zondo Commission have highlighted.

The Bill's centralising tendencies regarding procurement raise significant concerns about its compatibility with the Constitution's principles of cooperative governance. Centralisation manifests itself in several ways which risk completely removing local government elected officials from procurement regulation. Centralising power at the national level disregards local knowledge, needs, and geographical disparities potentially hindering optimal procurement outcomes. The lack of consultation with local government contradicts the spirit of cooperative governance. The Unit recommends a thorough review of the allocation of powers between the different spheres of government.

The Bill also demands substantial resources for successful implementation but in the same breath, the Bill fails to address capacity needs raising concerns about its feasibility in practice. The Bill offers no statutory basis that equips provincial and municipal government to fulfil their additional mandates prescribed in the Bill. The unit proposes adding a provision in the Bill explicitly mandating increased capacity and professionalisation. This provision should oblige relevant departments like the National and Provincial Treasury to allocate additional resources to procurement functions.

(See Presentation)

Joint Strategic Resources (JSR)
Prof Jonathan Klaaren (Professor at Wits University and member of JSR) stated that the Bill raises significant Constitutional issues. Secondly, the Bill should provide for the independence and effectiveness of public procurement regulatory functions. Thirdly, the Bill needs to strengthen anti-corruption enforcement mechanisms.

The revised Bill remains unclear whether it sees procuring institutions or the National Treasury as the first mover in setting up public procurement policies for procuring institutions. Chapter 4 of the revised Bill is not clear as it does not set out standards or concepts that assist implementation, and as currently drafted appears to fall short of the Constitutional framework standard as well as potentially the balance among the s217 principles. However, section 22 of the Bill which speaks about facilitating sustainable development is welcomed and it should be extended to promote green public procurement.

The Bill should statutorily embed the principles for procurement and establish checks and balances framed around s217 of the Constitution. Also, the Bill should provide adequate independence and effectiveness of the institutions fulfilling regulatory functions in public procurement which are distinct from the purchasing and operational functions. The Bill needs strengthened anti-corruption enforcement. For instance, the Bill's regulatory inspection or civil investigation powers need to be aligned with the existing investigative powers of the Special Investigating Unit (SIU), the new Investigating Directorate of the National Prosecuting Authority (NPA), and any new anti-corruption agency (NACA) as well as incentivised whistleblowing.

(See Presentation)

National Research Foundation (NRF) Submission
Ms Lindiwe Nkwe (Compliance and Reporting Senior Manager at the NRF) commented that the Bill does not promote an innovation-enabled environment. 17(2 a) largely removes any discretion that procuring institutions may have under sections 7 and 8 by granting the Minister far-reaching powers to prescribe to institutions how they should procure. The organisation recommends that the Minister should prescribe an appropriate and differentiated framework at minimum for innovation-centric procuring institutions, ideally for all procuring institutions, and include specific procurement methods to address innovation. Methods to support innovation procurement must be continually developed and implemented across procuring institutions.

Section 18(3) is extremely limiting at provincial and local government levels and may retard transformation. Why must a procuring institution trade-off between "black people within a particular geographical area" and other designations such as women or youth? This makes it impossible, for example, for a province or municipality to support black women-owned small businesses within their geographical areas, which they may have identified as a specific transformational need. The section must be removed and managed via regulation so that provincial and local governments have substantive powers in the procurement system.

She noted that they had identified cost implications as another challenging area within the Bill. Section 5 of the Memorandum says that "No substantial financial implications for the State are envisaged". She remarked that this could not be the case. On the contrary, the Bill will involve considerable costs related to implementation costs, compliance costs, procurement costs, and knock-on costs. The organisation recommends that all these cost implications must be quantified to determine what the financial implications for provinces and local governments are of enacting the Bill. Without such quantification, the Bill cannot legitimately be passed.

(See Presentation)

Discussion
The Chairperson posed a question to Treasury related to whether they have the capacity to do what they have set out in the Bill. Can local and provincial governments implement the Bill?

Mr D Ryder (DA, Gauteng) stated that the Bill has been through the National Assembly already. What the Committee is dealing with in the meeting is a B Bill. The National Assembly passed a version of the Bill on the 6th of December. On the 7th of December, an A Bill was issued and on the 8th of December, a B Bill was issued. The B Bill is currently the topic of discussion in the meeting.

There are material changes that have taken place between the Bill introduced in the National Assembly and the Bill that is before the Committee in the meeting. Consultation on this version of the Bill needs to be quite comprehensive and there needs to be a lot of discussion. The Committee cannot assume that the National Assembly has thoroughly ventilated the material content of the Bill because there are material differences. He was not certain that the National Treasury had been forthcoming about the contents of the Bill that had been passed in the National Assembly and the version of the Bill that was before the Committee in the meeting at present.

The Chairperson acknowledged that the Bill did indeed have material changes that made it different from the initial Bill that had been introduced in the National Assembly. He invited the Legal Advisor to expound on the process of a Bill reaching the NCOP. From his understanding, a Bill would ordinarily come to the NCOP once it has been passed and adopted by the National Assembly. Also, Parliament does have the right to change a Bill substantially. Parliament is obligated to listen to public comment because that is the nature of a healthy democracy but ultimately it is Parliament that has the power to make the final decision on any Bill.

Adv Frank Jenkins (Senior Parliamentary Legal Advisor) replied that chapter 4 of the Bill was substantially redrafted by National Treasury as Mr Ryder indicated. The redrafting was a result of public comment and deliberations within the Standing Committee on Finance which considered the Bill. Although there were serious concerns about time constraints related to how long the Bill sat in the National Assembly, the Bill still followed the ordinary processes of any other Bill that reached the NA and NCOP. The A version of the Bill is the proposed amendments that the Committee adopted. The B version of the Bill is the original Bill with the proposed amendments from the A version of the Bill. The NA approved the B Bill with its additions and then referred it to the NCOP for deliberations. Ultimately, there are no procedural irregularities in terms of how the Bill arrived at where it is now.

Mr Ryder remarked that it would be reasonable to assume that the NA processed a flawed Bill to meet time deadlines.

The Chairperson refuted Mr Ryder's assertion and stated that Adv Jenkins had not said anything about the NA processing a flawed Bill due to time constraints.

Mr Ryder said that Adv Jenkins may not have said it expressly, but he may have implied it and everyone could draw their own conclusion. He appreciated the excellent and well-considered inputs from the speakers. Many speakers spoke in unison about a few issues such as the constitutional issues that were raised. He was expecting Treasury to respond to the constitutional concerns that were raised, particularly the centralisation of procurement. This is an issue that triggers chapter 3 of the Constitution, and it limits the powers of provinces and local government. Also, the potential for bottlenecks due to this issue is substantial.

The issue around localisation and procurement is interesting because defining locality becomes a critical question. If you sit in Nationa Treasury, local is South Africa. If you are sitting in Emfuleni, then local is Sebokeng and surroundings. It is unclear what the centralised body means by local at this point. The ability to implement this Bill and the cost of implementation is not something that should be dismissed. The NRF has a valid point in bringing up the implementation costs because they will have a material impact on departments. We heard from the Finance Minister who said there is not enough money to fund NHI immediately so what is the point of processing this Bill in its entirety if it cannot be funded as well?

There are many pages of written submissions that the Committee must get through which might stretch the Committee's capacity, but it must be done to get as much information as possible. The Bill is going to impact small businesses such as those that are providing services to municipalities at a local level, yet these are the key players that are missing from the meeting at present. As part of the s76 process, there will be an opportunity for continuous public participation and public participation in provinces needs to be more comprehensive and reach out to small businesses and township economies because they are the backbone of the country, so their input is pivotal.

The Chairperson asked Treasury to look further into the issues of capacity and resources related to implementing the Bill. Concurring with Mr Ryder, he stated that the Bill is substantially different from what was presented by Treasury in the previous week. Speaking to procurement professionals and stakeholders, he assured them that this was not the only opportunity for public comments on the Bill. There would be numerous opportunities, but the stakeholders would have to avail themselves.

He noted that there needs to be a balance between consultation with stakeholders and Parliament's right to make a final decision. People are opposed to the Bill from different sides. Some people who are for and others who are against transformation have opposed the Bill. So, there is a spectrum of individuals who do not support the Bill. From 1998 and onwards, generally, Treasury has been very cautious about giving Ministers wide discretion and powers because past practices have created situations where Ministers run rogue with their powers.

There is a need for significant state intervention precisely in the spirit of cooperative governance. When it comes to procurement there must be a strong national framework while allowing latitude to municipalities and provinces. He emphasised that when it comes to the Constitutional issues, National Treasury must remedy the issues because they cannot bring forward a Bill that does not pass constitutional muster, particularly because of the subsequent amendments made before the Bill's referral to the NCOP. He reminded the attendees that it is important to note that any piece of legislation is political because it is laden with the objectives and goals that the ruling party seeks to achieve so there are various positions that one must consider when analysing the Bill holistically.

Mr Brunette repeated that there were substantial amendments made to the Bill especially on Chapter 4 by the NA. The Chapter does not meet the definition of a framework as required in terms of s217 of the Constitution which is the reason why most of the stakeholders in the meeting are worried. He emphasised that the institute was in favour of expanding preferential procurement, but the procurement system needs to be firmly positioned in sound legal foundations so that the procurement system can develop smoothly.
Mr Campbell reiterated that all the comments that they had made were in the interests of what they see as a significant social partner for South Africa. The contribution is meant to be constructive.

Prof Quinot addressed the matter of resources and cost and said what is important for the NCOP and the Committee to engage with is to interrogate the instruments that are designed in the system to assist Parliament in its functions, primarily socio-economic impact assessments, the memorandum, as well as the PFMA, and s35. All these factors are not accurately reflected in this Bill as discussed. In terms of the balance of what should be in the Act and what should be in the regulations is a very critical point that has been mentioned. One cannot put all the details in the Bill because that would be very cumbersome, and it is not what anyone is suggesting but there are very clear international global standards on how one can achieve that balance in public procurement law between putting the necessary principles into statute and supplementing those with regulations.

The Chairperson found Prof Quinot's input about the international agreements on public procurement law very useful because it has been a persistent theme since 1994. He asked Prof Quinot to submit a three-page summary that provides the details of the clear international global standards on how to achieve the balance in public procurement law between putting the necessary principles into statute and supplementing those with regulations.

Prof Klaaren thanked the Committee for initiating the process and allowing stakeholders to contribute, noting that the session felt constructive. He added that they would be happy to continue to participate.

Ms Nkwe reiterated that the organisation would avail itself to assist National Treasury where they require assistance. They are an innovation-centered organisation and most of their commentary on the Bill has been thoroughly researched. Their research indicates that the Bill should provide opportunities for new entry, not the market. She especially thanked Mr Mangwene for his assistance leading up to the proceedings.

Southern African Clothing and Textile Workers Union (SACTWU) Submission
Mr Simon Eppel (Research Director at SACTWU) recommended two ways of moving forward as it relates to improving the Bill. The first way forward is to provide comments and propose changes to the text of the Bill. The second way forward is to propose that the NCOP should insist on a process to amend the Bill by bringing it back to Nedlac in the next 6 months for proper deliberation and consultation.

The big changes coming out of the NA process such as chapter 4 have created risks. Some basic constitutionally mandated issues appear to be missing from the Bill such as the lack of clarity on price or pricing mechanisms in the Bill is curious and a concern. It may be argued that it is not aligned with the Constitution. After all, the primary legislation seems to be missing a matter critical to its mandate. The NCOP should consider this matter and address it.

The extensive new additions to the Bill are hard to interpret and appear deficient. This may introduce the risk of poor and even chaotic implementation which will constitute the basis for uncertainty, contestation, uneven application, and undermined policy objectives. Examples of the deficiencies laden in the Bill include some missing definitions.

Preferences require precise instructions & advanced administrative capabilities which are both lacking. This may lead to possible poor implementation. Procuring institutions generally have limited insight into the national supply base. The Bill mandates market research for some preferences but not others, raising concerns about misaligned preferences and compromised service delivery. Layering multiple preferences could, if applied haphazardly, fragment contracts to an unviable extent, threatening the sustainability of businesses, industries & job creation.

Without a common national standard for applying preferences, institutions may interpret them inconsistently, potentially fragmenting the market even further and preventing businesses, including black-owned enterprises, from achieving the necessary scale. This would furthermore undermine localisation, industrialisation, and jobs. Also, an overly complex tender system poses high entry barriers, hampers industrialisation efforts, and favors fraudulent conduct over legitimate business operations, promoting the proliferation of tender rigging.

(See Presentation)

Congress of South African Trade Unions (COSATU) Submission
Mr Matthew Parks (Parliamentary Coordinator at COSATU) noted that during the NA process, s13 was watered down. The section originally prevented leaders of political parties and other related persons from submitting bids for tenders. This exclusion was subsequently removed in the current version of the Bill. It must be returned in the interest of strong anti-corruption measures.

The Bill requires public institutions to keep a record of automatically excluded persons which is welcomed but to ensure that this is done in a meaningful way to enhance transparency and monitoring, and to avoid this clause becoming useless and the data being silenced within individual institutions, a national register of these interests should be kept at the Public Procurement Office (PPO), and it must be publicly disclosed.

In late 2022, Parliament had done a lot of work around the grey listing and money laundering legislation. There needs to be typos corrected within that legislation otherwise it is going to create a bit of a mess. There is a very basic factual error to correct in the Procurement Bill s33(2) which will have the effect of impacting transparency and the disclosure of beneficial ownership which the money laundering legislation developed quite well. The Procurement Bill needs to align the provision with both s56(7)(aA) and s56(12).

The Bill is silent on whistleblowing which is inappropriate. The Bill must protect whistle-blowers! It must encourage or incentivise whistle-blowers to step forward because they are a very useful tool to recover money & shatter corrupt networks. Given the significant amendments that happened to the Bill while at Parliament, particularly in relation to Chapter 4, there is more urgency to return this Bill to NEDLAC sooner - within 6 months – to engage deeply on its contents, risks, implementation, and challenges. He kindly requested the members of the NCOP to ensure that this outcome is realised.

(See Presentation)

Corruption Watch (CW) Submission
Ms Motlatsi Komote (Legal Researcher at CW) stated that Section 217(c) of the Constitution lays down an imperative of a public procurement system that is fair, equitable, transparent, competitive, and cost-effective. The problem is that these principles are not reflected in the current version of the Bill. A large bulk of these key principles have been left to subordinate legislation to deal with. Any policy principles of this nature should be embedded in the primary legislation. The risk of not doing so is that we vest too much discretion in a Minister without offering any guiding principles in the Bill itself.

The organisation has identified some issues related to public participation, mainly with the NA process. Towards the end of last year, there were significant changes that were made around Chapter 4, which raises concerns for the organisation because the various contributions the organisation made were not fully considered. Facilitating public involvement means giving members of the public a reasonable opportunity "capable of influencing the decision to be taken. There were substantial changes made by the OCPO to Chapter Four which had an impact on public participation. It would therefore be appropriate to refer the changes back to the NEDLAC.

She mentioned that they were alarmed about the removal of price as a criterion for evaluating tenders.
This misaligns the Bill with section 217 of the Constitution because public procurement must be equitable, competitive, transparent, and cost-effective. The organisation's recommendation is for the reinstatement of price as a criteria within the Bill.

She added that the organisation's recommendations include that the Committee incorporates incentivised whistleblowing in the final version of the Bill. Transparency and accountability mechanisms in the Bill should be strengthened. Separation of powers between the various entities (National Treasury, Public Procurement Officer, provincial treasuries) must be reinforced for clarity and efficiency purposes. Meaningful public participation must be considered throughout the legislative process in the NCOP. Progress made in receiving public input should not be lost.

(See Presentation)

Public Service Accountability Monitor (PSAM) Submission
Ms Lisa Higginson (Budget Advocacy Coordinator at PSAM) said that there was not enough information for monitoring since the Bill leaves key elements of reporting and disclosure to subordinate legislation. There is no justification for leaving these key elements to regulation. Their recommendation to the drafters is an adoption of data standards to strengthen transparency and enable citizen monitoring and oversight.

Very few concrete suggestions to the Bill to improve outcomes such as greater participation, institutional arrangements, and transparency have been implemented and several gaps remain. The National Treasury has committed to open contracting. There are some existing arrangements in place, notability e-Tenders and the Central Supplier Database. The challenge is that the e-tenders portal is not up to date, and it does not provide sufficient information for monitoring and oversight. Local Municipalities and Public Entities are not required to publish. This is stated in fine print on the e-Tenders website. Will the Bill overcome these challenges by accepting proposals for a centralised portal with greater transparency?

The main recommendations include addressing the concerns raised in previous submissions. Strengthen transparency provisions to ensure that the Bill addresses existing deficiencies. Adopt the Open Contracting Data Standard (OCDS) or similar standards to ensure objectives are met. Also, the Bill should align with the Department of Public Service and Administration (DPSA) government-wide open data principles.

(See Presentation)

South African Medical Device Industry Association (SAMED) Submission
Ms Tanya Vogt (CEO at SAMED) said that the areas they were most focused on considering how procurement in medical technology poses a unique challenge and how a one-size-fits-all all procurement plan could raise significant issues with regard to patient care and taking care of the healthcare sector in general. They would like to advocate for value-based procurement in healthcare. The removal of strategic sourcing is a concern within the med-tech environment. There are also conflicts between the proposed NHI Bill and the Procurement Bill.

Medical technologies are estimated to bring in approximately R20 billion in terms of the market size within the country and 80% of those businesses are small and medium-sized enterprises. Most of the med-tech products in the country are imported due to the large amounts of money needed for local investment and distribution. The industry is complex in that sub-contracting in the health sector often increases the price of Medical Devices (MDs). Localisation for MDs is complex, not like 'generics' in medicines which necessitates that the Procurement Bill consider the unique regulatory frameworks including clashes with the NHI Bill.

The removal of the principles around Bid Specification Committees and the Chapter on Supply Chain Management from the Draft Bill, in both the previous version of the Bill (B18-2023) and the current Bill, decreases the likelihood that there would be appropriate consideration as a matter of law, of unique requirements for med-tech procurement. MDs require significantly different considerations when arriving at specifications and goal-setting requirements. Procurement must allow for improvements introduced within contract structures - patients to benefit from innovation. Non-exclusive contracts/multiple models and types – meet the needs of different healthcare providers (HCPs) and patients. Account for the value of medical technology. Maintenance and servicing of medical equipment is critical. A clear and efficient procurement-to-
payment system to address consignment inventory.

The concept of Value-based Procurement, removed from the Draft Bill, and which no longer exists in the current Bill, sets out important parameters to ensure that medical device procurement is appropriate and responsive. "Strategic sourcing" is also now removed as a definition in the current version of the Bill. SAMED notes that the phrase "a strategic approach to procurement" is included in Chapter 5 for which the Minister may prescribe a framework, and although not defined, submits that it should be defined as value-based procurement i.e. making purchasing decisions that consider how a product or solution can best deliver the outcomes being measured and reduce the total cost of care — rather than focusing exclusively on purchasing a specific product at the lowest possible price. Low price does not always equate to high quality / better outcomes.

(See Presentation)

Will Power Submission
Mr Shaun Scott (Director and Chain Supply Management practitioner at Will Power) stated that the Bill must include Parliament and provincial legislators to inhibit continued fragmentation which is what the Bill is attempting to overcome in the first place. The Bill also applies to donor funding. This is concerning because it is likely to have significant financial and service delivery risks in provinces and local government because donors are reluctant to follow the exact prescripts of a national entity. Also, the district development model seems to be ignored in this version of the Bill.

In terms of the constitutionality of the Bill, it ignores the local and socio-economic constitutional objectives of provinces and local government. The central office and provincial treasuries may issue binding instructions, but they are not going to bring the Department of Cooperative Governance and Traditional Affairs (CoGTA) and the South African Local Government Association (SALGA) into the process.

There are also conflicts with the original legislative and executive powers of provincial legislatures and local government. They have identified 36 matters in their submissions that have not been catered for in the Bill which is concerning because if an Accounting Officer fails to take reasonable steps to implement the Act, they are liable for an offence or imprisoned for three years or they will be fined.

The current version of the Bill allows for specialist offices at the Public Procurement Office at the national level. The powers are just assigned powers to provincial treasuries, but the Bill doe does not assign specialist offices at the provincial level. Procuring institutions are defined but there are no original powers allowed to municipalities. This is going to be a key implementation issue. There is no provision in the Bill for the minimal organisational requirements, competencies, or positioning of where the procurement office will be.

In terms of preferential procurement, prequalification is limited to only one. This will surely retard transformation in provincial and local government. He stated that procedural measures do not belong in primary law because they are going to be limiting.

The Bill talks about subcontracting as a condition in BID and not a condition of contract. The condition of BID is going to empower the construction mafia and radical business forums in the country and continue to create unreasonable expectations at the lower community level. It is going to be practically challenging. Ultimately, conditions of contract work and we need to just stick with that.

(See Presentation)

Institute of Race Relations (IRR) Submission
Mr Gabriel Crouse (Writer and analyst at IRR) stated that they were opposed to race-based legislation, so they were reluctant to accept preferential procurement. The focus should be cost control and cost-effectiveness. There is no transparency and cost control in the Bill because it instead creates broad discretionary powers for the Ministry and procurement offices to deviate from a value-for-money basis to pay what Mr. Mathebula referred to as premiums. Those premiums are a cost, and that cost is not reported in the budget at present and that cost certainly will not be reported under the new system of procurement envisaged by the Public Procurement Bill. This is a major concern; in the organisation's written submissions it made recommendations to cure the problem.

He implored the Committee, stating that even if it could not stomach any of their other submissions, it must take seriously the fact that there is a cost, and that cost must be accounted for. He elaborated further on what the costs looked like, costs such as hiring new staff to process paperwork, purchasing computers, or software systems to deal with the processes envisaged in the Bill but more significant that are the costs that come out of seeing two different bids and spending extra on one business rather than another to get that premium. These premiums will be paid under the Bill as it is envisaged. What the Bill is lacking and must do is to create a system where every time such a cost is paid, that cost must be accounted for so that the amount can be reported back to the public.

If you look at international laws that try to deal with affirmative action, one finds that often affirmative action plays a particular role which is that of a tie breaker. From a procurement perspective, an instance of this could be a scenario where two bids are both equally cost-effective so the s217 requirement is being met but now the conundrum is to try to figure out how to break the tie. A real government procedure is to flip a coin in most cases but another way one might break the tie is by using a preference point system that can be used to break the tie using categories of preference.

Ultimately, balancing cost-effective requirements with transformational requirements as a tie breaker is a practical way that the Committee can reconcile s217(1) and s217(2) if the Committee seeks to cure the Bill of its Constitutional defects and set up a

framework that adheres to the Zondo Commission Report's advice to maximise value for money while respecting transformational imperatives. He asked the Committee to contemplate whether it was still necessary to enhance the scope of preferential treatment whereas black businesses are already thriving and doing well. South Africa is very different from what it used to be, and Treasury now needs to focus on getting the best value for buck.

(See Presentation)

Discussion

Mr Ryder said that COSATU raised some very poignant points such as their comment about the dilution of s217(1) and the IRR made a similar point. The IRR took it further by identifying that s216 has some very important aspects that need to be taken into consideration. Legislation needs to be balanced and take all the differing views into account. A hyper fixation on one particular clause in the Constitution might create a lack in addressing the Bill as a whole. COSATU also mentioned the issue around NEDLAC. NEDLAC is big, organised business and sometimes they are given too much power because they speak for a very advantaged and fairly small grouping. The point is that the Committee is not getting views from small businesses, the township economy players.

The issue of whistleblowing has been raised several times. COSATU pointed out that there are basic spelling and grammatical errors in the Bill before the Committee and the amendments to Chapter four that have not been tested and are unlikely to be properly tested. This makes it difficult for the Committee to produce a proper Bill. Corruption Watch spoke about the transparency issues laden in the Bill which create a risk for increased corruption. This is a significant point because the Bill gives the Minister broad powers but very little to no mention of oversight over the procurement process is alarming and should be addressed.

SAMED pointed out the disconnect between the NHI Bill and the Procurement Bill. It will be interesting to see which piece of legislation will then take precedence. SAMED made valid points relating to how nuanced procurement is in specialised areas, medicine being one. Mr Scott, from Will Power, pointed out one good thing about this piece of legislation and that is that it does not reference the District Development Model. The District Development Model is dead, and all the test models have pointed out that this model is never going to work. Will Power also pointed out the financial implications that have not been properly addressed.

He stated that he shared similar concerns with the IRR about race-based legislation. This type of legislation takes us back to an important question which is how race is going to be tested and how to determine who is black enough to benefit. Race is a complex topic because it has become a fluid concept. No one mentioned the Harvard Growth Lab's research and the IMF's research which indicates that preferential procurement is often counter-productive and does not deliver the intended outcomes that are hoped for.

Mr Parks remarked that everyone could concur that this is a major Bill that presents some challenges that need to be well-ventilated and investigated. Ideally, the Committee should remedy the challenges but regardless of whether the challenges have been fixed or not the Bill still must go back to NEDLAC. At a high level, NEDLAC is a much more functional space to debate policy issues than no space at all. The goal is to bring the Bill back within six months not just because of the importance of this Bill but also because public procurement is done badly in the country. It also poses an existential threat to public finances, socio-economic development, service delivery, democracy, and our social contract. The organisation is not worried about state control rather it is more worried about decentralization. There is a need for a system that captures data at a local level so that there is better oversight, a better ability to identify problems, and a better ability to respond to those problems.

Ms Komote reiterated that the Bill is important and that it should be done correctly. It should not be rushed, and it is important that the primary piece of legislation addresses the concerns that have been raised by stakeholders previously and currently related to transparency, accountability mechanisms, and open data contracting as well.

On the public participation process, the Bill should be taken back to NEDLAC for more consideration and stakeholder engagement. On the transparency and accountability mechanisms, we should not be leaving a lot to subordinate legislation to deal with. It is also important to ensure that there are effective checks and balances in place for the Minister because as the Bill stands in both of its versions the Minister has unfettered power. This is extremely risky and detrimental as demonstrated by state capture in the past.

Ms Zukiswa Kota (Programme Manager at PSAM) commented that much of what the previous speakers had said about the changes and continued participation around the Bill are important contributions. She agreed with Mr Ryder's remark that it was of great importance to include the people who will be directly affected by the potential reforms proposed in the Bill. This is a very vital consideration especially when thinking about substantive public participation. She added that social justice imperatives in public procurement are well appreciated by everyone but they seem to get lost in the complexity of the field of procurement, not unlike the field of finance for instance which has massive social justice implications if we do not have adequate and inclusive processes.

Ms Vogt said that they welcome the fact that there have been significant challenges between the Procurement Bill and the NHI Bill and where the two pieces of legislation land in the middle. A key question that must be addressed relates to which of the two Bills will end up taking precedence. In terms of dealing with public procurement in the health space, it cannot be a one-size-fits-all all environment. Healthcare is a very nuanced industry and without having highly specialised individuals who are adequately trained and with the requisite knowledge to be able to construct procurement budgets and write up specifications, there will be a dynamic impact on the delivery of healthcare services.

Mr Scott spoke about district municipalities and admitted that they were not doing well but we cannot dismiss the fact that there is a major gap in cooperative governance in the Bill. There is no way that a small-owned business by a black woman in the North West is

going to compete with Bidvest on price so premium is important so we are not at a stage in the country where we have the option to stop paying premium. He added that it is acceptable that there will be a common data platform on which that data would be available and transparent but one should not lay on top of that an approach that forces whether your buying locomotives, power stations, stationary, medical devices, things that have not been vetted yet. The problem is that there will be many entities requesting exemption and that means we will lose that common data platform so there must be a careful approach.

Mr Crouse expressed how impressed he was by the proceedings of February 6, 2024. It was amazing to see a branch of the legislature hold a branch of the executive responsible for delivering information for the public benefit. The fruits that came out of the Committee holding the National Treasury accountable is information that is crucially relevant to the public process and the broader policy debate in the country. The premiums are not included in annexures A, B, C, and D so there is a big problem that these premiums are not accounted for. He implored the Committee to request from the National Treasury the cost of premiums that are currently being paid to understand the cost of premiums that would have to be paid under the Bill.

Mr Parks stated that they supported the objectives of the Bill, but it does need significant work considering the tight time pressure. The Bill is urgent and various challenges like pricing, chapter four need to be addressed and transparency and accountability must be strengthened.

Closing Remarks

Mr Ryder, acting on behalf of the Chairperson, thanked all the participants for their contributions. Treasury has a substantial job ahead of it, particularly in light of the comments about time pressure. The Chairperson already alluded that the Bill has been in process for over a decade. To try and rush the Bill now when it has only been introduced at the eleventh hour does not appear to be very constructive. He was grateful for the positive comments that they received. The Committee will convene again with Treasury to get their feedback next Friday. He asked all the presenters to ensure that they were present and involved in the meeting with Treasury because they would be given an opportunity to engage with Treasury's responses. He also thanked the administration for their hard work in terms of collecting the submissions.

The meeting was adjourned.

"FA16"

PMG PARLIAMENTARY MONITORING GROUP

Public Procurement Bill: NT response to additional public input & Final Mandates

NCOP Finance

07 May 2024

Chairperson: Mr Y Carrim (ANC, KZN)

Meeting Summary

Video

The Select Committee on Finance concluded its processing of the Public Procurement (PP) Bill. This followed a series of deliberations on the Bill, which seeks to provide clear guidelines and standards for procurement across various government entities while promoting transparency, efficiency, and accountability in the procurement process to address socioeconomic challenges and advance transformation goals.

All provinces, except the Western Cape, voted in favour of the Bill.

At the start of the meeting, Members were taken through the additional comments submitted by stakeholders on the Bill, and the National Treasury's (NT) responses to them. Many of the issues raised by stakeholders had already been discussed by the Committee and were either accepted to form part of proposed amendments or rejected. One significant proposed amendment made to the Bill was the inclusion of Clause 68, which requires the department to conduct a review of the Act, 24 months after it is promulgated, to be reviewed by the Bill be reviewed within 24 months after it is promulgated, and taken to the National Economic Development and Labour Council (NEDLAC) for stakeholder input.

Members supported this proposed amendment as they viewed the Bill as temporary and transitional due to its significant impact on procurement across the three spheres of government and the several outstanding matters that have not been addressed by the legislation.

There were disagreements between the African National Congress (ANC) and Freedom Front Plus (FF+) regarding how to capture the latter's opposition to the Bill in the Committee's final report. The FF+ sought for its minority view to read that it opposed the Bill based on the fact that it was race-based legislation. However, the ANC rejected this claim and argued that it could not be race-based legislation because it also considers the empowerment of women and small enterprises in general. Furthermore, the party believed that without the empowerment of the historically disadvantaged, racial polarisation would deepen, widen and threaten the stability of the country.

Nevertheless, the report captured the Democratic Alliance and FF+'s opposition to the Bill.

Meeting report

The Chairperson welcomed all those who were present. Thereafter, he asked if any apologies were tabled.

Mr Nkululeko Mangweni (Committee Secretary) said no apologies were recorded.

The Chairperson outlined that the Committee would first be taken through the department's matrix report before deliberating on the PP Bill.

PP Bill Comments Matrix

Mr Willie Mathebula (Chief Procurement Officer at the NT) indicated that the department received comments from the National Research Foundation (NRF), Public Affairs Research Institute (PARI), the Congress of South African Trade Unions (COSATU), the South African Clothing and Textile Union (SACTWU), Business Unity South Africa (BUSA) and the Department of Trade, Industry and Competition (DTIC). A revised draft bill was submitted to stakeholders for input.

NRF Submission

In its submission, the NRF proposed removing the recommended wording 'of a procuring institution' in Clause 12 (1)(b). It also requested that the department review the definition of 'official' to ensure that all instances in which the term appears in the draft are comprehensive. The department responded that 'official' refers to an official of a procuring institution, the Public Procurement Office (PPO), and provincial treasuries. As a result, it did not see the need to amend the proposed clause.

The Chairperson requested that the department take the Committee through each submission and their responses.

He asked if any of the provincial finance committee chairpersons were present.

No response was received to his question.

Mr Mathebula said the NRF proposed removing the words 'officials or employees of departments' from the list of automatic exclusions in Clause 13 as they gave the impression that governmental departments and provincial employees are allowed to submit bids. In its response, the department pointed out that Clause 13 (1)(c) excluded a person appointed in terms of Section 9 or 12A of the Public Service Act from submitting bids.

The Chairperson mentioned that the provincial chairpersons could pose questions on the proposals.

Mr Mathebula highlighted that the NRF was pleased with the proposal made to Clause 20 (6)(b), as it promoted transparency. However, it requested that the department insert the 'deeming' clause in other sections of the Bill, such as those, for instance, that deal with the Tribunal. However, the department felt that this would not be possible due to the nature of the Tribunal's functions. Instead, it proposed including 'period' in the exemption and departure clauses.

This change would require the Minster to respond within 30 days to an application made to him for exemption or departure from the usual bid processes, based on the submission of all the necessary documentation to process the application.

On Clause 24 (1)(a)(i), the NRF submitted that the phrase 'strategic procurement in other countries' was ambiguous, led to many interpretations, and could be void for vagueness. After considering its recommendation, the department proposed a new provision, which would read: 'the promotion of strategic procurement when procuring in other countries for use in those countries.' The department believed that this covered government officials placed in other countries.

Mr D Ryder (DA, Gauteng) was pleased with the proposed amendment.

The Chairperson also supported the proposed amendment.

Mr Mathebula remarked that the NRF proposed replacing the phrase 'without limiting' with 'which encourages, where feasible' in Clause 24 (1)(d) or creating two new preference categories, namely 'new entrants' and 'emerging suppliers.' The department rejected these proposals as it felt that the clause was correctly legally drafted. Moreover, it believed that the various preferences measured in Chapter 4 already catered for these suppliers under the mechanisms provided.

The department noted the NRF's view that the term 'technical expert' was unclear in Cause 27 and proposed changing Clause 27 (2) to read: ' a procuring institution must ensure that persons who participate in bid committees have the relevant knowledge, skills and technical expertise to achieve the intended result required during the relevant committee process.'

Mr Tumelo Gopane (Board Member of the Construction Industry Development Board) asked if he could pose a question.

The Chairperson said the Committee could not do so as the public participation process had concluded. Furthermore, when it was not obliged to do so, the Committee gave stakeholders two and a half days to respond to the draft text sent to them on Friday. He asked the PLA for advice.

He suggested that Mr Gopane raise his concern with the Standing Committee in a written letter today so that he could receive a response by either Thursday or Friday.

Adv Frank Jenkins (Senior Parliamentary Legal Advisor) indicated that stakeholders could not participate in the meeting as it was not a public hearing. However, as the Committee is in charge of its processes and procedures, it could amend its agenda to allow their participation in the proceedings.

Mr Ryder noted that the CIDB was an internal stakeholder.

The Chairperson asked if Mr Gopane represented a government institution.

Mr Gopane mentioned that he sat on the CIDB Board. He clarified that he had sought to ask a question of clarity earlier and not to make any proposals on the Bill.

The Chairperson asked the PLA what it thought should be done.

Adv Jenkins remarked that this was permitted if the department responded briefly.

The Chairperson pointed out that the question was not about the length of the answer but the process. Nevertheless, he permitted all stakeholders to ask clarity-seeking questions if required, highlighting that very few changes had been made in the draft text sent.

Mr Gopane asked if the department's proposal on Clause 27 meant that, going forward, consultants would not sit on bid committees.

Mr Mathebula clarified that the department's proposal implied that whenever anybody participates in a bid committee, the committee should have the relevant knowledge, skills, and expertise, regardless of whether they are sourced internally or externally.

Mr Gopane noted the department's explanation.

He continued and said the department did not support the NRF's proposal to insert a new Clause 47 (4), which would provide that the tribunal must, in writing, within 60 days respond to the application for review by the bidder, giving reasons for the decision to reject. It did not support it because Clause 51 (3)(a) outlined that the panel for review proceedings envisaged in Section 47 or 48 must make an order in terms of subsection (1) within 30 days after the submission of the application for review. On request by the panel chairperson, the tribunal chairperson may extend the 30-day period for not more than 30 days.

The Chairperson supported the department's response to the proposal.

Mr Mathebula said the NRF proposed inserting a new Clause 61 (4), which requires the Minister to respond, in writing, within 60 days to the application for exemption by the procuring institution, giving reasons for the decision. The department noted the submission and proposed including a 30-day period after receipt of all documents in the clause.

The Chairperson supported the department's proposal. He was surprised that the Committee had not made this suggestion before.

PARI Submission

Mr Mathebula indicated that the department had previously dealt with PARI's submission on Clause 5, as stakeholders had felt the Bill overreached by tampering with the powers of municipalities. After much consideration, the department removed the compulsory instructions and circulars for municipalities, which aligned with the Constitution. However, PARI argued that the instructions issued are binding to municipalities.

As such, the proposed amendments in the D-Bill were posed to address the concerns of infringing on the constitutional powers of local government. These changes entailed that only the regulations and the Act would apply to municipalities, whereas circulars would be subject to adoption by councils as required by Section 156 of the Constitution.

The Chairperson asked if COSATU had not raised this concern as well.

Mr Mathebula confirmed that it had.

The Chairperson said that while he agreed with COSATU and PARI in principle that the weakest link in the legislation was local government, he accepted that not much could be done.

Mr Mathebula repeated that the regulations and Act will apply to the municipalities.

The Chairperson noted the response.

Mr Mathebula said PARI believed that Chapter 4 did not refer to open competition being adjudicated through a preferential points system. In response, the department elaborated that the evaluation criteria will be prescribed in Clauses 17, 18, and 19 and should be read together with Clause 24 (1)(d). Therefore, there was no need for a preference points system at this stage.

PARI also proposed amending Clause 24 (1)(d) to remove the word 'may' and include 'must', which the department agreed to.

COSATU and SACTWU submission

The Chairperson mentioned that the majority of the Committee considered this Bill temporary and transitional. As such, it recommended in its report that the Bill be reviewed within 24 months after it is promulgated, at the National Economic Development and Labour Council (NEDLAC). This recommendation was made considering that a new minister and committee may be in place. He stressed that the recommendation was not binding, and would only act as a guide.

He asked the PLA to consider a softer version of the recommendation and requested that the Bill be reviewed within 24 months, including through appropriate consultation with stakeholders, to see if any amendments are necessary.

While the department may not view it as desirable, he said, this had been done in other bills.

Mr Ryder noted that many stakeholders agreed such a review would be important. Even though he understood it was the role of the National Council of Provinces (NCOP) to have oversight over the impact of legislation once it is implemented, he thought based on the process that had been followed so far, which included the short time period allocated for the preparation of the public consultation process as well as the fact that the changes made to the B-version of the Bill were not taken back to NEDLAC, the proposed review should be binding, and not just a recommendation.

He suggested that the Committee, in its report, stress the need for the department to review the Bill within 24 months after it is adopted as an act, hold consultations with the stakeholders, submit a report to the committees of both Houses, which will consider the additional inputs and potentially draft another Bill, and include a timeline.

The Chairperson felt that Mr Ryder's suggestion was too complicated as it spoke of a review process, followed by the submission of a report and a decision on whether a new Bill should be discussed. Instead, he suggested that proposed amendments to the Bill should be made within 24 months. He asked if this process was possible.

Adv Jenkins confirmed that it was, as it has been done with a previous bill processed by the Committee.

The Chairperson asked if the PLA and department had prepared a new line to be included in the Committee report on the proposed review process.

Adv Jenkins confirmed that they had.

The Chairperson mentioned that this would be discussed after the presentation.

Mr Mathebula said both organisations felt that the Bill was unclear on whether Clauses 17, 18, and 19 were mutually exclusive and could not be applied simultaneously. Moreover, they believed that layering the clauses would cause issues in procurement. In response, the department said the provisions in Chapter 4 are meant to be implemented in a staggered manner within the prescribed thresholds.

The Chairperson noted that the department had covered this point extensively in previous meetings.

Mr Mathebula outlined that both organisations supported the inclusion in Clause 24 of a framework of elements against which to judge procurement relating to price. However, they believed the obligations to assess or evaluate contracts in 24 (1)(d) should be compulsory and include the term 'must' and not 'may', which was supported by the department.

The Chairperson supported the proposal.

BUSA Submission

Mr Mathebula indicated that the department supported BUSA's proposed new definition for procurement.

The Chairperson also supported the proposal.

Mr Ryder asked if Members could have time to look at the clause and respond to it later.

The Chairperson accepted the request.

Mr Mathebula stated that BUSA was concerned that Chapter 4 did not provide for preferences and evaluation for companies making a concerted effort towards skills development.

Mr F Du Toit (FF+, North West) expressed the FF+'s objection to including B-BBEE in the Bill, as it was discriminatory to other groups of people. He underlined that preference should not be given based on racial considerations.

The Chairperson said the FF+'s rejection of the Bill had already been recorded in the report.

DTIC submission

Mr Mathebula mentioned that the DTIC took issue with Clause 16 (3) as it believed it created a perverse incentive for some procuring institutions not to implement government objectives not embedded in Clauses 17, 18, or 19. In response, the department said Clause 16 (3) was drafted with the knowledge that these preference measures may not always be possible to be applied. For example, there may not be suppliers in the market for particular goods and services being procured. Moreover, the requirement to report is intended to ensure that where the preference measures cannot be applied, the Public Procurement Office (PPO) or relevant treasury would be able to guide and support officials and procuring institutions to ensure compliance with this Act.

The Chairperson pointed out that the department had previously gone through this with members and asked what the department's decision on this matter was.

Mr Mathebula said the department did not see a need to change Clause 16 (3).

Mr Ryder indicated that it was concerning that another government department/entity raised concerns around Clauses 17, 18, and 19, especially as the DTIC held dual responsibility for implementing the provisions. He was concerned that Parliament was being asked to pass a Bill on which the Cabinet was not united. This had to be taken seriously by the Committee, he said.

He asked if this was the full text of the DTIC's comments or if the NT had summarised them.

The Chairperson clarified that disagreements between departments on certain provisions of bills were not new and had happened over the years. This usually occurs when a Cabinet member cannot impress upon his or her colleagues on a matter and tries to do so when a bill is before Parliament. Having noted the frequency of the practice, the ruling party intervened and asked Ministers to desist from doing so.

Regardless, he, too, questioned why the department had come at the last minute to lodge this objection when it had time to do so in the National Assembly (NA) via the Minister in Cabinet. He proposed that the Committee, in its report, suggest that the DTIC's submission be referred to the NA.

While many amendments were made in the original bill, most remained the same. Considering this, some of the issues raised by stakeholders, such as those raised by the Institute for Race Relations (IRR) in its letter, were fundamentally ideological differences.

Nonetheless, he suggested that the Committee's report outline its serious concern that the DTIC had lodged this issue on the Bill at such a late stage and its belief that it should have been settled in the Cabinet process. Furthermore, the Committee would refer the matter to the NA and recommend that the NT meet with the DTIC as soon as possible so that the NA can process the bill.

He asked the NT why the DTIC had not settled this with the department earlier.

Mr Mathebula mentioned that the DTIC's comments related to the D-Bill, which had undergone further changes.

The Chairperson still felt that these issues could have been resolved earlier. Thereafter, he asked the department to flight the prepared proposal to include in Clause 68, which speaks to the review of the Act. After it was put before Members, he read it out. It read as: 'The Minister must review the implementation of the Act 24 months after it is published; consult stakeholders, including NEDLAC; and within 30 months after the publishing of the Act make a report public on the review and submit it to Parliament.'

He was not pleased with the 30-month timeline for producing and submitting the report or with the department's decision to review only the Act's implementation, not all of its provisions.

Adv Van Schoor believed that this was covered in subsection (a) of Clause 68, which included 'and the need for amendments to the Act'.

The Chairperson noted the response.

Adv Jenkins indicated that the word 'implementation' corresponded to Parliament's obligation to have oversight over the implementation of legislation.

The Chairperson asked if the PLA wanted the word left in the clause.

Adv Jenkins stated that this depended on how it was perceived, but in his opinion, the word 'implementation' was broad enough, as it looked at the performance reports and whether the objectives were met.

Mr Ryder asked if the South African Local Government Association (SALGA) could also be included alongside NEDLAC as a stakeholder to be consulted on the review process.

The Chairperson asked the PLA if this was necessary.

Adv Jenkins said the Act required SALGA to be consulted only on matters affecting local governments.

The Chairperson settled on a 30-month timeline. However, he asked why six months was required to publish the report.

Adv Van Schoor said that this could be reduced.

The Chairperson recommended that it be done within three months.

Adv Van Schoor noted the suggestion.

Mr Ryder was pleased with this clause.

Ms D Mahlangu (ANC, Mpumalanga) supported the clause.

Mr Ryder asked if the Committee could then deal with the letter sent to it by the IRR.

The Chairperson accepted his request and asked that it be flighted.

IRR letter to the Committee

The Chairperson outlined that the IRR objected to the length of time between the issuance of the B18D draft of the Bill and the deadline for stakeholder submissions on the draft, the reliability of the NT's claim that over a trillion Rand's worth of procurement projects had been given to black-owned companies.

He asked the department to comment on the IRR's suggestion that if procurement under Clauses 17, 18 and 19 is not cost-effective, the procuring institution must record and report the reasons to the PPO and the relevant treasury.

Mr Mathebula indicated that the IR had confused two pieces of legislation. Here, the department spoke to preferential procurement, a function of the Constitution.

The Chairperson said the Committee was aware of this, and that was not what he had asked. He had asked for the department's reply on the IRR's point that a procuring institution must record and report the reasons.

Mr Mathebula outlined that Black Economic Empowerment (BEE) premiums referred to the B-BBEE Act, which went beyond procurement. The department highlighted that procurement was but one element of the B-BBEE Act.

The Chairperson repeated that the department had not responded to the question directly. Nevertheless, while he appreciated the IRR's idea in principle, he felt that it would complicate matters as it would reinforce the view that cost-effectiveness superseded everything else. Moreover, the proposal did not go with the Standing Committee's rejection of price as a major determining factor during the evaluation of bids.

Mr Ryder suggested that the IRR's view on cost-effectiveness should be considered during the bid evaluation in the Committee report. He was cautious about defining cost-effectiveness, as it would set a new baseline. He admitted that defining 'cost-effective' was difficult.

The Chairperson asked for Mr Ryder to send the Committee a draft on how it should craft his suggestion in the report.

He mentioned that the Committee would then deliberate on the provincial mandates.

He asked the PLA whether permanent delegates or the provincial legislature's representative were expected to present the mandates.

Adv Jenkins indicated that usually, it was a representative from a provincial legislature's finance committee.

Final Mandates on PP Bill

Eastern Cape Legislature

Ms Z Nchita (ANC, Eastern Cape) presented the mandate on behalf of the province. She mentioned that the Eastern Cape (EC) voted in favour of the Bill.

Free State Legislature

Mr M Moletsane (EFF, Free State) presented the mandate on behalf of the province. He said the Free State (FS) voted in favour of the Bill.

Gauteng Legislature

Mr Sochayile Khanyile (Member of the Gauteng Provincial Legislature) presented the mandate on behalf of the province. He indicated that the provincial finance committee sat in the morning to confirm its decision to support voting in favour of the Bill.

KwaZulu-Natal Legislature

The Chairperson presented the mandate on behalf of the province. He said KZN voted in favour of the Bill.

He suggested that the Committee report note the quality of the reports submitted by the provincial legislatures.

Limpopo Legislature

Ms M Mamaregane (ANC, Limpopo) presented the mandate on behalf of the province. She mentioned that Limpopo voted in favour of the Bill.

Mpumalanga Legislature

Ms D Mahlangu (ANC, Mpumalanga) presented the mandate on behalf of the province. She said Mpumalanga voted in favour of the Bill.

Northern Cape Legislature

Mr W Aucamp (DA, Northern Cape) presented the mandate on behalf of the province. He mentioned that the Northern Cape (NC) voted in favour of the Bill.

The Chairperson indicated that the Committee's final report will highlight the need to address the issues leading to poor attendance at public hearings in NC.

North West Legislature

Mr Du Toit presented the mandate on behalf of the province. He said the North West (NW) voted in favour of the Bill.

The Chairperson asked the PLA if the Committee should wait until it finished deliberating on the PP Bill before voting on the final mandates.

Adv Jenkins said voting on the provincial mandates was unnecessary as the provinces had already done so.

The Chairperson clarified that he was asking if the Committee had to adopt the final mandates before or after its deliberations on the Bill.

Adv Jenkins advised that the Committee do so after deliberating on the Bill.

Ms Mahlangu indicated that the Western Cape (WC) had not presented its mandate.

The Chairperson noted this and asked that the representative present it on the province's behalf.

Western Cape Provincial Parliament

Ms L Moss (ANC, WC) presented the mandate on behalf of the province. She said the WC voted not in favour of the Bill.

The Chairperson asked which version of the Bill Members should look at.

Mr Ryder said the D-version would be more appropriate.

The Chairperson acknowledged the contribution made by his personal assistant to format the Bill and others.

Clause-by-clause deliberations on the D-Version of the PP Bill

The Chairperson asked if he was correct in saying that members only had to go through the proposed amendments.

Adv Jenkins confirmed this was correct.

Mr Ryder highlighted that the D-Version showed many changes made in the last phase of processing the Bill, not those made earlier. He asked if the department could flight a version of the Bill that contained all the changes made to it by the Committee.

Adv Van Schoor explained that all the changes made to the Bill were highlighted in red. All the proposed amendments included on Thursday were highlighted in yellow, and those emanating from the stakeholder's comments were highlighted in green.

Mr Ryder noted the response.

The Chairperson asked the department not to go over matters already dealt with by the Committee.

Adv Van Schoor outlined that the department added three changes, one of which is the review of the Act.

Chapter 1

Definitions, Objects, Application and Administration of Act

Adv Van Schoor indicated that no new proposals were made in this, except for distinguishing goods and services used for construction, repair, and maintenance based on the definition of procurement.

Mr Ryder was pleased with the proposal, which clarified the definition.

The Chairperson thought it was good that Members of the majority party accepted and noted the suggestions made by smaller parties.

He asked if the PLA agreed with the definition of strategic procurement, as he was displeased with it.

Adv Jenkins felt the definition was fine as is.

The Chairperson informed Members that the final mandates were accompanied by reports. Most of the information in them was covered in the Bill. He further told Members that he discussed the difference in ideology between the ANC and DA on the Bill with the chairperson of the WC finance committee.

Chapter 4

Clause 18: Prequalification criteria for preferential procurement

The Chairperson asked if the department included all the submissions from stakeholders.

Adv Van Schoor said that it had considered their suggestions and proposed amendments.

She then took Members to Clause 18 (4), which was highlighted earlier during the discussions on the DTIC's submission.

Mr Ryder felt that this currently formulated clause only encouraged procuring institutions to make purchases even when not necessary. He felt it should be tightened so that they only go out on procurement when required. He advised adding the word 'when' before the word 'procuring'.

Mr Mathebula said the addition could be made.

The Chairperson was pleased with the amendment.

Adv Jenkins was also pleased with it.

The Chairperson pointed out that the department and PLA would investigate the cross-referencing in the Bill and resolve it in the Announcements, Tablings, and Committee Reports (ATC) version of the Bill. He asked the PLA if the Committee report would be included in the ATC.

Adv Jenkins confirmed that it would be.

The Chairperson suggested that the Committee include in its minutes an appreciation of the contribution made by the department. He asked the PLA if the Committee could not also include this in its final report on the Bill.

Adv Jenkins said the Committee could do so.

The Chairperson said it would do so.

Thereafter, he said the Committee would vote on the Bill after going through its draft report.

Draft Report of the Select Committee on Finance on the PP Bill, Dated 07 May

The Chairperson took the Committee through the report. He mentioned that the draft report summarised the submissions made on the Bill and the Committee's observations and recommendations.

Referring to paragraph 6.24 of the report, he suggested that the report include the DA's opposition to the Bill and race-based quotas alongside that of the FF+.

Mr Du Toit disputed that the DA opposed the Bill based on racial quotas. He underlined that only the FF+ had done so.

Mr Aucamp said this was incorrect.

The Chairperson mentioned that the DA had also opposed the Bill based on its preferential procurement clauses, which would be captured in the report.

Mr Du Toit asked why it would be captured if this was false.

The Chairperson proposed that the report state the FF+ is the main party in the Committee, which is opposed to race-based legislation.

Mr Aucamp opposed this suggestion.

Mr Du Toit also opposed it as he believed the phrasing was unfair to other parties. He recommended that 6.24 remain as is.

Mr Ryder indicated that this was the FF+'s view, and the Committee could not instruct it on what it should be.

Mr Du Toit recommended that the minority view rather state that the party had strongly opposed race-based legislation since 1996.

Ms Mahlangu asked how the term 'race-based' related to the PP Bill, as it only concerned public procurement. She stressed that the FF+ could not rename the Bill despite its opposition.

Mr Du Toit said the Bill was race-based legislation.

Ms Mahlangu said it was not.

The Chairperson proposed that the first line of 6.24 states that the FF+ has always vigorously opposed race-based legislation.

Mr Du Toit suggested adding the words 'unlike political parties'.

The Chairperson would not allow this.

Ms Mahlangu mentioned that the FF+ was abusing the platform. She recommended that the report capture that the FF+ opposed the Bill because it favoured previously disadvantaged people.

Mr Du Toit took issue with Ms Mahlangu's suggestion as he felt it insinuated that all white people had benefited from Apartheid. This legislation, he continued, sought to benefit black people as a whole.

Ms Mahlangu asked him not to bring political debates into the discussion, as Members were focused on the Bill. The ruling party has, on several occasions, explained that the beneficiation of the previously disadvantaged would not be at the exclusion of white people. For instance, even though black women faced greater oppression than others, women as a whole are considered a category of historically disadvantaged persons.

Mr Du Toit requested that the Committee not influence the FF+'s view on the matter in the report.

Mr Moletsane pointed out that the rules required for opposing views to simply be recorded in a final report when dealing with a Section 76 Bill, with the debates on the bill done within the provincial legislatures.

The Chairperson indicated that the reports usually noted the opposition's view. However, the rules do not provide for a committee to draft a minority report.

Even though he thought the matter should not have been put up for debate, he asked Members to be careful about their language when expressing their views.

Nevertheless, he suggested that the report also set out the ANC's fundamental disagreement with the DA and FF+ approach to the Bill, as is clear from the amendments effected to the Bill and its overall support, and that the party did not accept that this is race-based legislation because it also considers women and small enterprises in general.

The ANC believed that without the empowerment of the historically disadvantaged, racial polarisation would deepen, widen and threaten the stability of the country, he added.

He asked the PLA if these changes could be changed as suggested.

Adv Jenkins indicated that the Committee could do so if it chose; however, the rules did not require it. The rules required that those who opposed a Bill be noted in the report.

The Chairperson asked if the Committee report could say that the FF+ has always been vigorously opposed to what it sees as essentially race-based legislation.

Mr Du Toit suggested a compromise for it to state the FF+ vigorously opposed race-based legislation.

The Chairperson said the Committee would not agree to that.

Ms Moss indicated that the FF+ was present in the meeting last week when she explained that the Bill sought to provide redress to all previously disadvantaged groups, and not only black people.

The Chairperson asked if the DA had any comments on this matter.

Mr Ryder highlighted that Rule 120.4 allowed for minority views to be expressed. Whilst he acknowledged that there had to be sensitivity in the language used by Members, he believed freedom of speech should be allowed.

Ms Mahlangu felt that the Committee should follow the PLA's advice. She said it was not fair to raise issues of race on the Bill, considering how Members have treated each other over the years.

The Chairperson said the debate on redress as a government policy should be had in the House, not the Committee.

Nowhere could it be found that individuals had an abstract right to say whatever they wanted and provoke other Members. He added that the FF+ has been given several opportunities to express its points on the matter.

He asked the PLA if the Committee report could read: 'The FF+ has always been vigorously opposed to what it sees as essentially race-based legislation'. This suggestion did not take away from the party's position; it was just mindful of people's sensitivities.

He mentioned that the bottom of the page would state that 'The majority party will state that it fundamentally disagrees with the positions of the DA and FF+, and strongly believes that without the empowerment of black people, this country's polarisation – class, racial and gender divisions – will dramatically increase, and the stability, security and prospects of economic growth in this country will be severely undermined'.

If the FF+'s version is put forward on the report, the ANC will state that, ultimately, in some or other sense, whites benefited from Apartheid, whether they were poor or rich, because they did not carry a passbook and were not threatened by the South African Defence Force. A few white people took the brave step to oppose the system, he noted.

He added that the matter would be put to a vote if needed.

Adv Jenkins said the Chairperson's proposal aligned with the NCOP Rule 120, which states that a committee may include the minority's views in the report.

The Chairperson included the FF+'s view and then below the view of the majority party.

Mr Du Toit said the Chairperson had created a perception that the FF+'s minority view had only been submitted on the Bill shortly before the meeting started when it was sent last Saturday. Not once during the day's communication did the Chairperson voice his dissatisfaction with the wording. To him, the Chairperson seemed to be threatening the FF+ through his language.

The Chairperson did not agree that the Committee had changed the meaning of the FF+'s view on preferential procurement in the report.

After the report was discussed, he asked the PLA if the Committee had to go through the Bill clause-by-clause before putting it up for a vote.

Adv Jenkins indicated it could be put up for a vote without further deliberation.

Mr Ryder informed Members that he would take them through the paragraph he was asked to draft earlier. It said: 'As part of the review process, the department must perform an assessment of the cost-effectiveness of procurement, taking into account price, social cohesion, the need to redress past disadvantages entrenched through legislated and societal mechanisms, together with the effective delivery of government objects.'

The Chairperson suggested that he replace the word 'price' with the phrase 'value for money.' He asked the department if this was consistent with the Bill.

Adv Van Schoor said the department preferred to continue using the word 'cost-effective' in the Bill because it was mentioned in the Constitution.

Adv Jenkins advised that the word competitiveness be included as well because the purpose of procurement was to develop the market and create a wider supply chain within a country. Set-asides are also included to empower people and develop supply chains so there is greater competition. This was in line with constitutional judgements, which stated that the government has a duty to develop them.

The Chairperson asked if anything in the wording undermined the prospects of disadvantaged emerging African entrepreneurs in public procurement.

Mr Ryder said there was nothing in the paragraph that did. Price gouging was something the Committee and government should be against. The DTIC set this example during the COVID-19 pandemic.

Empowerment can be seen as cost-effective, he added.

The Chairperson mentioned that the Committee has consistently highlighted that B-BBEE has failed to benefit the broader majority. He asked the department for comment on whether it believed the wording undermined the prospects of disadvantaged emerging African entrepreneurs in public procurement.

Mr Mathebula stated that several stakeholders said the use of price as part of the evaluation criteria had been discredited worldwide. The Standing Committee on Finance also raised that price was used as a gatekeeping mechanism.

The Chairperson said the Committee was aware of this. He was asking if the paragraph undermined the Bill.

Mr Mathebula confirmed that it would not.

Vote on the PP Bill

The Chairperson requested a mover to adopt the Bill.

Ms Mamaregane moved for its adoption.

Ms Nchita seconded the mover.

Mr Ryder indicated that the DA was opposed to the Bill.

Mr Du Toit expressed the FF+'s opposition to the Bill.

The Bill was adopted, noting the opposing views of the DA and FF+.

Vote on the Committee Report

The Chairperson requested a mover to adopt the report.

Mr T Xula (ANC, KZN) moved for its adoption.

The Chairperson asked if a provincial delegate could vote on Committee reports.

Adv Jenkins clarified that only permanent delegates could do so.

Ms Mahlangu moved for its adoption.

Ms Nchita seconded the mover.

The report was duly adopted, noting the FF's opposing view.

Read: Read: ATCC240509:Report of the Select Committee on Finance on the Public Procurement Bill (National Assembly- Section 76, B18d-2023), Dated 07 May 2024

The Chairperson thanked Members and the department for their work on the Bill.

Mr Ryder indicated that both the DA and FF+ had not been given the opportunity to state their opposition to the report on the record.

The Chairperson pointed out that their opposition was recorded in the report.

Mr Ryder expressed gratitude to the Parliamentary Monitoring Group for the standard and quality of its recording and reporting of the proceedings.

The Chairperson asked if the proposed paragraph should be included in the report.

Adv Jenkins stated that it formed part of the Committee's recommendation on the review process.

The Chairperson did not understand what else needed to be included in the report, as it already stated that this was a first-phase Bill and that a review process would be conducted 24 months after it was adopted.

Adv Jenkins cautioned the Committee against including a recommendation that would disadvantage the next committee. Mr Ryder's recommendation provided direction and circumscribed the scope of the review process.

The recommendation may assist the department in how to conduct its report on the 24-month review. Once the committee receives that report, it will interrogate it, and if there are issues, it can raise them, as was the case with the resolution on the role of the Standing Committee on Public Accounts (SCOPA) and the Joint Investigation Team in the Arms Deal saga. The PLA was tasked with looking into the resolution of the House to see if SCOPA should form part of the joint investigation team.

He felt that the paragraph narrowed the review process.

The Chairperson said the paragraph should not be added to the report if it would narrow the review process. Clause 68 should remain as is, he added.

The meeting was adjourned.

"FA17"

Supplement to Submissions on the Public Procurement Bill to the NCOP

NCOP Select Committee on Finance
25 March 2024

From: AmaBhungane
Corruption Watch
Public Affairs Research Institute (PARI)
Public Service Accountability Monitor (PSAM)

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

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

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

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

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

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

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

The new Chapter 4:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Contact:
Thabiso Parirenyatwa: thabisop@pari.org.za

PMG PARLIAMENTARY MONITORING GROUP

Public Procurement Bill: Treasury report-back on stakeholder consultation

NCOP Finance

17 April 2024

Chairperson: Mr Y Carrim (ANC, KZN)

Meeting Summary

Video

The Select Committee on Finance (NCOP) convened in a virtual meeting to hear National Treasury's response to submissions from engagement with stakeholders on the Public Procurement Bill. National Treasury highlighted the key issues that needed to be shared with the Committee.

The Joint Strategic Resource (JSR) had submitted that tenders must still be evaluated in a manner that would give effect to the purpose of section 217(1). Chapter 4 gave little reason to believe that this was how tenders would be evaluated, and there were valid concern that the Bill would unleash disruptive constitutional litigation. There was a further constitutional question about the gap in locating the power to develop preferential procurement policies. The Bill does not clearly assign the power to develop preferential procurement policies to procuring institutions.

JSR also raised that South Africa has a tradition of incentivised whistleblowing provisions in its legislation dealing with specific sectoral matters, as seen in environmental legislation. Procurement handles large sums of money, meaning that whistleblowing in this area could be incentivised without cost to the state. To do so, incentivised whistleblowing provisions must be carefully and specifically moulded to procurement operations. The Protected Disclosures Act only applies to employees, but in procurement incentivised whistleblowing it is often by persons who are not employees.

In response, National Treasury stated that enhancement of whistleblower legislation such as the Protected Disclosures Act was a matter to be attended by the Justice Department and that department had already published a discussion paper in 2023 on that.

The Procurement Reform Working Group (PRWG) said that the new Chapter 4 restricted participation in procurement from the outset and confused even South Africa's leading procurement experts on how the rules it sought to establish were meant to work in practice. It did not lay down any objective and measurable criteria for adjudication and it opened the way for anti-competitive practices as it did not mention price, which was highly unusual.

In response, Treasury said the regulations will detail how the framework must be implemented. It was proposed that clause 25(1) must be amended to contain a general requirement on bid evaluation as prescribed by regulations as part of the framework for an institution's procurement system.

NEDLAC said there were some improvements in the Bill and they appreciated those improvements. However, they had three concerns, firstly, it was hard to see the effects of the changes made to the Bill because they had not seen them in text so they had not figured out how they would work. Secondly, there were some larger unaddressed structural issues that were raised by other stakeholders. Thirdly, they still needed to see how the Bill would work in real life and is implemented. National Treasury opened the door on the Bill and kept saying it was up to the NCOP to recommend that the Bill goes back to NEDLAC within 18 months for further consultation. The NCOP should ensure that the Bill is taken back to NEDLAC within the next 18 months to work on the deeper issues and the same should apply to the regulations.

Other stakeholders that participated included the National Research Foundation (NRF); Business Unity South Africa (BUSA); NEDLAC; COSATU; Public Service Accountability Monitor (PSAM); South African Medical Technology Industry Association (SAMED); Willpower and SA Institute of Race Relations (IRR).

National Treasury said the text of the Bill based on the recommendations will be produced and submitted to the Committee. It assured the Committee that the regulations this time around, unlike normally, would be consulted on with the public, and the regulations would be provided for discussion at NEDLAC. The instructions will also be gazetted for public comment.

The Chairperson stated that there was general agreement that the Bill should be viewed as a temporary or transitional Bill and that within 18 months it should be reviewed through the NEDLAC process. There is no need to call off the Bill at this stage because the Committee still has plenty of time. No matter how long the process takes, there will always be disagreements, and the Constitutional Court will deal with the constitutional matters.

Meeting report

Opening remarks
The Chairperson welcomed National Treasury and the stakeholder organisations. This was a continuation of the public hearings on the Public Procurement Bill, and it was the tail end of the consultation process which would be followed by the Committee deliberation stage. He allowed Treasury 45 minutes to an hour to respond to the submissions requested from various stakeholders.

National Treasury response to further consultation
Mr Willie Mathebula, General Manager: National Treasury, said they picked up the key issues that they felt needed to be shared with the Committee from their report and if there were any other issues, the Committee would have to refer to the full report.

Adv Empie van Schoor, Chief Director: Legislation, National Treasury, presented the constitutional matters raised by the stakeholders. The JSR had submitted that the tenders in question must still be evaluated in a manner that would give effect to the purpose of section 217(1). Chapter 4 gave precious little reason to believe that this was how tenders would be evaluated, and there were valid concerns that the Bill would unleash disruptive constitutional litigation. There was a further constitutional question and this was the continuing gap in locating the power to develop preferential procurement policies clearly. The JSR repeatedly raised the concern that the Bill, although it often gestures in that direction, it does not clearly assign the power to develop preferential procurement policies to procuring institutions.

JSR also raised that South Africa has a tradition of incentivised whistleblowing provisions in its legislation dealing with specific sectoral matters, as seen in environmental legislation. Procurement handles large sums of money, meaning that whistleblowing in this area could be incentivised without cost to the state. To do so, incentivised whistleblowing provisions must be carefully and specifically moulded to procurement operations. The Protected Disclosures Act only applies to employees, but in procurement incentivised whistleblowing it is often by persons who are not employees.

In response, National Treasury stated that enhancement of whistleblower legislation such as the Protected Disclosures Act was a matter to be attended by the Justice Department and that department had already published a discussion paper in 2023 on that.

PRWG said that the new Chapter 4 restricted participation in procurement from the outset and confused even South Africa's leading procurement experts on how the rules it sought to establish were meant to work in practice. It did not lay down any objective and measurable criteria for adjudication and it opened the way for anti-competitive practices as it did not mention price, which was highly unusual.

In response, National Treasury said the regulations will detail how the framework must be implemented. It was proposed that clause 25(1) must be amended to contain a general requirement on bid evaluation as prescribed by regulations as part of the framework for an institution's procurement system.

PRWG also submitted that in South Africa's legislative landscape, the legitimate scope of confidentiality is established in the Promotion of Access to Information Act (PAIA). The Protection of Personal Information Act (POPIA) addresses how institutions handle personal information. By including 'personal information protected in terms of the Protection of Personal Information Act' in the Bill's definition of 'confidentiality', the definition may be read too broadly to constrain the release of all personal information. This undermines the Bill's objective of expanding transparency. The definition should allow confidentiality only where it is legitimate under PAIA.

In response, Treasury said the PRWG proposal was supported and that the grounds for refusal in PAIA be used for the definition of 'confidential information' in all respects and not only personal information.

The National Research Foundation (NRF) submitted that the SEIAS report was inadequate and naïve and characterised by fallacious premises. Relevant organs of the state need to be consulted on the cost implications – and accordingly it was a possible contravention of the PFMA. Like the VAT deregistration process of public entities, National Treasury should be providing additional funding to fund the additional roles and responsibilities, failing which, to place enactment/implementation of that on hold until Treasury fundraising efforts improve.

In response, National Treasury said Section 35 of the Public Finance Management Act provides that draft national legislation assigning an additional function, power or obligation on a provincial government must in the memorandum attached to that legislation, give a projection of the financial implications of that function, power or obligation to the province.

On unfunded mandates, Mr Mathebula said that as much as Treasury may have omitted to mention the projected financial implications, it was currently not possible to quantify the financial implications although Treasury understood that there will be financial implications.

Mr Mathebula responded to the stakeholder suggestion that the information on the outcome of the tender process must be made available within 14 days. With the introduction of the Tribunal, there are steps that any bidder who may be aggrieved by the outcome of the tender process must follow, including going back to the procurement institution to raise the issue and running through the Tribunal, meaning the proposed 14 days would not be enough.

On the register of persons prohibited from submitting bids, Mr Mathebula responded that this is a complex issue because all

government officials are not supposed to do business with the state. The question becomes what happens when the person decides to leave the state and whether they are allowed to bid. The matter needs to be considered carefully before it can be provided for in the Bill and its legal implications need to be considered.

The Chairperson thanked National Treasury for its presentation, noting the hard work done to provide detailed responses to the stakeholders. He would allow each of the stakeholders five minutes to respond to the Treasury presentation.

Stakeholder engagement

Mr Chris Campbell from Business Unity South Africa (BUSA) said the absence of the distinction that needed to be made between strategic and general procurement still bothered them in that the only reference to it was two lines in the Bill, yet it seemed to make a big difference. They were not convinced that National Treasury appreciated why it was necessary to expand more on it in the primary legislation. As much as they heard that there was cross consultation, they hoped that after all the work and effort that was everyone put in the process, there was confirmation of the constitutionality of Chapter 4 in the Bill so that the potential legal challenges can be avoided.

Mr Ron Grace from NRF said that it was unacceptable that National Treasury claimed that it cannot quantify because it can project in terms of the appetite. Treasury was prejudicing the Act because it could be challenged if it did not do the costing projection. The standstill period is going to retard service delivery and the Constitution also speaks about efficiency and service delivery. When Treasury summarised the NRF, it said nothing about the effectiveness of National Treasury, which was a key point in the NRF 300-page submission because checks and balances and accountability must be considered. International best practice must also be considered. Treasury does not show accountability in what it should be doing.

On international donor funding, if donor funding is more that 50%, it makes sense for it to be subject to regulations; if less that 50% then it does not apply. The Act should specify those regulations. The NRF would be available to assist with the drafting of the Bill should it be required and that it believed the Bill was not ready for implementation.

Mr Simon Eppel from NEDLAC said there were some improvements in the Bill, and they appreciated those. However, they had three concerns; firstly, it was hard to see the effects of the changes to the Bill because they had not seen them in text so they had not figured out how they would work. Secondly, there were some larger unaddressed structural issues that were raised by other stakeholders. Thirdly, they still needed to see how the Bill would work in real life and is implemented. National Treasury had opened the door on the Bill and kept saying it was up to the NCOP to recommend that the Bill goes back to NEDLAC within 18 months for further consultation. He appealed to the NCOP that the Bill is taken back to NEDLAC within the next 18 months to work on the deeper issues and the same should apply to the regulations.

Mr Matthew Parks from COSATU said they appreciate that the Bill must be passed now as it would be impossible not to, but there must be a supplementary Bill within 18 months to help strengthen the Bill further.

Ms Lisa Higginson from Public Service Accountability Monitor (PSAM) said it was helpful to understand National Treasury's position and its response to the PSAM question about putting a time limit on providing procurement information. They were still concerned about the extent of this but acknowledged the response from Treasury. PSAM hoped to see a radical improvement on commitment to transparency in the application of the Bill and that the change from instructional notes to regulations would make dramatic improvements. PSAM also hoped to see better enforcement of the regulations to ensure the information is accurate and makes it possible for the public to monitor procurement.

Ms Tanya Vogt from South African Medical Technology Industry Association (SAMED) said one key area not addressed was its recommendation that it should be mandatory to have a specialist on the committees. National Treasury had said it would consider this, but it was not addressed in the response presentation.

Mr Shaun Scott from Willpower said there is a small community of procurement people that work in Parliament and provincial legislatures, and they rely on the support and training that exists for the rest of the public procurement community. Excluding provincial legislatures and Parliament from the core of the Bill and just making Chapter 4 on Preferential Procurement applicable is going to create a difficulty within the capacity, the people, the training, and the systems that will be used by Parliament and provincial legislatures. He was looking forward to hearing what Adv Jenkins would say about the constitutionality of that. Willpower welcomed the changes proposed by Treasury, especially the one Treasury suggested that procurement processes be moved away from a department to more responsibility across the functions, but that will need to be explained more carefully because it was significant and clever proposal.

On the standstill period, Willpower did not believe that the clause currently addressed the practical implications that it will have in institutions and perhaps the standstill clause must be moved to the regulations, and it could be debated even further to ensure that it is practical.

Mr Gabriel Crouse from SA Institute of Race Relations (IRR) said the Chairperson had asked National Treasury for "black owned" data and what is currently happening in terms of procurement processes and BEE. Treasury provided information from the Central Supplier Database that over R1.2 trillion was spent on black procurement. Slide 20 to 26 of Annexure A deals with the different BEE level statuses and the number of BEE companies and how much they received each year respectively. Before that, slide 4 and 5 refer to 'black owned' and it defines black-owned companies as 51% black owned or more. The slide says black owned companies receive R588

billion out of the R1.2 trillion. That means black owned companies receive 63% of the procurement expenditure, which is a majority. The concern was that during the Treasury presentation, it was still saying those are not black owned companies. Treasury says there is a difference between black owned companies and BEE Level One, and this difference must be clarified alongside the R588 billion.

On the premium, the IRR had asked how the premium was going to be calculated, and Treasury's answer was in effect that there will be no premium, but there will be negotiations of a fair market price. Treasury said it believes that the Constitution provides that there should be a premium, but the question asked by IRR is how much? On unfunded mandates, Treasury said it did not table the Bill to state that there will be premiums, but its statement was about preference measures. However, the preference measures are what create the premiums, and the question is how much is that going to cost the provinces? Section 35 of the PFMA states national legislation, when it is drafted and tabled, must have a memorandum that says how much this is going to cost the provinces if they are getting new powers and responsibilities – does that refer to both the primary and subordinate legislation?

The Select Committee is involved in passing legislation and if there is an infringement on rights, section 36 of the Constitution is the lawmaker's guiding light. Section 36 says one cannot infringe upon a right if there is a less intrusive way to achieve section 217(2) and (3) interests. If the Committee does not choose that way, then it is going to fail the constitutionality test in section 36. Treasury said the tie breaker is consistent with section 36 of the Constitution, but the playing field is not level enough. Treasury should come with a picture of how level the playing field is so that the Committee can use it to make an informed decision.

Ms Caroline James from PRWG said they had little time to engage with the report prior to the presentation and although they had the engagement with Treasury, they were concerned that the engagement was limited, more limited to Treasury rather than with the Committee and they were unable to engage with the MPs' views on the Bill. PRWG hoped to hear and understand the Members' views on the Bill after the process with Treasury was completed.

Although they recognised the small changes made to the Bill in response to stakeholder comments, they still had not looked at the textual changes to the Bill and fully familiarise themselves on how those changes were implemented. The engagement with National Treasury was narrowly constrained to making comments on areas that could be easily fixed by correcting incorrect references to specific Acts rather than dealing with 'big picture' constitutional issues that still existed in the Bill.

Adv Nandipha Ntsaluba from Department of Military Veterans said there was an interesting inclusion in the definition of 'military veteran' in the Bill which seemed to extract only part (a) of the definition from section 1 of the Military Veterans Act. She was concerned if this would not cause a challenge because the definition is threefold. Military Veterans had pleaded that clause 58 should not confine itself to only two ministries. The experience that was gathered during the Military Veterans regulations development process signified that there was a need to look at the organs of state that are affected by the benefit, and the same approach should be adopted in developing regulation legislation in this space because it naturally will triangulate across various constitutional institutions. Lastly, the Department of Military Veterans had referred to consultations with the Information Regulator to deal with data privacy.

Discussion

Mr D Ryder (DA, Gauteng) appreciated the manner in which the public hearings were handled because Treasury's level of consultation and interactions with the stakeholders showed the maturity of the legislative process. The presentation document sent yesterday at 5pm had slides that were brief and perhaps more meaningful to Treasury and the stakeholders who participated than to the Members. He would need more time to read through the issues as they were difficult to follow having to cross-reference between the Bill, the stakeholder submissions and the Constitution for context.

In his response to the presentation, Mr Ryder said it seemed likely that there would be another round of fairly substantial changes to the Bill before it goes through, and that might lead to a referral back to the National Assembly. He was looking forward to hearing what the Chairperson's decision would be on how to move forward because several stakeholders had made calls to have the Bill taken back to NEDLAC. He felt there was a need to refer the Bill back to NEDLAC especially noting the volume of changes that have been made and the number of proposed changes.

The Chairperson said the National Assembly will have two days of sittings in the next few weeks and there were two plenaries in the next week, which would give the Committee more time to consume the information they were given. He did not see an issue with the amount of work the Committee has to do before the Bill is passed although he agreed that the presentation was hard to follow. He said the Committee heard that the National Assembly had voted on a Bill that they have never seen and asked the Parliamentary Legal Advisor to comment on how that was possible. Stakeholders were right to want to see the final text because that is what counts more than the policy responses from Treasury. There was no need to make final decisions at the moment because it was still in its initial phases and Members should not think it will be easier if the process is suspended until after the elections because entirely new Committee members in the NCOP and the National Assembly will have to deal with it.

There was general agreement that the Bill should be viewed as a temporary or transitional Bill and that within 18 months it should be reviewed through the NEDLAC process. There is no need to call off the Bill at this stage because the Committee still has plenty of time. No matter how long the process takes, there will always be disagreements, and the Constitutional Court will deal with the constitutional matters.

The Chairperson asked that Adv Jenkins to meet with the Committee in an online meeting next Tuesday 23 April to speak on the constitutional issues that were raised by stakeholders. On unfunded mandates, it is hard to believe when a government department

says there are no financial implications on specific matters. The unfunded mandates are not subject to legal scrutiny, but the Memorandum can be changed if Treasury was in the wrong. It is not fair to expect a final and definite figure on the cost implications and the issue of a public procurement office in National Treasury is not necessary.

Parliamentary Legal Advisor response

Adv Frank Jenkins, Parliamentary Legal Advisor, said he would participate in the 23 April meeting to explain the constitutional issues, although there were not constitutional matters in the stakeholder submissions. On unfunded mandates, it was a chicken and egg issue because when Parliament receives a department annual report, it usually mentions the chapters of the relevant legislation that the department must implement and the budgets would flow from those duties of implementing the legislation.

Legislation is not operative and does not always get budget, but sometimes the budget follows legislation. However, passing the legislation results in budget allocation because there is legal compliance which cannot be circumvented in an annual performance plan. The issue of the Memorandum to the Bill setting out the financial obligations is not accurate because there is usually a Socio-Economic Impact Assessment done by the Department of Planning, Monitoring and Evaluation in the Presidency which stakeholders and National Treasury have access to which would explain further what would happen when the Bill is implemented.

On the role of the provincial legislatures and Parliament in the Bill, the PFMA was passed in 1999, in which there was a recognition of the constitutional principle of separation of powers. So the PFMA states it applies only in a limited respect to provincial legislatures and Parliament because of the separation of powers. That was also given effect by Parliament when it passed the Financial Management of Parliament and Provincial Legislatures Act in 2009.

Chapter 4 of the Public Procurement Bill is fulfilling the prescripts of the Preferential Procurement Policy Framework Act. The Public Procurement Bill as it becomes an Act cannot apply wholly to Parliament and the provincial legislatures because of the separation of powers recognised by the Constitution. Parliament is entitled constitutionally to arrange and determine its own internal arrangements and proceedings and it is empowered to provide for its own financial management, including supply chain management.

Lastly, the comment that the Public Procurement Bill was not served before the National Assembly was incorrect as the Standing Committee on Finance considered a draft Bill that was prepared for it and it was finalised in the form of a B-Bill before the National Assembly.

The Chairperson said one of the stakeholders mentioned a 300-page submission and he was not sure what the stakeholder expected in reply because that would be unfair to expect Treasury to reply to the whole document with all the work that it has faced. He asked Adv Jenkins to think about what could be done about whistleblowers and if he could respond to that in the 23 April meeting. On part-implementation of the Bill, that was done before with the Municipal Systems Bill, where the Minister would regulate some parts of the Bill to come into effect at different times and that could be a possible option to follow.

National Treasury's response

Mr Mathebula said the text changes to the Bill based on the recommendations will be produced and submitted to the Committee. He assured the Committee that the regulations this time around, unlike normally, would be consulted on with the public, and they would be availed for discussion at NEDLAC. The instructions will also be gazetted for the public to comment on.

On transformation and the BEE procurement practices, he said the measurement of BEE levels is based on the broad-based nature of the BEE Act. There are many instances where big businesses will ignore the ownership element of the scorecard and prioritise other elements of it, and their obtaining a status level 1 or 2 proves the broad-based nature of the BEE Act. This means the R588 billion did not necessarily go to black people because it could have easily gone to companies who decided to ignore the ownership levels of BEE.

The current system of the Preferential Procurement Policy Framework Act (PPPFA) has the two preference point systems of the 80/20 and 90/10, where in contracts of more than R50 million, the 90/10 is applied. As this Bill does not have a formula to state the percentage of what the premium will be, National Treasury is moving for the formula to be prescribed through regulations by the Minister and the public will have an opportunity to comment on it. Since the enactment of the PPPFA, black people have always said the inclusion of the preference point system formula in the primary legislation is the problem. That led to people complaining that the PPPFA does not go far enough in addressing transformation. National Treasury was merely avoiding including a formula for the premiums and evaluations early within Chapter 4 of the Bill.

The Chairperson asked Mr Mathebula and his team to respond to the specific questions asked by the stakeholders and they could respond to others in writing if the meeting went over time.

Mr Mathebula replied that the strategic versus operational issue was noted and in Treasury's view, Chapter 5 provides a specific approach. For example, the education sector would say the Learner Teacher Support Material (LTSM) is important to them and the procurement thereof should be strategic in nature. There is a clause in Chapter 5 which provides a comprehensive approach to strategic and operational issues. In clause 64, there is a specific reference to the procurement of infrastructure and capital assets in that the approach should be strategic, and the details thereof will be in the regulations because infrastructure is wide-ranging.

Mr Mathebula noted that the NRF said the standstill would cause a loss of donor funds, but Treasury felt that some government departments underspend and they end up losing the money. The standstill is because of the introduction of a Tribunal to deal with some disputes and it is important to ensure that government is not litigated against when an aggrieved bidder takes the matter back

to that specific department or to the Tribunal.

If there is any procurement that is urgent that will have an impact on service delivery, there should at least be an emergency provision that can be invoked. On donor funding, any treasury currently will have a unit that specifically manages donor funds; hence the donors must also comply with the Bill because there should not be a fragmented system where donors have their own system and want to impose their procurement system on South Africa. The bid committees must be cross-functional in nature and must contain different expertise because they deal with different kinds of procurement in the country, and that is covered in clause 29.

Mr Mathebula said that the 300-page NRF submission can be looked at over time but given the time constraints and the public participation process held all around the country, it was not possible to read 300 pages which had to inform a 37-page Bill before the Committee. Treasury would look at the submission over time to see how the submission may inform the regulations going forward. The definition of 'military veteran' and 'data privacy' will also be considered, but some of the concerns in the longer submission to the Committee were addressed.

Adv van Schoor said including the proposed definitions for words and phrases dealing with section 217(1) would not be appropriate because they would be dealt with in the regulations. The reading of section 35 refers to Bills tabled in Parliament and it is not defined in the PFMA.

The Chairperson thanked National Treasury and the stakeholders for the work they put into the engagements on the Bill.

The meeting was adjourned.

"FA19"

PMG PARLIAMENTARY MONITORING GROUP

Public Procurement Bill: NT response to additional public input & Final Mandates

NCOP Finance

07 May 2024

Chairperson: Mr Y Carrim (ANC, KZN)

Meeting Summary

Video

The Select Committee on Finance concluded its processing of the Public Procurement (PP) Bill. This followed a series of deliberations on the Bill, which seeks to provide clear guidelines and standards for procurement across various government entities while promoting transparency, efficiency, and accountability in the procurement process to address socioeconomic challenges and advance transformation goals.

All provinces, except the Western Cape, voted in favour of the Bill.

At the start of the meeting, Members were taken through the additional comments submitted by stakeholders on the Bill, and the National Treasury's (NT) responses to them. Many of the issues raised by stakeholders had already been discussed by the Committee and were either accepted to form part of proposed amendments or rejected. One significant proposed amendment made to the Bill was the inclusion of Clause 68, which requires the department to conduct a review of the Act, 24 months after it is promulgated, to be reviewed by the Bill be reviewed within 24 months after it is promulgated, and taken to the National Economic Development and Labour Council (NEDLAC) for stakeholder input.

Members supported this proposed amendment as they viewed the Bill as temporary and transitional due to its significant impact on procurement across the three spheres of government and the several outstanding matters that have not been addressed by the legislation.

There were disagreements between the African National Congress (ANC) and Freedom Front Plus (FF+) regarding how to capture the latter's opposition to the Bill in the Committee's final report. The FF+ sought for its minority view to read that it opposed the Bill based on the fact that it was race-based legislation. However, the ANC rejected this claim and argued that it could not be race-based legislation because it also considers the empowerment of women and small enterprises in general. Furthermore, the party believed that without the empowerment of the historically disadvantaged, racial polarisation would deepen, widen and threaten the stability of the country.

Nevertheless, the report captured the Democratic Alliance and FF+'s opposition to the Bill.

Meeting report

The Chairperson welcomed all those who were present. Thereafter, he asked if any apologies were tabled.

Mr Nkululeko Mangweni (Committee Secretary) said no apologies were recorded.

The Chairperson outlined that the Committee would first be taken through the department's matrix report before deliberating on the PP Bill.

PP Bill Comments Matrix

Mr Willie Mathebula (Chief Procurement Officer at the NT) indicated that the department received comments from the National Research Foundation (NRF), Public Affairs Research Institute (PARI), the Congress of South African Trade Unions (COSATU), the South African Clothing and Textile Union (SACTWU), Business Unity South Africa (BUSA) and the Department of Trade, Industry and Competition (DTIC). A revised draft bill was submitted to stakeholders for input.

NRF Submission

In its submission, the NRF proposed removing the recommended wording 'of a procuring institution' in Clause 12 (1)(b). It also requested that the department review the definition of 'official' to ensure that all instances in which the term appears in the draft are comprehensive. The department responded that 'official' refers to an official of a procuring institution, the Public Procurement Office (PPO), and provincial treasuries. As a result, it did not see the need to amend the proposed clause.

The Chairperson requested that the department take the Committee through each submission and their responses.

He asked if any of the provincial finance committee chairpersons were present.

No response was received to his question.

Mr Mathebula said the NRF proposed removing the words 'officials or employees of departments' from the list of automatic exclusions in Clause 13 as they gave the impression that governmental departments and provincial employees are allowed to submit bids. In its response, the department pointed out that Clause 13 (1)(c) excluded a person appointed in terms of Section 9 or 12A of the Public Service Act from submitting bids.

The Chairperson mentioned that the provincial chairpersons could pose questions on the proposals.

Mr Mathebula highlighted that the NRF was pleased with the proposal made to Clause 20 (6)(b), as it promoted transparency. However, it requested that the department insert the 'deeming' clause in other sections of the Bill, such as those, for instance, that deal with the Tribunal. However, the department felt that this would not be possible due to the nature of the Tribunal's functions. Instead, it proposed including 'period' in the exemption and departure clauses.

This change would require the Minster to respond within 30 days to an application made to him for exemption or departure from the usual bid processes, based on the submission of all the necessary documentation to process the application.

On Clause 24 (1)(a)(i), the NRF submitted that the phrase 'strategic procurement in other countries' was ambiguous, led to many interpretations, and could be void for vagueness. After considering its recommendation, the department proposed a new provision, which would read: 'the promotion of strategic procurement when procuring in other countries for use in those countries.' The department believed that this covered government officials placed in other countries.

Mr D Ryder (DA, Gauteng) was pleased with the proposed amendment.

The Chairperson also supported the proposed amendment.

Mr Mathebula remarked that the NRF proposed replacing the phrase 'without limiting' with 'which encourages, where feasible' in Clause 24 (1)(d) or creating two new preference categories, namely 'new entrants' and 'emerging suppliers.' The department rejected these proposals as it felt that the clause was correctly legally drafted. Moreover, it believed that the various preferences measured in Chapter 4 already catered for these suppliers under the mechanisms provided.

The department noted the NRF's view that the term 'technical expert' was unclear in Cause 27 and proposed changing Clause 27 (2) to read: ' a procuring institution must ensure that persons who participate in bid committees have the relevant knowledge, skills and technical expertise to achieve the intended result required during the relevant committee process.'

Mr Tumelo Gopane (Board Member of the Construction Industry Development Board) asked if he could pose a question.

The Chairperson said the Committee could not do so as the public participation process had concluded. Furthermore, when it was not obliged to do so, the Committee gave stakeholders two and a half days to respond to the draft text sent to them on Friday. He asked the PLA for advice.

He suggested that Mr Gopane raise his concern with the Standing Committee in a written letter today so that he could receive a response by either Thursday or Friday.

Adv Frank Jenkins (Senior Parliamentary Legal Advisor) indicated that stakeholders could not participate in the meeting as it was not a public hearing. However, as the Committee is in charge of its processes and procedures, it could amend its agenda to allow their participation in the proceedings.

Mr Ryder noted that the CIDB was an internal stakeholder.

The Chairperson asked if Mr Gopane represented a government institution.

Mr Gopane mentioned that he sat on the CIDB Board. He clarified that he had sought to ask a question of clarity earlier and not to make any proposals on the Bill.

The Chairperson asked the PLA what it thought should be done.

Adv Jenkins remarked that this was permitted if the department responded briefly.

The Chairperson pointed out that the question was not about the length of the answer but the process. Nevertheless, he permitted all stakeholders to ask clarity-seeking questions if required, highlighting that very few changes had been made in the draft text sent.

Mr Gopane asked if the department's proposal on Clause 27 meant that, going forward, consultants would not sit on bid committees.

Mr Mathebula clarified that the department's proposal implied that whenever anybody participates in a bid committee, the committee should have the relevant knowledge, skills, and expertise, regardless of whether they are sourced internally or externally.

Mr Gopane noted the department's explanation.

He continued and said the department did not support the NRF's proposal to insert a new Clause 47 (4), which would provide that the tribunal must, in writing, within 60 days respond to the application for review by the bidder, giving reasons for the decision to reject. It did not support it because Clause 51 (3)(a) outlined that the panel for review proceedings envisaged in Section 47 or 48 must make an order in terms of subsection (1) within 30 days after the submission of the application for review. On request by the panel chairperson, the tribunal chairperson may extend the 30-day period for not more than 30 days.

The Chairperson supported the department's response to the proposal.

Mr Mathebula said the NRF proposed inserting a new Clause 61 (4), which requires the Minister to respond, in writing, within 60 days to the application for exemption by the procuring institution, giving reasons for the decision. The department noted the submission and proposed including a 30-day period after receipt of all documents in the clause.

The Chairperson supported the department's proposal. He was surprised that the Committee had not made this suggestion before.

PARI Submission

Mr Mathebula indicated that the department had previously dealt with PARI's submission on Clause 5, as stakeholders had felt the Bill overreached by tampering with the powers of municipalities. After much consideration, the department removed the compulsory instructions and circulars for municipalities, which aligned with the Constitution. However, PARI argued that the instructions issued are binding to municipalities.

As such, the proposed amendments in the D-Bill were posed to address the concerns of infringing on the constitutional powers of local government. These changes entailed that only the regulations and the Act would apply to municipalities, whereas circulars would be subject to adoption by councils as required by Section 156 of the Constitution.

The Chairperson asked if COSATU had not raised this concern as well.

Mr Mathebula confirmed that it had.

The Chairperson said that while he agreed with COSATU and PARI in principle that the weakest link in the legislation was local government, he accepted that not much could be done.

Mr Mathebula repeated that the regulations and Act will apply to the municipalities.

The Chairperson noted the response.

Mr Mathebula said PARI believed that Chapter 4 did not refer to open competition being adjudicated through a preferential points system. In response, the department elaborated that the evaluation criteria will be prescribed in Clauses 17, 18, and 19 and should be read together with Clause 24 (1)(d). Therefore, there was no need for a preference points system at this stage.

PARI also proposed amending Clause 24 (1)(d) to remove the word 'may' and include 'must', which the department agreed to.

COSATU and SACTWU submission

The Chairperson mentioned that the majority of the Committee considered this Bill temporary and transitional. As such, it recommended in its report that the Bill be reviewed within 24 months after it is promulgated, at the National Economic Development and Labour Council (NEDLAC). This recommendation was made considering that a new minister and committee may be in place. He stressed that the recommendation was not binding, and would only act as a guide.

He asked the PLA to consider a softer version of the recommendation and requested that the Bill be reviewed within 24 months, including through appropriate consultation with stakeholders, to see if any amendments are necessary.

While the department may not view it as desirable, he said, this had been done in other bills.

Mr Ryder noted that many stakeholders agreed such a review would be important. Even though he understood it was the role of the National Council of Provinces (NCOP) to have oversight over the impact of legislation once it is implemented, he thought based on the process that had been followed so far, which included the short time period allocated for the preparation of the public consultation process as well as the fact that the changes made to the B-version of the Bill were not taken back to NEDLAC, the proposed review should be binding, and not just a recommendation.

He suggested that the Committee, in its report, stress the need for the department to review the Bill within 24 months after it is adopted as an act, hold consultations with the stakeholders, submit a report to the committees of both Houses, which will consider the additional inputs and potentially draft another Bill, and include a timeline.

The Chairperson felt that Mr Ryder's suggestion was too complicated as it spoke of a review process, followed by the submission of a report and a decision on whether a new Bill should be discussed. Instead, he suggested that proposed amendments to the Bill should be made within 24 months. He asked if this process was possible.

Adv Jenkins confirmed that it was, as it has been done with a previous bill processed by the Committee.

The Chairperson asked if the PLA and department had prepared a new line to be included in the Committee report on the proposed review process.

Adv Jenkins confirmed that they had.

The Chairperson mentioned that this would be discussed after the presentation.

Mr Mathebula said both organisations felt that the Bill was unclear on whether Clauses 17, 18, and 19 were mutually exclusive and could not be applied simultaneously. Moreover, they believed that layering the clauses would cause issues in procurement. In response, the department said the provisions in Chapter 4 are meant to be implemented in a staggered manner within the prescribed thresholds.

The Chairperson noted that the department had covered this point extensively in previous meetings.

Mr Mathebula outlined that both organisations supported the inclusion in Clause 24 of a framework of elements against which to judge procurement relating to price. However, they believed the obligations to assess or evaluate contracts in 24 (1)(d) should be compulsory and include the term 'must' and not 'may', which was supported by the department.

The Chairperson supported the proposal.

BUSA Submission

Mr Mathebula indicated that the department supported BUSA's proposed new definition for procurement.

The Chairperson also supported the proposal.

Mr Ryder asked if Members could have time to look at the clause and respond to it later.

The Chairperson accepted the request.

Mr Mathebula stated that BUSA was concerned that Chapter 4 did not provide for preferences and evaluation for companies making a concerted effort towards skills development.

Mr F Du Toit (FF+, North West) expressed the FF+'s objection to including B-BBEE in the Bill, as it was discriminatory to other groups of people. He underlined that preference should not be given based on racial considerations.

The Chairperson said the FF+'s rejection of the Bill had already been recorded in the report.

DTIC submission

Mr Mathebula mentioned that the DTIC took issue with Clause 16 (3) as it believed it created a perverse incentive for some procuring institutions not to implement government objectives not embedded in Clauses 17, 18, or 19. In response, the department said Clause 16 (3) was drafted with the knowledge that these preference measures may not always be possible to be applied. For example, there may not be suppliers in the market for particular goods and services being procured. Moreover, the requirement to report is intended to ensure that where the preference measures cannot be applied, the Public Procurement Office (PPO) or relevant treasury would be able to guide and support officials and procuring institutions to ensure compliance with this Act.

The Chairperson pointed out that the department had previously gone through this with members and asked what the department's decision on this matter was.

Mr Mathebula said the department did not see a need to change Clause 16 (3).

Mr Ryder indicated that it was concerning that another government department/entity raised concerns around Clauses 17, 18, and 19, especially as the DTIC held dual responsibility for implementing the provisions. He was concerned that Parliament was being asked to pass a Bill on which the Cabinet was not united. This had to be taken seriously by the Committee, he said.

He asked if this was the full text of the DTIC's comments or if the NT had summarised them.

The Chairperson clarified that disagreements between departments on certain provisions of bills were not new and had happened over the years. This usually occurs when a Cabinet member cannot impress upon his or her colleagues on a matter and tries to do so when a bill is before Parliament. Having noted the frequency of the practice, the ruling party intervened and asked Ministers to desist from doing so.

Regardless, he, too, questioned why the department had come at the last minute to lodge this objection when it had time to do so in the National Assembly (NA) via the Minister in Cabinet. He proposed that the Committee, in its report, suggest that the DTIC's submission be referred to the NA.

While many amendments were made in the original bill, most remained the same. Considering this, some of the issues raised by stakeholders, such as those raised by the Institute for Race Relations (IRR) in its letter, were fundamentally ideological differences.

Nonetheless, he suggested that the Committee's report outline its serious concern that the DTIC had lodged this issue on the Bill at such a late stage and its belief that it should have been settled in the Cabinet process. Furthermore, the Committee would refer the matter to the NA and recommend that the NT meet with the DTIC as soon as possible so that the NA can process the bill.

He asked the NT why the DTIC had not settled this with the department earlier.

Mr Mathebula mentioned that the DTIC's comments related to the D-Bill, which had undergone further changes.

The Chairperson still felt that these issues could have been resolved earlier. Thereafter, he asked the department to flight the prepared proposal to include in Clause 68, which speaks to the review of the Act. After it was put before Members, he read it out. It read as: 'The Minister must review the implementation of the Act 24 months after it is published; consult stakeholders, including NEDLAC; and within 30 months after the publishing of the Act make a report public on the review and submit it to Parliament.'

He was not pleased with the 30-month timeline for producing and submitting the report or with the department's decision to review only the Act's implementation, not all of its provisions.

Adv Van Schoor believed that this was covered in subsection (a) of Clause 68, which included 'and the need for amendments to the Act'.

The Chairperson noted the response.

Adv Jenkins indicated that the word 'implementation' corresponded to Parliament's obligation to have oversight over the implementation of legislation.

The Chairperson asked if the PLA wanted the word left in the clause.

Adv Jenkins stated that this depended on how it was perceived, but in his opinion, the word 'implementation' was broad enough, as it looked at the performance reports and whether the objectives were met.

Mr Ryder asked if the South African Local Government Association (SALGA) could also be included alongside NEDLAC as a stakeholder to be consulted on the review process.

The Chairperson asked the PLA if this was necessary.

Adv Jenkins said the Act required SALGA to be consulted only on matters affecting local governments.

The Chairperson settled on a 30-month timeline. However, he asked why six months was required to publish the report.

Adv Van Schoor said that this could be reduced.

The Chairperson recommended that it be done within three months.

Adv Van Schoor noted the suggestion.

Mr Ryder was pleased with this clause.

Ms D Mahlangu (ANC, Mpumalanga) supported the clause.

Mr Ryder asked if the Committee could then deal with the letter sent to it by the IRR.

The Chairperson accepted his request and asked that it be flighted.

IRR letter to the Committee

The Chairperson outlined that the IRR objected to the length of time between the issuance of the B18D draft of the Bill and the deadline for stakeholder submissions on the draft, the reliability of the NT's claim that over a trillion Rand's worth of procurement projects had been given to black-owned companies.

He asked the department to comment on the IRR's suggestion that if procurement under Clauses 17, 18 and 19 is not cost-effective, the procuring institution must record and report the reasons to the PPO and the relevant treasury.

Mr Mathebula indicated that the IR had confused two pieces of legislation. Here, the department spoke to preferential procurement, a function of the Constitution.

The Chairperson said the Committee was aware of this, and that was not what he had asked. He had asked for the department's reply on the IRR's point that a procuring institution must record and report the reasons.

Mr Mathebula outlined that Black Economic Empowerment (BEE) premiums referred to the B-BBEE Act, which went beyond procurement. The department highlighted that procurement was but one element of the B-BBEE Act.

The Chairperson repeated that the department had not responded to the question directly. Nevertheless, while he appreciated the IRR's idea in principle, he felt that it would complicate matters as it would reinforce the view that cost-effectiveness superseded everything else. Moreover, the proposal did not go with the Standing Committee's rejection of price as a major determining factor during the evaluation of bids.

Mr Ryder suggested that the IRR's view on cost-effectiveness should be considered during the bid evaluation in the Committee report. He was cautious about defining cost-effectiveness, as it would set a new baseline. He admitted that defining 'cost-effective' was difficult.

The Chairperson asked for Mr Ryder to send the Committee a draft on how it should craft his suggestion in the report.

He mentioned that the Committee would then deliberate on the provincial mandates.

He asked the PLA whether permanent delegates or the provincial legislature's representative were expected to present the mandates.

Adv Jenkins indicated that usually, it was a representative from a provincial legislature's finance committee.

Final Mandates on PP Bill

Eastern Cape Legislature

Ms Z Nchita (ANC, Eastern Cape) presented the mandate on behalf of the province. She mentioned that the Eastern Cape (EC) voted in favour of the Bill.

Free State Legislature

Mr M Moletsane (EFF, Free State) presented the mandate on behalf of the province. He said the Free State (FS) voted in favour of the Bill.

Gauteng Legislature

Mr Sochayile Khanyile (Member of the Gauteng Provincial Legislature) presented the mandate on behalf of the province. He indicated that the provincial finance committee sat in the morning to confirm its decision to support voting in favour of the Bill.

KwaZulu-Natal Legislature

The Chairperson presented the mandate on behalf of the province. He said KZN voted in favour of the Bill.

He suggested that the Committee report note the quality of the reports submitted by the provincial legislatures.

Limpopo Legislature

Ms M Mamaregane (ANC, Limpopo) presented the mandate on behalf of the province. She mentioned that Limpopo voted in favour of the Bill.

Mpumalanga Legislature

Ms D Mahlangu (ANC, Mpumalanga) presented the mandate on behalf of the province. She said Mpumalanga voted in favour of the Bill.

Northern Cape Legislature

Mr W Aucamp (DA, Northern Cape) presented the mandate on behalf of the province. He mentioned that the Northern Cape (NC) voted in favour of the Bill.

The Chairperson indicated that the Committee's final report will highlight the need to address the issues leading to poor attendance at public hearings in NC.

North West Legislature

Mr Du Toit presented the mandate on behalf of the province. He said the North West (NW) voted in favour of the Bill.

The Chairperson asked the PLA if the Committee should wait until it finished deliberating on the PP Bill before voting on the final mandates.

Adv Jenkins said voting on the provincial mandates was unnecessary as the provinces had already done so.

The Chairperson clarified that he was asking if the Committee had to adopt the final mandates before or after its deliberations on the Bill.

Adv Jenkins advised that the Committee do so after deliberating on the Bill.

Ms Mahlangu indicated that the Western Cape (WC) had not presented its mandate.

The Chairperson noted this and asked that the representative present it on the province's behalf.

Western Cape Provincial Parliament

Ms L Moss (ANC, WC) presented the mandate on behalf of the province. She said the WC voted not in favour of the Bill.

The Chairperson asked which version of the Bill Members should look at.

Mr Ryder said the D-version would be more appropriate.

The Chairperson acknowledged the contribution made by his personal assistant to format the Bill and others.

Clause-by-clause deliberations on the D-Version of the PP Bill

The Chairperson asked if he was correct in saying that members only had to go through the proposed amendments.

Adv Jenkins confirmed this was correct.

Mr Ryder highlighted that the D-Version showed many changes made in the last phase of processing the Bill, not those made earlier. He asked if the department could flight a version of the Bill that contained all the changes made to it by the Committee.

Adv Van Schoor explained that all the changes made to the Bill were highlighted in red. All the proposed amendments included on Thursday were highlighted in yellow, and those emanating from the stakeholder's comments were highlighted in green.

Mr Ryder noted the response.

The Chairperson asked the department not to go over matters already dealt with by the Committee.

Adv Van Schoor outlined that the department added three changes, one of which is the review of the Act.

Chapter 1

Definitions, Objects, Application and Administration of Act

Adv Van Schoor indicated that no new proposals were made in this, except for distinguishing goods and services used for construction, repair, and maintenance based on the definition of procurement.

Mr Ryder was pleased with the proposal, which clarified the definition.

The Chairperson thought it was good that Members of the majority party accepted and noted the suggestions made by smaller parties.

He asked if the PLA agreed with the definition of strategic procurement, as he was displeased with it.

Adv Jenkins felt the definition was fine as is.

The Chairperson informed Members that the final mandates were accompanied by reports. Most of the information in them was covered in the Bill. He further told Members that he discussed the difference in ideology between the ANC and DA on the Bill with the chairperson of the WC finance committee.

Chapter 4

Clause 18: Prequalification criteria for preferential procurement

The Chairperson asked if the department included all the submissions from stakeholders.

Adv Van Schoor said that it had considered their suggestions and proposed amendments.

She then took Members to Clause 18 (4), which was highlighted earlier during the discussions on the DTIC's submission.

Mr Ryder felt that this currently formulated clause only encouraged procuring institutions to make purchases even when not necessary. He felt it should be tightened so that they only go out on procurement when required. He advised adding the word 'when' before the word 'procuring'.

Mr Mathebula said the addition could be made.

The Chairperson was pleased with the amendment.

Adv Jenkins was also pleased with it.

The Chairperson pointed out that the department and PLA would investigate the cross-referencing in the Bill and resolve it in the Announcements, Tablings, and Committee Reports (ATC) version of the Bill. He asked the PLA if the Committee report would be included in the ATC.

Adv Jenkins confirmed that it would be.

The Chairperson suggested that the Committee include in its minutes an appreciation of the contribution made by the department. He asked the PLA if the Committee could not also include this in its final report on the Bill.

Adv Jenkins said the Committee could do so.

The Chairperson said it would do so.

Thereafter, he said the Committee would vote on the Bill after going through its draft report.

Draft Report of the Select Committee on Finance on the PP Bill, Dated 07 May

The Chairperson took the Committee through the report. He mentioned that the draft report summarised the submissions made on the Bill and the Committee's observations and recommendations.

Referring to paragraph 6.24 of the report, he suggested that the report include the DA's opposition to the Bill and race-based quotas alongside that of the FF+.

Mr Du Toit disputed that the DA opposed the Bill based on racial quotas. He underlined that only the FF+ had done so.

Mr Aucamp said this was incorrect.

The Chairperson mentioned that the DA had also opposed the Bill based on its preferential procurement clauses, which would be captured in the report.

Mr Du Toit asked why it would be captured if this was false.

The Chairperson proposed that the report state the FF+ is the main party in the Committee, which is opposed to race-based legislation.

Mr Aucamp opposed this suggestion.

Mr Du Toit also opposed it as he believed the phrasing was unfair to other parties. He recommended that 6.24 remain as is.

Mr Ryder indicated that this was the FF+'s view, and the Committee could not instruct it on what it should be.

Mr Du Toit recommended that the minority view rather state that the party had strongly opposed race-based legislation since 1996.

Ms Mahlangu asked how the term 'race-based' related to the PP Bill, as it only concerned public procurement. She stressed that the FF+ could not rename the Bill despite its opposition.

Mr Du Toit said the Bill was race-based legislation.

Ms Mahlangu said it was not.

The Chairperson proposed that the first line of 6.24 states that the FF+ has always vigorously opposed race-based legislation.

Mr Du Toit suggested adding the words 'unlike political parties'.

The Chairperson would not allow this.

Ms Mahlangu mentioned that the FF+ was abusing the platform. She recommended that the report capture that the FF+ opposed the Bill because it favoured previously disadvantaged people.

Mr Du Toit took issue with Ms Mahlangu's suggestion as he felt it insinuated that all white people had benefited from Apartheid. This legislation, he continued, sought to benefit black people as a whole.

Ms Mahlangu asked him not to bring political debates into the discussion, as Members were focused on the Bill. The ruling party has, on several occasions, explained that the beneficiation of the previously disadvantaged would not be at the exclusion of white people. For instance, even though black women faced greater oppression than others, women as a whole are considered a category of historically disadvantaged persons.

Mr Du Toit requested that the Committee not influence the FF+'s view on the matter in the report.

Mr Moletsane pointed out that the rules required for opposing views to simply be recorded in a final report when dealing with a Section 76 Bill, with the debates on the bill done within the provincial legislatures.

The Chairperson indicated that the reports usually noted the opposition's view. However, the rules do not provide for a committee to draft a minority report.

Even though he thought the matter should not have been put up for debate, he asked Members to be careful about their language when expressing their views.

Nevertheless, he suggested that the report also set out the ANC's fundamental disagreement with the DA and FF+ approach to the Bill, as is clear from the amendments effected to the Bill and its overall support, and that the party did not accept that this is race-based legislation because it also considers women and small enterprises in general.

The ANC believed that without the empowerment of the historically disadvantaged, racial polarisation would deepen, widen and threaten the stability of the country, he added.

He asked the PLA if these changes could be changed as suggested.

Adv Jenkins indicated that the Committee could do so if it chose; however, the rules did not require it. The rules required that those who opposed a Bill be noted in the report.

The Chairperson asked if the Committee report could say that the FF+ has always been vigorously opposed to what it sees as essentially race-based legislation.

Mr Du Toit suggested a compromise for it to state the FF+ vigorously opposed race-based legislation.

The Chairperson said the Committee would not agree to that.

Ms Moss indicated that the FF+ was present in the meeting last week when she explained that the Bill sought to provide redress to all previously disadvantaged groups, and not only black people.

The Chairperson asked if the DA had any comments on this matter.

Mr Ryder highlighted that Rule 120.4 allowed for minority views to be expressed. Whilst he acknowledged that there had to be sensitivity in the language used by Members, he believed freedom of speech should be allowed.

Ms Mahlangu felt that the Committee should follow the PLA's advice. She said it was not fair to raise issues of race on the Bill, considering how Members have treated each other over the years.

The Chairperson said the debate on redress as a government policy should be had in the House, not the Committee.

Nowhere could it be found that individuals had an abstract right to say whatever they wanted and provoke other Members. He added that the FF+ has been given several opportunities to express its points on the matter.

He asked the PLA if the Committee report could read: 'The FF+ has always been vigorously opposed to what it sees as essentially race-based legislation'. This suggestion did not take away from the party's position; it was just mindful of people's sensitivities.

He mentioned that the bottom of the page would state that 'The majority party will state that it fundamentally disagrees with the positions of the DA and FF+, and strongly believes that without the empowerment of black people, this country's polarisation – class, racial and gender divisions – will dramatically increase, and the stability, security and prospects of economic growth in this country will be severely undermined'.

If the FF+'s version is put forward on the report, the ANC will state that, ultimately, in some or other sense, whites benefited from Apartheid, whether they were poor or rich, because they did not carry a passbook and were not threatened by the South African Defence Force. A few white people took the brave step to oppose the system, he noted.

He added that the matter would be put to a vote if needed.

Adv Jenkins said the Chairperson's proposal aligned with the NCOP Rule 120, which states that a committee may include the minority's views in the report.

The Chairperson included the FF+'s view and then below the view of the majority party.

Mr Du Toit said the Chairperson had created a perception that the FF+'s minority view had only been submitted on the Bill shortly before the meeting started when it was sent last Saturday. Not once during the day's communication did the Chairperson voice his dissatisfaction with the wording. To him, the Chairperson seemed to be threatening the FF+ through his language.

The Chairperson did not agree that the Committee had changed the meaning of the FF+'s view on preferential procurement in the report.

After the report was discussed, he asked the PLA if the Committee had to go through the Bill clause-by-clause before putting it up for a vote.

Adv Jenkins indicated it could be put up for a vote without further deliberation.

Mr Ryder informed Members that he would take them through the paragraph he was asked to draft earlier. It said: 'As part of the review process, the department must perform an assessment of the cost-effectiveness of procurement, taking into account price, social cohesion, the need to redress past disadvantages entrenched through legislated and societal mechanisms, together with the effective delivery of government objects.'

The Chairperson suggested that he replace the word 'price' with the phrase 'value for money.' He asked the department if this was consistent with the Bill.

Adv Van Schoor said the department preferred to continue using the word 'cost-effective' in the Bill because it was mentioned in the Constitution.

Adv Jenkins advised that the word competitiveness be included as well because the purpose of procurement was to develop the market and create a wider supply chain within a country. Set-asides are also included to empower people and develop supply chains so there is greater competition. This was in line with constitutional judgements, which stated that the government has a duty to develop them.

The Chairperson asked if anything in the wording undermined the prospects of disadvantaged emerging African entrepreneurs in public procurement.

Mr Ryder said there was nothing in the paragraph that did. Price gouging was something the Committee and government should be against. The DTIC set this example during the COVID-19 pandemic.

Empowerment can be seen as cost-effective, he added.

The Chairperson mentioned that the Committee has consistently highlighted that B-BBEE has failed to benefit the broader majority. He asked the department for comment on whether it believed the wording undermined the prospects of disadvantaged emerging African entrepreneurs in public procurement.

Mr Mathebula stated that several stakeholders said the use of price as part of the evaluation criteria had been discredited worldwide. The Standing Committee on Finance also raised that price was used as a gatekeeping mechanism.

The Chairperson said the Committee was aware of this. He was asking if the paragraph undermined the Bill.

Mr Mathebula confirmed that it would not.

Vote on the PP Bill

The Chairperson requested a mover to adopt the Bill.

Ms Mamaregane moved for its adoption.

Ms Nchita seconded the mover.

Mr Ryder indicated that the DA was opposed to the Bill.

Mr Du Toit expressed the FF+'s opposition to the Bill.

The Bill was adopted, noting the opposing views of the DA and FF+.

Vote on the Committee Report

The Chairperson requested a mover to adopt the report.

Mr T Xula (ANC, KZN) moved for its adoption.

The Chairperson asked if a provincial delegate could vote on Committee reports.

Adv Jenkins clarified that only permanent delegates could do so.

Ms Mahlangu moved for its adoption.

Ms Nchita seconded the mover.

The report was duly adopted, noting the FF's opposing view.

Read: Read: ATCC240509:Report of the Select Committee on Finance on the Public Procurement Bill (National Assembly- Section 76, B18d-2023), Dated 07 May 2024

The Chairperson thanked Members and the department for their work on the Bill.

Mr Ryder indicated that both the DA and FF+ had not been given the opportunity to state their opposition to the report on the record.

The Chairperson pointed out that their opposition was recorded in the report.

Mr Ryder expressed gratitude to the Parliamentary Monitoring Group for the standard and quality of its recording and reporting of the proceedings.

The Chairperson asked if the proposed paragraph should be included in the report.

Adv Jenkins stated that it formed part of the Committee's recommendation on the review process.

The Chairperson did not understand what else needed to be included in the report, as it already stated that this was a first-phase Bill and that a review process would be conducted 24 months after it was adopted.

Adv Jenkins cautioned the Committee against including a recommendation that would disadvantage the next committee. Mr Ryder's recommendation provided direction and circumscribed the scope of the review process.

The recommendation may assist the department in how to conduct its report on the 24-month review. Once the committee receives that report, it will interrogate it, and if there are issues, it can raise them, as was the case with the resolution on the role of the Standing Committee on Public Accounts (SCOPA) and the Joint Investigation Team in the Arms Deal saga. The PLA was tasked with looking into the resolution of the House to see if SCOPA should form part of the Joint investigation team.

He felt that the paragraph narrowed the review process.

The Chairperson said the paragraph should not be added to the report if it would narrow the review process. Clause 68 should remain as is, he added.

The meeting was adjourned.

[The following report, replaces the Report of the Select Committee on Finance, which was published on page 6 of the Announcements, Tablings and Committee Reports dated 08 May 2024]

Report of the Select Committee on Finance on the Public Procurement Bill (National Assembly- Section 76, B18d-2023), Dated 07 May 2024

1. INTRODUCTION AND BACKGROUND

The Minister of Finance introduced the Public Procurement Bill, (B18-2023) (the Bill) in the National Assembly (NA) in June 2023. The Bill was passed by the NA and transmitted to National Council of Provinces (NCOP) for concurrence on 6 December 2023.

The objective of the Bill is to regulate public procurement and to prescribe a framework within which preferential procurement must be implemented.

The Bill intends to address the fragmentation of public procurement legislation, align it to international best practice, where appropriate, and assist in implementing government's socio-economic policy objectives.

2. OVERVIEW OF THE PUBLIC PROCUREMENT BILL

The PPB proposes to, (1) create a single framework regulating procurement, in line with all applicable provisions in sections 195, 216, and 217 of the Constitution of the Republic of South Africa, 1996 (Constitution), (2) establish a Public Procurement Office (PPO) in the National Treasury (NT), with specific functions for provincial treasuries (PTs) and duties of procuring institutions, (3) make provision for procurement integrity and debarment, (4) establish a framework providing for the implementation of a preferential procurement policy, (5) provide for the procurement system, methods and related matters (these include a bid committee system and development of information and communication technology (ICT) based procurement system), and (6) establish dispute resolution mechanisms.

3. PROCESSING OF THE BILL

The Bill was processed in terms of the procedure established in terms of section 76 of the Constitution. The Select Committee on Finance (Committee) invited the provincial Select Committees on Finance to the briefing on the Bill by NT on 06 February 2024 and all the other meetings.

The Committee held public hearings on 23 February 2024 and received a total of 33 submissions. Twelve stakeholders made oral submissions. These are Business Unity South Africa (BUSA), Public Affairs Research Institute (PARI), African Procurement Law Unit (APLU), Joint Strategic Resources (JSR), National Research Foundation (NRF), South African Institute for Chartered Accountants (SAICA), Corruption Watch (CW), Public Service Accountability Monitor (PSAM), the South African Medical Technology Industry Association (SAMED), Congress of South African Trade Unions (COSATU) and Southern African Clothing and Textile Workers Union (SACTWU), Will Power (WP), and the Institute for Race Relations (IRR) Legal NPC.

Twenty one written submissions were received from the Solidary Trade Union (STU), Construction Industry Development Board (CIDB), Equal Education and Law Centre (EELC) and Equal Education (EE), Pharmaceutical Task Group (PTG), Consumer Goods Council of South Africa (CGCSA), Pharmaceuticals Made in South Africa (PHARMISA), City of Cape Town (CCT), Amabhungane Centre for Investigative Journalism, Health Justice Initiative (HJI), Budget Justice Coalition (BJC) and Imali Yethu Civil Society Coalition for Open Budgets, Construction Sector Charter Council (CSCC), University of Stellenbosch (US) (Venter, Quinot and Scott), Sakeliga (formerly Afribusiness), Webber Wentzel, Eskom, Perishable Products Export Control Board (PPECB), Civil Engineering Group, MEC Wenger, Mr Michael Freema, and Dear South Africa.

At a meeting of the Committee on 19 March 2024, the NT responded to the submissions of stakeholders, and they, in turn, responded to the NT's responses. The Committee then engaged with both NT and the stakeholders.

In its responses the NT dealt with, among others, concerns regarding constitutionality, independence of the Public Procurement Office (PPO), functions of PPO, provincial treasuries and procuring institutions, transparency and integrity measures, whistleblowing, dispute resolution and the extent of regulation-making powers. The Committee raised concerns about NT in some instances only noting stakeholders' comments and explaining that some of the issues will be addressed through regulations, circulars, guidelines, and instructions and should not form part of the primary legislation. The Committee expressed disappointment with NT's responses and urged NT to provide a comprehensive feedback and engage constructively in the process. The Committee invited stakeholders to submit further comments and directed NT to meet separately with the stakeholders to

see if they can reduce the differences between them, given that the Bill is a Section 76 Bill which must include the views of the provinces.
Twelve stakeholders submitted summaries of outstanding issues that still had to be addressed. Those who made submissions were COSATU and SACTWU, JSR, Procurement Reform Working Group (PRWG) NRF, PSAM, CSCC, NRF, Willpowers, IRR Legal NPC, Black Business Council (BBC), Business Unit South Africa (BUSA) and Dr Ncedo Mkhondweni. An additional submission was received by MK Liberation War Veterans. Subsequently, NT met with the stakeholders between 8 and 10 April 2024 and provided feedback on the outcome of the engagements to the Committee on 17 April 2024. The report was discussed at length in subsequent sittings of the Committee.
Permanent delegates of the Committee briefed their respective provinces on the Bill between February and April 2024. On 30 April 2024 and 02 May 2024, the Committee considered the provincial negotiating mandates. The Committee held meetings on 23, 25, 26 and 30 April 2024 and 02 May 2024 to further process the Bill, decide on policy issues and consider the Bill clause-by-clause. On 07 May 2024, the Committee considered and adopted the report. In all, the Committee spent 39 hours **(depends on how many hours today – but this figure allocates 3 hours) on the Bill.**

4. SUMMARY OF KEY ISSUES RAISED DURING THE COMMITTEE'S PUBLIC PARTICIPATION PROCESS AND NATIONAL TREASURY'S RESPONSES

This is a brief overview of the submissions made by stakeholders. Their full submissions can be found at on the website of Parliament (https://www.parliament.gov.za/). The following key issues were raised by the stakeholders in oral and written submissions:

4.1 **Poorly defined terms, omissions, and inconsistencies**: Some stakeholders raised concerns about definitions in the Bill, that must be amended, replaced, deleted, or reviewed. Some suggested insertions of new definitions and rectification of errors and omissions. Also, clauses were said to be poorly drafted, undefined, unclear, and hard to interpret, and may introduce the risk of poor implementation. The stakeholders suggested that the National Council of Provinces (NCOP) should strengthen this Bill to address these substantial drafting concerns before its finalisation.

4.2 **Inadequate public participation process:** Issues raised included that Chapter 4 has not been tested by a National Economic Development and Labour Council (NEDLAC) review process; inputs made in the NA were largely not considered; and there was a lack of meaningful public participation in the NA process. Stakeholders complained that the timeline for processing the Bill in the NA and NEDLAC was rushed. Proposals were made that the Bill not be processed by the Committee, and be returned to NEDLAC for further discussions and be brought back within six months.

4.3 Others suggested that a "supplementary" Bill and the regulations be brought back to NEDLAC in the next 18 months. NT outlined its public participation process undertaken since 2014. NT explained that it (1) conducted a comprehensive consultation process with stakeholders in all spheres of government, Cabinet and government institutions, (2) subjected the Bill to the NEDLAC process for six months in 2022, (3) ensured that the Ministers of Labour and Finance received a NEDLAC report signed off by all social partners, and (4) ensured that the Bill was certified by the Office of the State Law Advisers. Also, the Presidency, through the Department of Planning, Monitoring and Evaluation (DPME), issued a certificate for the Social Economic Impact Assessment Study (SEIAS), which permitted NT to proceed with the Bill; the Bill went though the NA process; and the Bill considered the Zondo Commission of Inquiry recommendations and the 2017 Constitutional Court judgement regarding preferential procurement regulations, amongst other judgements.

4.4 **Major concerns with the Chapter 4 amendments**: Several stakeholders raised the need for clarification of "pre-qualification", "set-asides", "sub-contracting", "asset management", "complementary goals", local production and content, and "transformation". Suggestions were also made to redefine value for money in "set-asides" but also include social and economic redress for the injustices of the past to ensure that South Africa achieves all the objectives of section 217(1)(2) and (3) of the Constitution. Other issues identified included misalignment of Chapter 4 with the rest of the Bill; the removal of price as a criterion for evaluating tenders; and that the many amendments made in the NA process have created risks and potential legal challenges; and the role of municipal and provincial procuring institutions has been undermined. On the power to determine a preferential procurement policy, stakeholders argued that certain provisions in Chapter 4 of the Bill appear to supersede the five principles outlined in section 217(1) of the Constitution. A proposal was made that clauses 17, 18 and 19 be amended, to remove all categories that are not black or black-owned.

NT responded that:

4.4.1 The inclusion in clause 18(1) related to "prequalification" states that the prescribed thresholds and conditions must include a prescribed minimum of potentially qualifying suppliers to ensure competition. It is proposed that clause 17(5) be amended by omitting paragraph (a) to (c) which provides that a bid set-aside in terms of subsection (1) be evaluated in terms of the prescribed criteria. "Prequalification" for preferential procurement and subcontracting as a condition of contracts are included in a manner that aligns with the aims of sections 217(2) and (3) of the Constitution , especially considering the majority judgment in the Minister of Finance v Afribusiness (NPC [2022] ZACC 4) at paragraph 116 of the Constitutional Court judgement: "Happily, both the first judgment and this judgment and, indeed, the Minister understand the impugned regulations to do what is envisaged in section 217(2) of the Constitution."

4.4.2 Based on the intentions of section 217 of the Constitution, it is not correct that "set-asides" are unconstitutional, as section 217(2) provides for preference in the allocation of contracts and for the protection and advancement of persons or categories of persons previously disadvantaged by unfair discrimination. The reason that "set-asides" were

regarded as not being valid was that the founding legislation, the Preferential Procurement Policy Framework Act (PPPFA), did not provide for "set-asides" per se, but for preferential procurement to only occur within the context of a preference point system. Clause 17 is drafted in a manner that recognises that it may not always be possible to implement the "set-asides" provisions, and clause 17(6) states what should happen in such instances. Furthermore, clause 18(7) is written in a manner that ensures that competition is not flouted when procuring institutions make use of the pre-qualification provisions. NT believes that the necessary checks and balances have been written into the designation provisions. Different categories of "set-asides" have been proposed as stand-alone categories to further elevate different categories of people previously disadvantaged, in line with the comments received.

4.4.3 On local production and content, the Constitution in section 217(2)(a) provides for preferences in the allocation of contracts, which preferences may relate to several vulnerable categories, such as the local manufacturing base of the country. It is believed that the necessary checks and balances are contained in clause 20, the provision for designation of sectors for local production and content.

4.4.4 Stakeholders expressed a view that the price used in evaluating tenders could be deemed unconstitutional as section 217(1) of the Constitution makes provision for cost-effectiveness and competition as one of the principles of public procurement. NT said that procurement, and public procurement in particular, by its very nature, should first and foremost be about price. They further highlighted that only if the national legislation can be brought under section 217(3), which requires a legislative framework for the preferential procurement part of the exercise, can there be a departure from the requirements of section 217(1).

4.4.5 Regarding alignment, Chapter 4 should be understood in the context of the procurement system envisaged in section 217(1) of Constitution, and is also linked to Chapter 5, which provides a framework for this system to be prescribed by regulations. Procuring institutions must implement their procurement systems and policies considering the nuances of their sector and industries. In the Constitutional Court judgement of the Minister of Finance v Afribusiness, Justice Mhlantla stated at paragraph [79] that: "The stand-alone reading of section 217(1), which ignores section 217(2), is not only a disservice to statutory interpretation, but also ignores the founding values of the Constitution". This reaffirms that national legislation providing a framework to give effect to section 217(2) of the Constitution must consider the founding values of the Constitution and the need to deliberately redress past discriminatory practices and provide for measures to make a meaningful difference to the lives of South Africans who suffered under apartheid.

4.4.6 It is proposed that procedural provisions in clause 17(5)(a) to (c) be omitted as well as all references to "complementary goals" in Chapter 4. It is proposed that clause 25(1) be amended to contain a general requirement on bid evaluation as prescribed by regulation as part of the framework for an institution's procurement system, which is to include cost-effectiveness, functionality and technical requirements, where applicable. Institutions must apply the preferential procurement provided for in Chapter 4 within their procurement systems developed and implemented as determined by regulation under clause 25, read with clause 8, of the Bill. The PPO may issue a model policy, which the procuring institution may customise according to its own institutional requirements.

4.4.7 On transformation, as to the proposed removal in clause 17(3), 18(1) and 19(1) of categories that are not black people or owned by black people, NT did not support removal of categories of "women", "people with disabilities", "youth", "small enterprises" and "co-operatives" categories. These categories of persons accord with section 217(2)(a) and (b) of the Constitution in that persons who were previously disadvantaged by unfair discrimination included all women, not just black women, as an example. Furthermore, section 217(2)(a) allows for categories of preference in the allocation of contracts. Therefore, the framework in Chapter 4 may provide for preferences for other vulnerable categories of persons, such as "small enterprises" generally.

4.4.8 NT did not agree with the notion that preferential procurement is discretionary, as alleged. The Bill is clear that preferential procurement policy of a procuring institution must comply with the framework of Chapter 4 which includes matters to be prescribed by regulation. To make compliance with the regulations clearer it is proposed that it be included in clause 16.

shifting functions within the institutions should result in limited costs, it proposes to remove the enforcement role for PTs in respect of municipalities. NT acknowledged that the establishment of the Tribunal will result in additional costs. clause 68 of the Bill provides for the provisions of the Act to be brought into operation on different dates and also on different dates for different categories of institutions and different categories of procurement. Where applicable, the availability of funds will be considered in determining the effective date of provisions.

4.15 **Issues with the dispute resolution mechanisms and the Public Procurement Tribunal**: Concerns were raised that, (1) the Bill fails to introduce truly effective oversight and accountability mechanisms, (2) it is not clear that the Tribunal in section 38 (clause 36 in the D-version of the Bill) will be adequately resourced to effectively fulfil its duties, (3) the Tribunal does not meet the urgent need to address corruption in procurement, (4) no provision is made for transitional arrangements during the proposed 18 to 24 months period to establish the Tribunal, (5) a single procurement Tribunal for all issues may result in bottlenecks and delayed resolution of issues. They feel that panels in the Tribunal in the Bill and the financial costs be included. NT said that clause 29 explicitly speaks about Bid Committees. NT's other responses were: The dispute resolution procedures are aimed at saving costs and improving turnaround times in service delivery, and the remedies are clearly set out. Also that:

4.15.1 Tribunals are provided for in existing legislation – for example, the Financial Services Tribunal (FST) established by the Financial Sector Regulation Act (FSRA), 2017 and the Tribunal established by the Social Assistance Act (SSA), 2004 for appeals against South African Social Security Agency (SASSA) decisions. The Tribunals will reduce the prospects of judicial reviews. This matter is provided for in clause 54(1).

4.15.2 Clause 47(1) provides that the Chairperson of the Tribunal must constitute a panel for each application, and in terms of clause 48, having panels to attend to disputes in provinces could be provided for in Tribunal rules.

4.15.3 NT proposes that clauses 47 and 48 be amended to specifically deal with the regulation of panels and requirements for operation at a provincial level. The costs of Tribunals are to be carried through appropriations from the National Revenue Fund (NRF) by Parliament and will be proposed through the normal budget process once the estimated costs have been determined and the there is the required readiness for the Tribunal to commence its work.

4.16 **Problematic donor funding clause in the Bill**: Some stakeholders submitted that the Bill requires that all procurement using donor funds must comply with the Act but that may cause significant financial implications for municipalities, as international donors may opt not to adhere to red-tape requirements. While requesting an exemption may result in delays, provinces and municipalities may lose their grant or donor funding if there is a protracted review process which may severely impact service delivery. Significant delays may also result in the need for more costly solutions. A suggestion was made to include a "standstill" clause (54) in the regulations since the delay may result in losing donor funding. NT explained that many government institutions can't spend all their allocations from the fiscus. The "standstill" clause is there because there is a Tribunal to address disputes; there is provision for exemption in case of emergencies; NT has a unit that specifically manages donor funding; and donors must also comply with the requirements of the Bill. The Bill in clause 62 enables exemptions for donor funded procurement and in clause 64(1)(a)(vii) the regulation of donor funding.

5. PROVINCIAL MANDATES

The Committees met by 30 April 2024 and by 07 May 2024, respectively, to consider negotiating and final mandates from the provinces. NT's written responses to issues raised in negotiating mandates were sent to provinces on 30 April 2024.

5.1 Negotiating mandates

The Eastern Cape supported the Bill and made comments; Free State supported the Bill with proposed amendments and made recommendations; Gauteng supported the Bill and made recommendations; KwaZulu-Natal supported the Bill with proposed amendments; Limpopo supported the Bill and made recommendations; Mpumalanga supported the Bill; North West supported the Bill with proposed amendments; Northern Cape supported the Bill with proposed amendments; and Western Cape did not support the Bill. It provided reasons and made recommendations.

5.2 **Final mandates**

The Eastern Cape; Free State; Gauteng; KwaZulu-Natal; Limpopo; Mpumalanga; Northern Cape and North-West provinces supported the Bill. The Western Cape did not support the Bill.

The committee expresses its appreciation for the quality of the submissions received from the provinces generally.

6. COMMITTEE'S OBSERVATIONS AND RECOMMENDATIONS

6.1 The Committee appreciates the active participation of civil society stakeholders in the Bill and the quality of the submissions received. NT could obviously not respond to each and every point made by all the stakeholders. The verbal responses by NT were significantly better and more comprehensive than the written submissions, especially because NT was constantly challenged by Committee members in robust exchanges. The Committee thoroughly went through NT's report on its April meeting with stakeholders and its other responses to the stakeholder's submissions. The same applied to the submissions of the provinces when they forwarded their negotiating mandates. Overall, the Committee is satisfied with NT's responses to the key issues in the Bill.

6.2 **A "first phase" bill:** The Committee believes that there are several issues raised by the stakeholders and the Committee that are not addressed in this Bill. The Committee sees this Bill as a "first phase" Bill. Further matters can be considered in a "second phase" Bill. The Committee recommends that within two years, the Bill be reviewed, including through a NEDLAC process, and any amendments needed, be brought to Parliament.

6.3 **Need for Bill:** The Committee considered statistics from NT, DTI, the Committee researcher, and some of the stakeholders on the extent to which Blacks have been empowered. While there has been some progress it is not enough at all. The reasons for this are many, and some of the points made in this regard by stakeholders are correct. The government and Parliament must accept our failures in this regard. The Committee reiterates its rejection of the same people being empowered repeatedly, mainly because of their political connectivity, at the expense of other sections of Black people. Empowerment has to be spread equitably across all strata of Black people and due recognition has to be given to smaller emerging businesses within the framework of this Bill.

6.4 **Drafting errors, omissions, and inconsistencies:** The Committee notes that there were drafting errors, omissions and inconsistencies in the Bill, many identified by the stakeholders and others by Committee members. While acknowledging the urgency in which this Bill was processed by the NA, the Committee finds this unacceptable.

6.5 **Inadequate public participation process:** The Committee notes the calls by civil society stakeholders to return the Bill to NEDLAC for further consultation, particularly on the significant amendments made in Chapter 4 in the NA process. The Committee also notes, as mentioned above, that NT conducted a comprehensive consultation process with stakeholders in all spheres of government, Cabinet, and government institutions. NT also subjected the Bill to the NEDLAC process for six months in 2022 and to the NA process. In a reply to the stakeholders, the Committee noted:

We have the fullest regard for Nedlac and the negotiations and other processes that take place there. It helps if Bills have been processed through Nedlac because they usually come with a degree of consensus or at least a sense of what the differences are between the parties. While Nedlac plays a very important role, it is Parliament, as you well know, that ultimately decides on Bills, taking into account what was decided during the Nedlac process.

Our processing of this Bill has followed the usual process, except that we have given far more attention to it than to other Bills, and we asked for a further process of consultation between yourselves and NT. As usual, we receive a briefing on the bill; then have public hearings where we engage with your submissions; then comes NT's response to your submissions, after which you reply to what NT says and then we engage with both yourselves and NT. We had the further process of your engagements with NT between 8 and 10 April, and when the report was brought to Parliament, we had further engagements with yourselves and NT. It is usually after having heard the stakeholders and NT – all sides - that the committee begins to shape its views. Which is exactly what we have been doing since the committee stage began on this Bill. And you are free to attend meetings or catch up on its proceedings through YouTube. Moreover, our views will be expressed in

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the amendments that are being processed. If all goes well, we will have processed the amendments by Thursday or Friday this week. We hope to send you the Bill with the amendments by Friday evening for you to send your comments by noon on Monday (6 May 2024). We know that some of you will argue it is too brief a period for you to comment. I'm afraid that's the best we can do. Some of you have been engaging with this Bill over several years, including when it was first gazetted for comment and in the Nedlac process and since, including through the SCoF process. As you might know, we are not obliged in terms of Parliament's rules and norms on processing legislation to take further comments from you beyond the engagements we have already had with you, subject to the standard of reasonableness. We will consider your responses to the amendments at our meeting of 7 May. Some of you want to overhaul the entire bill, we understand, but we are not in support of that. So, we would strongly recommend that you send your comments on the amendments in a brief, precise form and if you want to offer any alternative wording, kindly do so. Ultimately, it is for Parliament, not NT, to decide on these amendments and that is exactly what will happen…
…Adv Jenkins was present in all the SCoF meetings – and I refer you to his comments. He does not find the public participation process to be flawed. Normally, civil society stakeholders complain that Parliament does not carry out its oversight and legislative roles effectively. SCoF made changes to the Bill. That its right.
Several of the stakeholders seem to think that Parliament has to agree with what was decided at NEDLAC. If we were to mechanically or automatically agree with the outcomes of NEDLAC negotiations, Parliament would be abdicating its role in terms of the Constitution, relevant legislation and Rules of Parliament. Besides, the Committee cannot ignore the submissions of stakeholders who were not involved in the NEDLAC process, several of whom had different views from those who took part in NEDLAC.
To create more space and time for public participation, the Committee applied for permission to the NCOP Chairperson for an extension beyond the usual eight-week cycle to process Bills. The permission was granted. According to Adv Frank Jenkins of Parliament's Legal Services Unit, to his knowledge, this is the first time a committee has sought such an extension. The Committee, in fact, spent an extra five to six weeks beyond the eight-week cycle, which ended on or about 2 March 2024 on this Bill.
According to the Committee Secretary, Mr Nkululeko Mangweni, the Committee sat for 40 hours, as follows:
Hours spent on the bill

Date	No. of Hours	Agenda
6 Feb 24	3	Briefing by NT
23 Feb 24	3	Public hearing on the bill
1 March 24	3	Responses by NT on submissions
14 March 24	3	Responses by NT on submissions
19 March 24	3	Responses by NT on submissions
17 April 24	3	Report back by NT on engagement with stakeholders
23 April 24	3	Further processing of the bill
25 April 24	3	Further processing of the bill
26 April 24	3	Further processing of the bill
30 April 24	3	Consideration of negotiating mandates
2 May 24	6	Further processing of the bill
7 May 24	4	Consideration of final mandates
Total	40	

Members of the Committee also took part in meetings of the provincial legislatures during the negotiating and final mandates process.
The Chair of the Committee also engaged for many hours with NT officials and Committee members. Adv Jenkins' overview of the legitimacy of the public participation process and some of the key constitutional issues are attached as Annexure A.

6.6 **Public participation in the Provinces:** NT participated in hearings between 08 February 2024 and 22 March 2024 on the Bill. Public participation hearings took place in eight provinces as follows: in districts in the Eastern Cape (four towns in OR Tambo/ Alfred Nzo, four in Amathole/ Buffalo City Metro, four in Chris Hani/ Joe Gqabi and four in Sarah Baartman/ Nelson Mandela Metro), three districts in Mpumalanga (Mbombela, eNkangala,

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and Gert Sibande), three districts in Free State (Parys, Welkom/Virgina and Smithfield/ Bloemfontein), three hearings in the Western Cape (George, Cape Town and Saldanha Bay), one hearing in Limpopo, one hearing in Gauteng and Northern Cape arranged a virtual public hearing for its entire province. NT did not attend public participation hearings of the KwaZulu-Natal and Northwest legislatures. NT responded in writing to the public submissions made in Gauteng, Western Cape and KZN.

6.7 **Constitutionality of the Bill:** The Committee notes the views of several stakeholders that the Bill is not constitutionally sound. However, the State Law Advisors (in respect of the tabled Bill, NT's legal advisers, and Parliamentary Legal Service unit could not establish any grounds for unconstitutionality. The Committee relies on advice from the Parliamentary Legal Services unit. Annexure A covers issues related to the constitutionality of the Bill.

6.8 **Major concerns with Chapter 4 amendments:** The Committee notes conflicting views from stakeholders on the constitutionality of Chapter 4 in general and on various clauses. The Committee further notes the concerns about "pre-qualification", "set-asides", "sub-contracting", "transformation", removal of price as a criterion for evaluating tenders, and misalignment of the Bill with section 217 of the Constitution. Many of these concerns have been addressed by the amendments made.

6.9 **Exclusion of reference to price or premium in the Bill:** The Committee believes that small emerging businesses are often not able to compete with established businesses on price and are often excluded from procurement. The Committee requested NT to insert price and related criteria in the Bill without undermining the prospects of small emerging businesses being empowered. The Bill takes into account: (1) section 25, which deals with criteria for evaluation, has been amended to include cost-effectiveness, capability, functionality and technical requirement with limiting new entrants and emerging suppliers and (2) refers to section 195(1)(b) of the Constitution, which relate to Efficiency, Economy and Effectiveness (EEE) use of resources (3) the expected percentage of the premium and the evaluation criteria will be published for public comment, and (4) the clauses on debarment and criminal offences in the Bill seeks to address abuse of the procurement system.

6.10 **Cooperative governance undermined:** The Committee notes the concerns raised, which include that the Bill does not acknowledge the local government sphere; the specific Sections 125 and 217 of the Constitution, where the spheres were separated, may be unconstitutional; and economic development ignores the local and socio-economic objectives of the provinces and local government. However, the Bill is amended to include the requirement that organised local government be consulted on draft regulations affecting municipalities and municipal entities. The removal of powers of the PPO and PTs in respect of local government is proposed. Amendments to enable procurement in a geographical area – a municipality or a province - are also proposed.

6.11 **Too much regulatory powers given to the Minister of Finance:** The Committee notes the comprehensive reply to this matter in section 4.13 above. While the Committee accepts NT's views, we believe that as the Bill comes into effect, there has to be a review of the extent of the Minister's power to regulate and this matter be considered in the "second phase" of the Bill process.

6.12 **Financial implications of implementing the Bill**: The Committee notes that the expected ICT-based procurement, and establishment of PPOs and Tribunal and its panels would require additional funds, while there will be transitional costs for provinces and municipalities because of the Bill. The Committee also notes many stakeholder's dissatisfaction about NT's initial assertion that no additional financial resources were required to implement the Bill, and its recent reluctant acknowledgement that while the quantum is not known, setting up the Tribunal and its panels will have financial implications. The Committee further notes NT's explanation that the existing pools of practitioners in the departments would help implement the Bill and there are no direct impacts on PTs. The Committee is clear that there will be financial implications in the implementation of the Bill, and cannot understand why NT could have thought there would be none. However, NT has altered the memorandum to mention that there will be financial implications to the implementation of the Bill. The Committee recommends that within six months NT estimates the financial cost of the Bill and reports to the Committee on this.

6.13 **Concerns about capacity to implement:** The Committee is concerned about the capacity of NT and the relevant institutions in all three spheres of government to effectively implement the Bill. It notes, however, that the Bill provides for different sections of the Bill to be implemented at different times. The Committee recommends that capacity, funding and other

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resources should also be taken into account when decisions are taken on this phasing in of the Bill. The Committee recommends that within six weeks of the Committee being constituted in the 7th term of Parliament, NT must present an implementation programme on this Bill to the Committee.

6.14 **Lack of transparency and access to information:** The Committee notes that some stakeholders are concerned that the Bill does not provide for transparency and might be in violation of the Constitution because of this. NT holds that the Bill adequately covers transparency in different sections and that the public would have adequate access to information through the enabling provisions in the Act for public access to procurement processes and information including through ICT based portals. The Committee recommends that PPO, provincial treasuries and procuring institutions should put as much information in the public domain as possible, subject to market sensitive and other confidential information. The Committee is aware of the market sensitivities entailed and the need to protect the confidential information of companies, but in the "second phase" review of the Bill, consideration needs to be given to the relevant legal and other issues and whether it is viable for stakeholders to attend the bid adjudication process or parts of it or watch a video of the full or parts of the process (whether it be live-streamed or recorded).

6.15 **Whistleblowing**: The Committee notes the calls made by stakeholders for the inclusion of incentivized whistleblowing in the Bill. NT believes that strengthening the protection of whistle-blowers is supported through the amendment of the Protected Disclosures Act (PDA) administered by the Department of Justice (DoJ) and cannot be through this Bill, and that the Minister of Justice has published a paper for this purpose and invited interested parties to submit written comments on the discussion paper on proposed reforms for whistle-blower protection regime in South Africa. The Committee is seriously concerned about the lack of protection for whistle-blowers. Some have been killed, others have lost their jobs and remained unemployed, many have suffered huge financial losses, and others have been seriously affected in other ways. In principle, the Committee supports some form of incentivized whistle-blowing, but as this issue falls under the DoJ and they have published a paper on this recently, we do not have the authority to make a decision on this. However, the Committee recommends that the review of the Protected Disclosures Act be finalised urgently, and consideration be given to incentivized whistle-blowers being included.

6.16 **Lack of independence of the PPO**: The Committee notes concerns that the role, structure, and independence of the PPO is not aligned with the Zondo Commission Report recommendations, while accountability mechanisms are not clearly defined in the Bill and that the PPO should be separate from NT and accountable to Parliament. NT replied, as mentioned above, that the role of the PPO is to perform functions regarding government's requirements, which cannot be provided in-house, and does not regulate the procurement by the private sector. In addition, the PPO is not the chief buyer on behalf of the government. There is no justification from creating an entity separate legal entity for this purpose. The Committee agrees that the PPO should remain within NT.

6.17 **Problematic donor funding clause in the Bill**: The Committee notes the concerns raised that the Bill requires all procurement using donor funds to comply with the Act and that this may have significant financial implications for municipalities. NT's argument is that all procurement, regardless of the source of funding should be subjected to the Bill. The Bill in clause 62 enables exemptions for donor funded procurement and in clause 64 (1) (a) (vii) enables the regulation of donor funded procurement.

6.18 **The Bill is not applicable to Parliament**: The Committee notes that clause 3(2) of the Bill provides for the application of the preferential procurement provisions to Parliament and Provincial Legislatures and not the rest of the Act. The legal doctrine of separation of powers is expressed in the Constitution and requires that Parliament and provincial legislatures must determine and control their own internal arrangements, which includes policies for public procurement. However, such policies must be consistent with the framework in national legislation contemplated in section 217 of the Constitution. The Preferential Procurement Policy Framework Act - which will be repealed when the Bill is promulgated - provides the framework and hence the Bill replaces that framework in chapter 4. The Financial Management of Parliament and Provincial Legislatures Act (FMPPLA), 2009 determines that Parliament must prescribe a policy for public procurement that must be consistent with the PPPFA and BBBEEA. The FMPPLA should consider what is relevant to Parliament in this Bill.

6.19 **Concerns of the construction sector:** The Committee is very concerned about the destructive consequences of the "construction mafia", with its demands of 30 per cent of the

cost of every project. The Committee notes that clause 27 has preventative measures that procuring institutions must take and the provisions on debarment and offences (specifically extortion), if duly enforced, will address this partly. But the law enforcement and justice system need to be far more effective in dealing with this.

6.20 **Concerns raised by provinces in negotiating mandates**: The Committee appreciates the concerns raised by the provinces. Many of these issues were raised by the stakeholders in the NCOP public hearings and have been addressed. Some of the issues will be addressed through regulations and others in the implementation process. There were also issues raised that do not belong in this Bill. These concerns include the challenges with the CIDB grading system; non-adherence to the 30-day payments rule by most departments and translations of bid documents to all languages. NT's response to the latter concern was that it would consult with the Pan South African Language Board (PanSALB) and other relevant bodies for this requirement to be considered for inclusion in the regulations. The Committee supports the proposal that bid documents should not only be in English. The Committee believes that consideration needs to be given when this Bill is reviewed to establish a Procurement Regulator as either an independent entity or part of the National Treasury, with assured operational independence. The submissions from the provinces - some more than others – were very comprehensive and helpful, and the Committee expresses its appreciation.

6.21 **Proposed amendment of the definition of "Black people" in the BBBEE Act:** The Committee notes the concern from KZN about the categories listed under "Black" in the B-BBEE Act and the recommendation that the PPB should separate the demographic reference to "Black people" from Indian and "Coloured" people. Many African entrepreneurs believe that Indians in KZN benefit disproportionately through B-BBEE – and that this is not fair. The Committee recognises this concern. However, this would mean changing many other BEE and other laws that refer to all people of colour as Black and this review will have to be done through a proper policy process, not in this Bill.

6.22 **Protection of Officials:** The Committee notes the concern that there is no protection of procuring officials against the notorious behaviour of business forums who demand a certain percentage and chase companies away from projects. Procuring officials also need protection from other abuse as well. The Committee recognises the need for the protection of officials; however, this cannot be addressed in this Bill. Ultimately it is a criminal matter, cutting across all spheres of government, which must be reported to the police and be dealt with by law enforcement agencies.

6.23 The Committee has decided that the Minister must, within 24 months after the Act is published as an Act in the Gazette, review the implementation of the Act and the need for any amendments to the Act. This should be done after consultation with stakeholders, including NEDLAC and within 30 months after the Act is Gazetted, a report on the review should be made public and submitted to Parliament. As part of the review process, the Department must perform an assessment of the cost-effectiveness of procurement and competitiveness, taking into account price, social cohesion, the need to redress past disadvantages entrenched through legislated and societal mechanisms, together with effective delivery of government objectives.

6.24 The committee expresses serious concern that a Government Department, the Department of Trade, Industry and Competition (DTIC), has brought up an issue at the last stage. The Committee believes that these differences should have been settled in the cabinet process. The Committee is not clear why the DTIC's concern was not raised at an earlier stage in the Standing Committee on Finance (SCoF) process. However, the National Assembly might consider take this further. The Committee recommends that NT meets with DTIC by the time the SCoF process begins to address their concern.

6.25 The DA is opposed to the Bill because it rejects the premise that race can be used as a proxy for the historically disadvantaged. While it acknowledges that the majority of people who have historically been deprived of opportunity are black, there are many others who have been disadvantaged. Furthermore, the past 30 years of democracy have gone some way to correcting the injustices experienced by many South Africans during the Apartheid years. While much more needs to be done, focus should be on empowering those who have remained unempowered. Race is, therefore, an outdated measure. It is furthermore demeaning to South Africans to still be subjected to the "race classifications" that made Apartheid the evil system that it was. Our present government's policies are contributing to racial polarisation. The DA believes that the best way for government to achieve socio-economic redress is to govern well, uplifting the majority of South Africans who remain

trapped in hardship rather than advantaging a select few. Many of the programmes favouring the few have to date been counter-productive, with projects designed to uplift large groups failing because of lack of skills or malfeasance of the project bid-winner. While redress is essential and fast-tracking interventions are necessary, the current model does not achieve this, and the Bill is a continuation of the same stale thinking. This bill undermines social cohesion under the guise of restorative justice, and its impacts will be far reaching. While strategic government procurement is nothing new, the mechanisms entrenched by this bill are the same mechanisms that have failed to have a broad impact over the past 30 years in South Africa, and affirmative action has been internationally proven to be ineffectual. It is disappointing that the Methodology for Assessing Procurement Systems (MAPS) has not been engaged to evaluate the proposed implementation of the bill and been consulted to achieve a more constructive system that has greater impact in terms of addressing the chosen ideological outcomes. In stark contrast, the DA tabled our solution through a Social Impact Bill, formally titled the Preferential Procurement Policy Framework Amendment Act, in June 2023 which proposes a focus on the Sustainable Development Goals to address the root causes of inequality of opportunity, to benefit the majority of poor and vulnerable citizens. While the Bill before us is a marked improvement on the bill that entered this House, we cannot accept the perpetuation of legislation that entrenches the racially divisive policies of the governing party.

6.26 The FF Plus also opposes the Bill and says that the pervasive influence of Broad-Based Black Economic Empowerment (BBBEE) on South Africa's public procurement process has been profoundly negative, exacerbated by the entrenchment of state capture and 30 years of cadre deployment. While the quality of products and services should be the primary concern, BBBEE often prioritises race-based criteria, distorting procurement practices. The Freedom Front Plus has always been vigorously opposed to what it sees as essentially a race-based legislation since democracy's inception in South Africa. Stricter BBBEE regulations won't necessarily uplift black communities, and the proposed Bill, as it stands, fails to combat corruption and wasteful spending, further entrenching the ANC's ideology. Introducing a sunset clause to BBBEE legislation, alongside other race-based laws, is imperative as the current open-ended approach impedes genuine transformation and economic evolution. Overregulation perpetuates discrimination against non-black minorities while failing to drive real progress in impoverished communities.

6.27 The ANC fundamentally disagrees with the positions of the DA and FF Plus and strongly believes that without effective empowerment of Black people, especially from the more disadvantaged strata, the race, class and gender polarisation in this country will significantly increase. Moreover, the social stability of the country will be severely undermined, and the prospects of economic growth will also be considerably reduced.

6.28 The Committee expresses considerable gratitude and appreciation to NT officials, Mr Willie Mathebula and Adv. Empie Van Schoor and their team, for the many hours they spent on the Bill and enormous work they did.

6.29 The Chairperson expresses his appreciation to the Committee members for the work they put into the processing of this Bill. In particular, members of the opposition parties who are opposed to the Bill but participated actively and usefully in the Committee meetings.

Democratic alliance and Freedom Front plus rejected the report

The Select Committee on Finance, having considered and examined the Public Procurement Bill [B18D - 2023] (National Assembly – section 76), referred to it, and classified by the JTM as a section 76 Bill reports the Bill with amendments.

Report to be considered.

ANNEXURE A

Notes on the correspondence regarding the processing of the Public Procurement Bill [B 18B-2023]
Prepared by Constitutional and Legal Services Office of Parliament, F Jenkins, 26 April 2024

1. Public participation

The correspondence indicates that the public participation process was flawed and 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.

1.1 The test set out by the Constitutional Court

The Constitutional Court held in *Doctors for Life International v Speaker of the National Assembly* (Doctors for life) that there are at least two aspects of the duty to facilitate public involvement:

(i) the duty to provide meaningful opportunities for public participation in the law-making process; and

(ii) the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.

Parliament has the discretion to decide on appropriate measures in each case, provided these must be reasonable.

1.2 Factors to be taken into account to determine the reasonable measures to give effect to the constitutional obligation to facilitate public involvement.

(i) Parliament has a discretion and courts will not be quick to second guess what Parliament deemed necessary in the circumstances, provided that the measures must be reasonable. The Court will not prescribe measures.

(ii) Standing rules/models/framework will provide a guiding measure to what is required.

(iii) The nature and impact of the legislation under consideration.

(iv) Time concerns (urgency), efficiency and cost may be considered but "saving of money and time in itself does not justify inadequate opportunities for public involvement."

1.3 Failures

(i) In the *Doctors for life* matter, there were neither public hearings held at provincial legislatures, nor at the level of the NCOP.

(ii) In *Land Access Movement of South Africa and Others (LAMOSA) v Chairperson of the National Council of Provinces and Others* – concerning the Restitution of Lands Rights Amendment Act – inadequate notice periods for the public hearings, inadequate translations of the Bill – lack of attendance of NCOP Members in the hearings.

(iii) The case of *South African Veterinary Association v Speaker of the National Assembly and Others* concerned an amendment during deliberations that added the requirement that veterinarians also be licensed to compound and dispense medicines. This new amendment was never presented to the public prior to finalisation of the legislative process. There should have been permission sought from the Assembly to expand the scope of the Bill as required by the rules and a call for comments on this amendment.

(iv) In *Mogale and Others v Speaker of the National Assembly and Others (Mogale)* the Court considered the Public Participation Framework and the Practical Guide for Members of Parliament and Provincial Legislatures and made findings due to the lack of compliance with pre-hearing workshops on the Bill; insufficient notice periods prior to hearings; lack of transport to the hearings; misrepresentation about the scope of the Bill during the hearings; inability to participate in the hearings; insufficient copies of the Bill during hearings and insufficient translation of the Bill for certain communities.

1.4 Response to correspondence relating to public participation

Parliament has a discretion to determine the manner in which to fulfil the obligation to facilitate public involvement; the cardinal issue is whether Parliament's process was reasonable. There are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.

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In this instance the only issue with the opportunity to make submissions on the Public Procurement Bill pertains to the period allowed to make the submissions. Be that as it may, many submissions were received as indicated in the correspondence. Given that the Public Procurement Bill was introduced in the National Assembly on 30 June 2023. Prior to that, National Treasury briefed the Standing Committee on Finance on 23 May 2023, and formally on the tabled Bill 5 September 2023. The call for public comment was published in all official languages in print media and the website of Parliament starting 18 August 2023, with a deadline of 11 September 2023. Extension was granted to those that requested it. The SCoF held public hearings on the Bill on 12 and 13 September 2023. The Bill was adopted by the NA and referred to the NCOP on 6 December 2023. The allegation that National Treasury could only respond directly to just more than a third of the public comments in its written reply to the Standing Committee does not mean that the Standing Committee did not consider the issues that emanated from all the public submissions. The process of public engagement is still ongoing in the Select Committee. Looking forward, it is probable that the Standing Committee will once again have an opportunity to look at the amendments made by the NCOP.

The were neither obstacles to attend the physical meetings by the Standing Committee nor those the virtual meetings of the Select Committee, and to participate during those meetings. Notices of the meetings were given, and people attended. The correspondence does not question anything in this regard.

In respect of the ability to take advantage of the opportunity provided to make comments, there were no issue about language, translations, understanding of the purpose of the Bill and so on. The critical question pertains whether the use of the opportunity to participate in legislative process was capable of influencing the decision to be taken. The record of the process in the Assembly and the Council shows that public comments resulted in many changes to the Bill, and this process is ongoing.

It is not correct to aver that those who took part in public participation were not "capable of influencing Parliament's decision making" as the stakeholders do not know the views of the Members to the Standing and Select Committees. The interaction between National Treasury and stakeholders plays out in public with the purpose that the Committee is placed in a position to give effect to its mandate to report back to the relevant House. The Select Committee is still considering the Bill. The Committee will begin with a clause-by-clause consideration of the Bill on 30 April and stakeholders will be able to ascertain whether their comments were accommodated in the Bill. What is clear is that the respective committees have been open to being influenced by the public hearings.

2. Content of the amendments

2.1 Amendments by the Standing and Select Committee to Chapter 4 that are questioned in the correspondence is a policy matter, as indicated. The amendments were as a result of public input, in my understanding. I cannot find any of these amendments to be unconstitutional and it is my responsibility to inform the Committee if any amendments the Committee effects are unconstitutional. The process followed is in my view compliant with the constitutional requirements for public involvement.

2.2 The public involvement process must give the public a meaningful opportunity to influence Parliament, and Parliament must take account of the public's views. Even if the lawmaker does not change its mind, it must approach the public involvement process with a willingness to do so. However, this does not mean that the legislature must accommodate all demands arising in the public participation process, even if they are compelling.

3. Lack of regulations

The argument presented in the correspondence indicates that the absence of regulations at this point in time poses challenges to the understanding of the complete regulatory framework being established by the Public Procurement Bill. Whilst it is understood that the regulations will provide a clearer picture of the entire regulatory framework pertaining to public procurement as envisaged in the Bill, the submission by the stakeholders that it is impossible to properly interrogate the effect and constitutionality of the Bill without sight of how the provisions will play out in practice is fallacious. The absence of the regulations at this point in the process does not

affect the constitutionality of the Bill. Regulations must be consistent with the enabling legislation. As was the case in the matter of *Minister of Finance v Afribusiness NPC* – concerning the constitutionality of the 2017 Regulations to the Preferential Procurement Policy Framework Act – the regulations to the Public Procurement Bill must comply with the enabling statute. The absence of regulations does not impugn the constitutionality of the enabling statute in this matter. Usually, Bills are passed in Parliament without the regulations being finalised.

4. **Memorandum to the Bill**

The comment about the issue of financial implications of the Bill does not impugn the constitutionality of the Bill. The Memorandum to the Bill is not part of the Bill, as regulations will form part of the Act after the promulgation of the Act. The issue of the financial implications has been discussed in an open hearing and it is not intended to mislead the public or Parliament. The Committee has already expressed its concerns about the financial implications of the Bill and will make this clear in its report to Parliament.

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"FA21"

Read: Letter to Presidency re Public Procurement Bill

Robert Hlongwane <Robert@presidency.gov.za>
on behalf of
President RSA <PresidentRSA@presidency.gov.za>
Mon 2024-05-27 08:30
To:Tsukudu Moroeng <tsukudu@lrc.org.za>

1 attachments (10 KB)
Read: Letter to Presidency re Public Procurement Bill;

https://zaf01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.thepresidency.gov.za%2Fcontent%2Flegal-disclaimers&data=05%7C02%7Ctsukudu%40lrc.org.za%7Ce8db70a7af544ea4d19108dc7e1686eb%7C71235ecb3fce4c3aa68cb643678f5fb6%7C0%7C0%7C638523882422739245%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C0%7C%7C%7C&sdata=oALuRpSdPN9nZMQgmFojuXKjrVxIy4XCmUiokEpXmes%3D&reserved=0

"FA22"

RE: Letter to Presidency re Public Procurement Bill

Robert Hlongwane <Robert@presidency.gov.za>
on behalf of
President RSA <PresidentRSA@presidency.gov.za>
Mon 2024-05-27 09:41

To:Tsukudu Moroeng <tsukudu@lrc.org.za>
Cc:Nomusa Zondi <Nomusa@presidency.gov.za>;Makhosini Makhubele <Makhosini@presidency.gov.za>;Mike Louw <mike@presidency.gov.za>

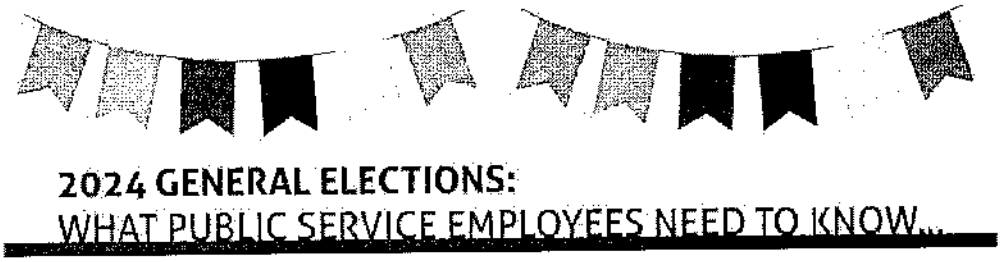
Dear Mr Moroeng

Receipt of the correspondence addressed to the President of the Republic of South Africa, HE President Cyril Ramaphosa, is acknowledged with appreciation.

Kind regards

Robert Hlongwane
Private Office of the President
West Wing, Room 65, Union Buildings
The Presidency
Tel: 012 300 5219
Website: www.thepresidency.gov.za
E-Mail: Robert@presidency.gov.za

THE PRESIDENCY
REPUBLIC OF SOUTH AFRICA



Mintirho ya vulavula

From: Tsukudu Moroeng <tsukudu@lrc.org.za>
Sent: Friday, 24 May 2024 18:01
To: President RSA <PresidentRSA@presidency.gov.za>; President Hotline(DPME) <president@presidency.gov.za>; presidency@po.gov.za; Malebo Sibiya <malebo@presidency.gov.za>; Abram Mothwa <Abram@presidency.gov.za>
Cc: Quinot, G, Prof [gquinot@sun.ac.za] <gquinot@sun.ac.za>; Caroline James <caroline@amabhungane.org>; Motlatsi Komote <motlatsik@corruptionwatch.org.za>; Claire Rankin <Claire@lrc.org.za>; Shaun Scott <shaun.scott@wil.co.za>; Tabitha Paine <tpaine@cer.org.za>; tabitha.paine@gmail.com
Subject: Letter to Presidency re Public Procurement Bill

Dear Office of the Presidency,

Kindly see attached a letter from **concerned individuals and groups** for your attention, regarding the Public Procurement Bill.

Please acknowledge receipt once received.

We thank you for your kind consideration.

Kind regards,

LRC LEGAL RESOURCES CENTRE

TSUKUDU MOROENG
Attorney

M: +27 11 038 9709 | T: +27 11 038 9709 | tsukudu@lrc.org.za | www.lrc.org.za
Constitution Hill, 1 Kotze Street, West Wing, Women's Jail, 2nd Floor, Braamfontein, Johannesburg, 2001

PMG PARLIAMENTARY MONITORING GROUP

"FA23"

Public Procurement Bill: National Treasury response to public submissions; Procurement & B-BBEE Statistics briefing

NCOP Finance

26 April 2024

Chairperson: Mr Y Carrim (ANC, KZN)

Meeting Summary

Video

The Select Committee on Finance convened virtually to discuss stakeholder submission on the Public Procurement (PP) Bill. National Treasury presented the input and its response.

In its submission to the Committee, Business Unity of South Africa (BUSA) claimed that there was evidence showing that of the public comments received following the August 2023 invitation by the Standing Committee on Finance, only 36% of these were considered, with 64% not having been processed, and that this would likely be challenged in the courts based on legal precedent.

The Parliamentary Legal Advisor advised members that, in this instance, Parliament had passed the test for public participation, which looks at whether members of the public had a meaningful opportunity to impact the Bill's processing. Parliament invited stakeholders to make written and verbal submissions, facilitated engagements between them and the department and considered all the proposals

The Committee noted that several supporters of Broad-Based Black Economic Empowerment (B-BBEE) did not believe that the Bill went far enough in advancing the policy, with organisations such as the Black Business Council (BBC) proposing that other designated persons, except black and black-owned companies, be removed from the legislation. It also did not understand why some of those who supported B-BBEE thought that the Bill would regress the gains made by the policy so far.

There was significant disagreement regarding the department's proposal to include military veterans Clause 17 (3) of the Bill as a standalone category. On the one hand, members of the Democratic Alliance and Freedom Front Plus argued that it was unnecessary to do so as provision had already been made for military veterans in the B-BBEE Act.

They further contended that the proposal for military veterans to refer only to those involved in the South African liberation war from 1960 to 1994 sought to provide towards Mkhonto We Sizwe and other guerilla fighters aligned to the African National Congress. It would only be fair, given the serious sacrifice all soldiers, including those who served the South African National Defence Force, undergo, for all those who have served the country to receive the same benefits, they argued.

Members from the ANC rejected the proposal as they believed those who served under liberation movements had been disadvantaged by having to flee the country to perform their activities, which prevented them from furthering their education and also from working to earn a salary, unlike those who served the SANDF, who were remunerated for their services and already received pension benefits.

Despite the opposition, the majority supported including the department's proposal.

In the second half of the meeting, Members were taken through the statistics on the progress of B-BBEE by the NT and the Department of Trade, Industry and Competition (DTIC). Officials from the DTIC outlined that the impact of B-BBEE entities on gross domestic product (GDP) from 2009 to 2021 amounted to R350.15 billion, with a total of 949,680 jobs created. Furthermore, the overall black ownership increased from 27% in 2017 to 39.5% in 2021, and overall black women ownership from 9% to 12.4%.

Both departments admitted that despite the progress made by B-BBEE so far, significant barriers to entry for black people to participate fully in the economy remained. Black businesses still faced higher barriers to entry arising from their continued exclusion from established business networks and value chains. Other reasons include poor access to inputs and markets and lower skill levels.

The Chairperson of the Committee hoped that the Committee could conclude its work by Friday so that it could send the Bill out to civi society organisations to receive comments by Monday, 6 May, and then vote on it the following day.

Meeting report

The Chairperson welcomed all those present and apologised for arriving at the meeting two minutes late. He outlined that the Committee would continue deliberating on the department's responses to the submissions made on the PP Bill. Thereafter, it would receive a briefing from the DTIC on the B-BBEE statistics at 15:30.

He asked if the NT had any announcements to make.

Adv Empie Van Schoor (Chief Director: Legislation, NT) mentioned that the department submitted a document on Chapter 4 of the Bill to the Committee. In addition, she said that Mr Willie Mathebula would arrive 5 minutes late to the meeting.

The Chairperson informed Members that the Southern African Clothing and Textile Workers Union (SACTWU) was quite displeased that the two-pot pension retirement system will only be implemented in September of this year.

Afterwards, he referred Members to page 22 of the presentation document.

Briefing on the NT's responses to the submissions made on the PP Bill

Adv Van Schoor said she would take Members through Business Unity of South Africa (BUSA)'s comments.

BUSA questioned whether the government was getting value for money in its public spending. In response, the department highlighted that cost-effectiveness was provided for in the Objects Clause, with reference to Section 195 of the Constitution. The Objects Clause contains additional wording that, among other things, touches on assessing cost benefits and risks.

The Chairperson was concerned about BUSA's claim that the Bill deconstructed the B-BBEE Act and asked that the department move to that point and provide members with more clarity.

Adv Van Schoor asked if she could move through each comment sequentially.

The Chairperson accepted her request.

He asked if BUSA's claim that there was evidence showing that of the public comments received following the August 2023 invitation by the Standing Committee on Finance, only 36% were considered, with 64% not having been processed, was true and that this would likely be challenged in the courts based on legal precedent.

Adv Frank Jenkins (Senior Parliamentary Legal Advisor) said the question was whether the Committee received a briefing if it knew about the submissions and whether it considered them. The test for public participation looks at whether persons had a meaningful opportunity to impact the process. In his opinion, the Standing Committee allowed the public to make written and oral submissions before it, and responses were provided. Furthermore, he felt that the department did look at all the submissions.

It was correct that Parliament would be wrong if the National Assembly (NA) did not examine the submissions. Also, the National Council of Provinces (NCOP) was required to examine what was submitted to it and what work provinces had done in processing a bill.

He indicated that Parliament followed all of the correct procedures. While he admitted that Parliament could consider urgency and time, they could not override the constitutional obligation to involve the public.

The Chairperson asked if the PLA knew about the case where the Constitutional Court (CC) invalidated the Traditional and Khoi-San Leadership Act.

Adv Jenkins confirmed that he was, and highlighted that it was also referred to as the Mogale matter. In the Doctors For Life matter, the court said Parliament must enable and give the public a meaningful opportunity to participate in the consultations around legislation.

Due to funding from the European Union (EU), Parliament has created a sector public participation model that acts as a guideline for the whole sector. Certain issues are put to provincial legislatures and Parliament. One requirement is that there must be pre-public hearing empowerment workshops for the public to understand the legislation being considered.

In the Mogale Judgement, the CC said this requirement was unmet. Given this, he advised that the Committee view this in a broader light and ask whether people understand the legislation before them and the purpose of the public participation process.

The Chairperson pointed out that those who made submissions on the Bill were experts so they did not require workshops.

Adv Jenkins agreed with the Chairperson's view.

The Chairperson indicated there was no reason for the department to respond to BUSA's concern regarding Parliament. Even though the organisation had endless opportunities to participate in the process, he added that it would be provided another chance once the Committee had sent them the Bill.

Mr D Ryder (DA, Gauteng) agreed with the advice given by the PLA and noted that the level of participation in the Bill has been better than most. Stakeholders were given an opportunity to engage with the Committee and the department extensively. In addition, he pointed out that the broad majority of whom the Bill affects did not have access to the gazettes on a weekly basis and probably did not have the expertise as the interest groups that actively engaged in the process.

Considering this, he argued that the level of participation in the bill was not deep enough. This was illustrated during the recent discussions around the Division of Revenue Bill, where the Gauteng provincial legislature could not get a single person to make a comment during the public participation process. He urged the parliamentary staff and Committee to do more to attract comments from people impacted by the Bills, like small businesses and contractors, rather than only large organisations and organised businesses.

The Chairperson agreed with Mr Ryder's comments. He informed the Committee that previously, Parliament received funds for non-governmental organisations and marginalised people to fly to Cape Town and spend one or two nights there. However, that fell away after the then Speaker said there were insufficient funds to continue doing so. Also, during the previous parliamentary term, the

Standing Committee received money to transport pensioners from Maritzburg to Cape Town.

Adv Van Schoor, on BUSA's concern that B-BBEE overlapped with the sector codes, said the department proposed a new clause that would replace the use of certificates: a bidder having a prescribed minimum percentage of preferential procurement from enterprises owned or managed by black people in terms of the applicable code of good practice on black economic empowerment, issued in terms of Section 9 of the B-BBEE Act. The department believed this addressed BUSA's concern that the Bill undermined the B-BBEE Act

Mr Ryder asked if this change meant that there would still be different tiers of B-BBEE status levels.

Mr Willie Mathebula (Chief Procurement Officer at the NT) indicated that the levels would remain as they form part of the B-BBEE Act.

Adv Van Schoor said BUSA felt the urgency to implement the Bill was linked to the department trying to close a gap created by the CC's invalidation of the 2017 Procurement Regulations. In response, the department pointed out that the gap was closed when it issued the 2022 Procurement Regulations, with the difference being that these matters are largely done through procurement policy institutions. Except for the framework in the Preferential Procurement Policy Framework Act (PPPFA), there was not much else to determine, so it was left to procuring institutions to implement preferential procurement.

The Chairperson asked the department to respond to BUSA's questions on whether cost-effectiveness was synonymous with value for money, when competitiveness was deemed acceptable, and when it was not.

Mr Mathebula explained that BUSA meant that procuring institutions should look at what value would be derived despite the price.

The Chairperson said he had understood the question. What he was asking was what had been implied by BUSA through the question. To him, this seemed more like a philosophical question.

Mr Ryder agreed that it was a philosophical question, as competition presupposed a number of different inputs. The aim of this legislation was to address historical injustices that have led to unequal playing fields. He felt this debate was for individual political parties, not the Committee.

Adv Van Schoor then took Members through the comments of the Congress of South African Unions (COSATU) and SACTWU. Both unions requested that the department include a default position for open competition according to a points system that includes price, preference, quality, and functionality. Noting this, the department proposed including a provision in Clause 16 that would recommend a layered application of Clauses 17, 18, and 19. If none are applicable, then the normal open competition provisions will apply.

Linked to that is the proposed provision in Clause 25 (1)(d), which would apply to all procurement, including evaluations of cost-effectiveness and functionality.

The unions also raised concerns about certain procedural issues in Clause 17, which the department proposed should be removed. In addition, they proposed that the Bill require procuring institutions to conduct market research and policy analysis. However, the department highlighted that this was provided for in Clause 18 and the regulations requiring the procuring institution to state the need and intended operation.

They also expressed concern about the excessive layering of Clauses 17, 18 and 19. The department responded that local content is applied across the board, so if there is a designation for a particular product, it must be applied, whether preferential or normal procurement. Furthermore, the department will propose a provision that states local content designation applies across the board.

Mr Ryder considered whether Clause 25 interfered with Clauses 18 (1)(c)(v) and 23. He believed local content requirements had to be defined in terms of the geographical area where procurement would be taking place, in line with Clause 23, but this was limited by Clause 18 (3). He was bothered by Clause 18 (3).

Adv Van Schoor explained that local content and locality were two separate matters. Clause 20 dealt with local content, which would be linked to the country, not a province, district, or local municipality. She further indicated that the department planned to submit its work on expanding the provisions relating to geographical location to the Committee on Tuesday.

Mr Mathebula added that the power given in Clause referred to the designation of local content, which was broader and had nothing to do with locality.

The Chairperson asked if the department had considered defining local content and locality in the Bill.

Adv Van Schoor said that the department would consider doing so. The only definition it could provide is that local content referred to what is contained in Clause 20.

Mr Ryder suggested that the Bill could reference the provision which touches on the powers given to the Minister of the DTIC to determine local content.

Adv Van Schoor remarked that the department had supported specific proposed amendments by the two unions, such as adding a prescribed minimum of potential qualifications to Clause 18 and omitting Clause 25.

She told Members that COSATU had proposed a national register of excluded persons, their families and known close associates that contract with the state. In its response, the department said that creating and maintaining such a register would be too complex and not feasible. Moreover, Clause 13 already contained a prohibition that automatically excluded persons who may not contract with the state.

The department proposed a new provision in Clause 33 (2), which states that if a bid is above a prescribed value, the Minister must make regulations about disclosing details when a bid is evaluated to a family member or known close associate of the automatically excluded person.

The Chairperson supported the department's proposal as he believed the register would be impossible to implement.

Adv Van Schoor indicated that COSATU also requested that the Bill be brought back to Parliament for consultation once it has been enacted for 18 months.

The Chairperson noted this. He asked to be reminded if the Committee and department had agreed that the definition of 'confidentiality' should not block legitimate access to information.

Adv Van Schoor confirmed that they had.

She then took Members through Dr Ncedo Mkondweni's submission. While he supported the Bill, he believed the proposal is that the preferential points weighting must be greater than the weighting for price and quality or functionality combined. During the discussions, he proposed that the department remove the reference to functionality in Clause 17 (5), which the department agreed to.

Dr Mkondweni also requested that the department prescribe contracting methods, which it previously proposed, including in Clause 64 for different procurement categories.

Dr Mkondweni pointed out that there is a problem with service providers and procuring institutions utilising so-called standard contracts which do not comply with legislation. If that were the case, such contracts would be legally invalid. However, he proposed that it would do no harm to include a clause in the Bill which states that if a contract is concluded by a procuring institution and a successful bidder that is contrary to a provision of this Act, that provision of the contract would be null and void, which the department agreed to.

The Chairperson asked if such a provision was already in the Bill or if the department proposed including it.

Adv Van Schoor clarified that the department had proposed that it be included.

The Chairperson noted that certain people or organisations felt the PP Bill was less progressive than the B-BBEE Act. In contrast, the department argued that the Bill was necessary as the B-BBEE Act was inadequate.

Mr Mathebula confirmed that this observation was correct.

The Chairperson asked if the majority of those who advocated for BEE felt that the Bill had made some progress in advancing the policy, but it did not go far enough.

Mr Mathebula acknowledged that advocates of BEE, such as the BBC, perceived that the Bill did not go far enough in advancing the policy. He said it was important to note that BEE was not only measured through procurement, as the Act was broader and spoke to sector codes, et cetera. The question was how to ensure the BEE Act found some level of expression in the Bill and did not regress the gains made thus far.

The Chairperson indicated that a delegation of black businessmen from KwaZulu-Natal complained about the Bill. Given the concerns around the Bill, he thought there might be a need to reach out to black businessmen after it was passed to point out that this was only the first phase of its application and that phase two would look deeply into other matters. However, he stressed that the Committee could not accept the BBC's proposal to exclude different categories of people, including those with disabilities, from benefiting from public procurement due to their skin colour.

Mr Ryder mentioned that the Committee discussed the BBC's proposal to remove other designated persons from the Bill, whereas other institutions and the Democratic Alliance have argued that race is no longer a proxy for poverty or the previously disadvantaged. He felt that various interest groups have narrow preferences on this matter.

Despite not agreeing with the Bill, he did not understand the perception that the Bill would regress the gains made by B-BBEE.

Ms D Mahlangu (ANC, Mpumalanga) said that the Committee had asked the department to provide a breakdown of the B-BBEE statistics. Even though all members of the public could make submissions on the Bill, the Committee did not have to agree with each proposal. The ANC, she continued, was clear on its position regarding B-BBEE.

She was pleased that the department also rejected the BBC's proposal.

The Chairperson still felt that the department, accompanied by the Minister, should meet with the BBC to manage perceptions. Workers also expressed dissatisfaction with the Bill, and trade union members questioned whether their leaders had consulted them on it.

Adv Van Schoor then took Members through the submission of the Construction Sector Charter Council (CSCC). She said the organisation's main concern was that the trumping clause in the Bill would lead to the demise of the B-BBEE Act, especially Section 10 (1)(b) of the same act, which said that every organ of state must apply any relevant code of good practice issued under that Act in developing and implementing preferential procurement policy. As such, they proposed that the trumping clause be removed.

In its response, the department explained that the trumping clause was important as this Bill would be responsible for regulating public procurement, and removing it for this purpose may give rise to a conflict with other legislation. Furthermore, she mentioned that the B-BBEE Act and its sector codes were not only given effect through public procurement.

With this in mind, the department proposed that Clause 18 (1)(a) be amended.

The Chairperson noted the department's response.

Adv Van Schoor proceeded to take Members through the Institute of Race Relations (IRR)'s submission. One of the issues raised by the IRR was that the department failed to address how BEE premiums are to be counted in the bill. The department responded by pointing out that the aim of Chapter 4 was to address fundamental constitutional provisions and that there was provision for conditions, thresholds, and parameters to ensure that preference measures were implemented responsibly. Moreover, the department felt that there was provision for negotiations to ensure that procuring institutions did not pay exorbitant contract prices.

The IRR also discussed the rejection of the maximum value-for-money option in any tender process and the two elements that must be considered, such as the cost the procuring institution would have paid absent the preference and the price of the winning contract and how the department would deal with that. In its response, the department said this would be managed through the regulations.

The Chairperson asked if all the regulations were subject to parliamentary scrutiny.

Adv Van Schoor confirmed that was correct.

The Chairperson stated that nothing stopped Parliament from holding public hearings on regulations.

Adv Van Schoor also confirmed that was correct.

She said that the IRR questioned whether paying premiums was pro-poor. The department believed Section 217 (2) provided for preference and that paying more for market price to achieve this was justified.

Another concern the IRR raised was the department's alleged promotion of uneconomical discretionary power to the Minister. The NT's position was that if it is uneconomical, it should not be made mandatory for the Minister to refuse except when it is justified. For instance, to protect the manufacturing base of South Africa against foreign imports. However, in the case of instructions, which mainly deal with the administrative matters related to implementing the Act, if it is uneconomical, then the Public Procurement Office (PPO) should grant such a departure from the instruction.

The IRR also asked how race would be tested. In response, the department explained that the definition in Clause 1 was the same as the one used in the B-BBEE Act. If any individual misrepresented themselves, claiming to be black when they are not, this would be seen as fraudulent.

The Chairperson did not understand why the IRR thought that the department increased incentives for individuals to identify as black to receive premiums without explaining how disputes around racial classification are to be adjudicated. He wondered how someone could present themselves as black if they were white.

Adv Van Schoor thought this comment related to the alleged new movement of people not identifying as any gender.

The Chairperson indicated that during Apartheid, some individuals were able to re-classify themselves from black African to so-called Coloured or be re-classified by the then government.

While he acknowledged the well-written submission by the IRR, he noted a fundamental philosophical and policy difference between it and the ANC.

Adv Van Schoor added that the IRR sought for the department to have a tendering process open to everyone, and race to be used as a tiebreaker if required.

Thereafter, she took Members through the MK Liberation War Veterans (MKLWV) submission. It requested the inclusion of military veterans in Clause 17 and not only Clause 18. As such, the department proposed including them in Clause 17 (3) as a standalone category and under the list of small enterprises. In addition, it also proposed that the definition of military veterans be narrower to state: any South African citizen who rendered military service to any non-statutory military organisations involved in the South African liberation war from 1960 to 1994.

The department took paragraph A, removed the word statutory, and removed paragraphs B and C from the clause.

The Chairperson asked if the organisation was in agreement with the change.

Adv Van Schoor said it was difficult to say. During the consultations, a representative from the organisation said the clause would be acceptable if it were limited to non-statutory forces.

The Chairperson advised the department to take the position that is most consistent with the government's existing legislation and policy. Parliament would send the Bill's text to the organisation to investigate the proposed change.

Mr Ryder asked why military veterans were included as a separate group, as the proposed definition did not include anyone who had served since 1994. He wondered whether the intention to include military veterans was to reward individuals who had fought for Umkhonto We Sizwe (MK) or the Azanian People's Liberation Army (APLA). In addition, he asked if the provision would be expanded to include all people who had served their country before and subsequent to 1994.

Military veterans across the world are handled uniquely as they have given service to their country, he said. Nevertheless, he was pleased that the definition proposed was obtained from the Military Veterans Act (MVA) because if the Committee re-defined what military veterans were, they would be treading on dangerous grounds.

Mr F Du Toit (FF+, North West) wondered why the department sought to include military veterans in the Bill as provision has been made for them in the B-BBEE Act. He felt that this was a duplication and that the proposal was only made to gain favour from military veterans.

Ms Mahlangu agreed with Mr Ryder's comment that the Committee should not create its own definition for military veterans when it is already provided for in the MVA. This would be outside its mandate.

The Chairperson said the department could not equate MK guerillas with those who served the state before 1994. The government has already decided to implement policies that would benefit those who were involved with the MK and APLA. For him, there was a fundamental and political difference between fighting for one's country through the MK and fighting for an oppressive minority regime. As far as he was concerned, the legislation should benefit the guerillas of the MK and any other liberation movement that opposed the Apartheid regime.

Despite that, he acknowledged that many of the former soldiers who served the Apartheid regime had been included in the South African Defence Force. Those and individuals who joined the defence force post-1994 soldiers were entitled to the benefits envisaged in this proposed clause.

Adv Van Schoor clarified that the department was proposing a specific definition for the purposes of this Act, which is limited to people who fought in the non-statutory forces. The reason for this was their concern that this group of individuals were disadvantaged.

The Chairperson said the Members should agree to disagree on the matter, as the majority party would not change its stance given the contribution made by liberation movements to bring about democracy in the country.

Mr W Aucamp (DA, Northern Cape) stated that it is often said that wars are places where young people die due to the decisions of their elders. Many military veterans between 1961 and 1994 did not have a choice; they had to serve. Those individuals were specifically included in the definition found in the MVA to further the nation-building project and prevent differential treatment between them and guerillas. As such, he felt that it would be unfair to exclude them.

The Chairperson agreed with Mr Aucamp's statements and stressed his commitment to nation-building. Even though he recognised that many white men died during the Angolan War, he believed that they had a choice to either defect to the ranks of liberation movements or leave the country. Nonetheless, he thought those matters were irrelevant to the Bill as there was already existing ANC and government policy to provide housing and special pensions to non-statutory military veterans.

This position was a non-negotiable position for the ANC.

Mr Du Toit took issue with the fact that the Chairperson had painted the so-called military veterans as heroes when they had bombed and killed innocent civilians in the country.

Ms Mahlangu requested that members desist from raising sensitive political debates in the meeting, as it distracted them from the business of the day. She advised the FF+ to submit a motion in the House for debate if it wanted to pursue the matter further.

The Chairperson indicated that the number of civilians killed in the Pretoria Church Street Bombing and Durban beach-front bombing did not even amount to 2% of the civilians killed by the South African Defence Force within the country. It had not been the policy of the ANC to kill innocent civilians, he added.

Nevertheless, he echoed Ms Mahlangu's sentiments that the Committee focuses on the matters at hand. He advised the department to retain its proposal.

Mr Aucamp stressed that the struggle was concluded through a negotiated settlement between the two opposing sides. Everyone in the country had chosen the road to peace. In those discussions, the definition of the word military veterans in the MVA was produced. He called for the Committee to not change that definition.

The Chairperson mentioned that the Committee would not be changing the definition.

Mr Aucamp clarified that he meant that the application of the definition should not be changed.

The Chairperson explained that policies and legislation prioritised non-statutory veterans. One policy related to housing provision by the Department of Human Settlements. Meanwhile, the Special Pension Act has only been made available to non-statutory veterans. It was indispensable to reconciliation and nation-building to give those who were non-statutory benefits.

He proposed that the DA and FF+ request a special NCOP or Department of Military Veterans debate on this matter, as it was irrelevant to the matters at hand and was evoking strong emotions from Members. He then closed the matter.

Adv Van Schoor said the MKLWV raised concerns around Clause 18 and that it may lead to veterans' exclusion, but now, with the inclusion in Clause 17, the department believed this would not be the case.

Another proposal it made was that certain industries, particularly the defence and security industries, be earmarked for empowerment by military veterans. The department believed that having such specific earmarking for one category for specific sectors was not viable.

The Chairperson said the Committee could not agree with MKLWV's proposal.

Adv Van Schoor said the MKLWV proposed that Clause 38 include South Africans who specialise in developing emerging businesses on a tribunal. As the tribunal was to hear disputes, the department believed the minimum requirement had to be individuals with experience in law or procurement. The Minister can appoint additional individuals to the tribunal if other expertise is required.

The Chairperson asked if the DTIC was present in the meeting.

Mr Mathebula confirmed that it was.

The Chairperson stated that the DTIC would take Members through the statistics on the progress of B-BBEE.

He indicated that the IRR had sent a letter to the Committee stating that the department was misleading Members. He stressed that the committee would determine this.

Procurement Spend Statistics briefing

Mr Tumelo Ntlaba (Acting Chief Director: SCM IT, Office of the Chief Procurement Officer), Mr Jacob Maputha (Senior Manager at the DTIC) and Mr Stephen Hanival (Chief Economist: Research at the DTIC) took the Committee through the presentation.

Mr Ntlaba stated that the initial transformation policies post-1994 focused on enabling black South Africans to obtain a non-controlling stake or equity in existing enterprises. However, they did not address the need to focus on new enterprise development or promote businesses controlled by black South Africans. Noting this, the Cabinet approved the Black Industrialists Policy (BIP) in 2015, which seeks to increase black South Africans' participation in ownership and control of productive enterprises in key sectors and value chains of the economy.

Despite the progress made by BEE and BIP, significant barriers to entry for black people to participate fully in the economy remained. Black businesses still faced higher barriers to entry arising from their continued exclusion from established business networks and value chains. Other reasons include poor access to inputs and markets and lower skill levels.

Mr Maputha pointed out that recently, the private sector has begun to publish regular analyses of progress on BEE, such as the Sanlam Transformation Gauge. In addition, the DTIC contracted Blueprint Consulting to undertake an independent evaluation of BEE and BI programmes. All the statistics contained in the report drew from this research.

Key findings

- The B-BBEE entity impact from 2009 to 2021 to total gross domestic product (GDP) amounts to R350.15 billion;
- Over this period a total of 949,680 jobs have been created
- Overall black ownership increased from 27% in 2017 to 39.5% in 2021;
- Overall black women ownership from 9% to 12.4%;
- The average of black-owned entities on the Johannesburg Stock Exchange (JSE) increased from 29% to 39%
- Whereas no 100% black-owned entities featured on the JSE
- Some overachievements were recorded for the measure of the sector targets for the percentage of large entities target ownership by sector; most notable were;
- 46% target achieved against a sector target of 25% in finance;
- 50% target achieved against a sector target of 32.5% in construction
- However, this was not achieved for Agri BEE, which has obtained 20% against a target of 25% in Agri BEE and 20% against a sector target of 27% for property

Mr Hanival informed the Committee that while early BEE deals created a class of asset-rich black South Africans, the current realities suggest that share ownership as a means of building wealth for black South Africans outside of workers' schemes and similar is not an approach used by cash-poor South Africans.

He further said that the data on the B-BBEE Codes suggested that there may be a reason for realigning prioritisation towards management control and enterprise development.

Discussion

The Chairperson thanked the DTIC and NT for the informative presentation.

Afterwards, he asked if the department had seen the IRR's letter, which said the figures presented were false. He asked if the department had any response.

Mr Mathebula mentioned that one of the elements on the B-BBEE balanced scorecard was ownership. It was possible to have a BEE-level status 1 without necessarily considering ownership. This also meant that a black-owned company might not receive a BEE-level status 1. He added that when reporting the figures, it is often assumed that a company with a BEE-level status 1 is a black-owned company because of the broad-based nature of the policy.

The Chairperson asked where the IRR obtained the figure that black-owned companies had been paid trillions for government procurement.

Mr Mathebula said that the figure was incorrect.

The Chairperson noted the department's response. Thereafter, he asked for the Committee Content Advisor to present the independent B-BBEE statistics.

Independent B-BBEE statistics briefing

The Committee Content Advisor took the Committee through the presentation.

She told Members that the Chairperson of the Committee requested that the content and research support team provide independent statistics on the beneficiaries of BEE and procurement data.

Key findings

- According to the Sanlam Transformation Gauge, the B-BBEE scorecard elements for listed and unlisted companies for 2023 were not met apart from the socioeconomic development one
- Concerning the black ownership element, 81% of the target was met in 2023;
- 69% was met for management control;
- 85% for skills development and;
- 76% for enterprise and supplier development (ESD)
- Regarding the black ownership element, integrated transport (61%) and property (65%) were the worst-performing sectors in terms of meeting their targets in 2023

After the presentation, the Chairperson opened the floor for discussion.

Discussion

Ms Mahlangu appreciated the two presentations as she felt they were progressive.

The Chairperson asked a series of questions. First, he asked if one could be classified as level 1 without being 100% black-owned and whether there has been a consideration on how the points are allocated to incentivise the industry to open spaces up for black ownership and also emerging black companies to grow and be profitable apart from state procurement.

He noted that enterprise and development allocated 40 points.

Second, he asked why Sanlam conducted a transformation gauge.

Third, he asked what the word 'reluctance' meant in the NT and DTIC's presentation.

Fourth, he asked if black ownership stood at 39.5%. If so, this showed that the ANC-led government had failed to provide a full transformation of the economy.

Fifth, he asked what was being done to avoid the repetitive empowerment of the same elites.

Mr Hanival indicated that some of the questions raised were subject to discussion with the Minister of the DTIC as the department is currently undergoing a policy review. As such, he could not respond to the question on re-allocating points to black ownership.

One significant change in the BEE model from the first two administrations to now is the move to a broad-based model. The idea behind providing points for skills development, ESD, and other factors was to move away from the pattern of the same elites benefitting repeatedly from tenders. Even if the same number of black beneficiaries continued to benefit from procurement, those funds would still go into skills and supply development, thus benefiting a much broader cohort of individuals.

The department believed that this was a positive element of the new broad-based model, and it would take up the question of whether more points should be allocated for black ownership with the Minister. Furthermore, it planned to interrogate the figures even further, he said.

On why Sanlam conducted a transformation gauge, he was unsure as to why it had done it. Over the years the department has attempted to create a big sample of information. However, many of these reports suffered from the challenge of having to depend on self-reporting, with not all verification agencies looking as deeply into companies' BEE levels as the department would have liked. As such, often, the department will need to independently look at whether a company is actually at level 1 or not.

Presently, black ownership is between 30% and 40%. The department did not have reliable data across the public and private sectors to state the overall impact of black ownership on the economy.

Mr Mathebula mentioned that previously procuring institutions did not perform independent verification checks on whether a company was actually BEE level 1 until the CC judgement, so they only relied on the certificate submitted by bidders.

Mr Ntlaba outlined that, under the B-BBEE Act, small companies have to submit a sworn affidavit to claim their BEE level. However, the department has noted problems with this, as some people have had their affidavits stamped despite making representations. As such, the department is looking into tightening up the controls of this process.

The Chairperson agreed that these controls should be tightened up.

Ms Mahlangu also supported the idea as she previously found that some individuals would register their companies under the names of their domestic workers.

The Chairperson asked the department to take Members through the PP Bill slide presentation.

Briefing on the NT's responses to submissions received during the public hearings of the PP Bill

Adv Van Schoor took Members through the remaining comments and responses they had not dealt with.

The Chairperson pointed out that set-asides were not unconstitutional.

Adv Van Schoor mentioned that they were contained in the 2017 Regulations.

The Chairperson asked about the court's issue with the set-asides in the 2017 regulations.

Adv Van Schoor explained that the department issued regulations that had set asides and subcontracts, and the court said the Minister did not have the authority to make such regulations, as the regulation-making power in the PPPFA was very limited to anything necessary or expedient.

The Chairperson asked how the department would avoid that from happening again.

Adv Van Schoor said that by being specific in Chapter 4 on what powers the Minister had to make regulations.

The Chairperson asked that, in this case, the legislation would set out the power and not the Minister.

Adv Van Schoor confirmed this was the case.

Adv Jenkins agreed with the department's proposal.

The Chairperson said that he previously asked the department if the instructions from the PPO were binding, to which it denied. However, the Bill said that they are binding.

Adv Van Schoor could not recall making that statement. Nonetheless, she mentioned that the instructions were binding.

The Chairperson asked that Members stay for 10 minutes to complete the deliberations.

Regarding the view submitted by stakeholders that the Bill should incentivise whistleblowers and provide for protection, he asked if any country did so.

He agreed with the department that the dispute resolution procedures would save costs and improve turnaround times in service delivery.

In its report, the Committee highlighted its concern about the extent to which the Minister is expected to regulate and recognised that there were too many uncertainties. As the department began to implement the Bill, Parliament would get a better sense of what the Minister should regulate and limit it to the minimum necessary.

Adv Van Schoor said one of the concerns raised by stakeholders was that too many areas were to be prescribed by the regulations.

The Chairperson asked the department to respond to this.

Adv Van Schoor remarked that the department clarified this was for compliance and preventative measures.

She told Members that the department compiled a 600-page document that made proposed amendments not referred to in the presentation. It would highlight the proposals in a different colour in the Bill.

The Chairperson asked if the department was proposing them for amendment in the Bill.

Adv Van Schoor confirmed that it was.

The Chairperson stressed that the proposals made on the Committee's policy decisions could be effected in the Bill, as Parliament decided on legislation. The department must make clear any amendments made over and above what was agreed to in terms of policy.

Adv Van Schoor repeated that these amendments would be highlighted in a different colour.

Closing remarks by the Chairperson

The Chairperson thanked all those involved in the process from the beginning, especially the opposition parties, who engaged robustly despite ideological differences. He added that members formed part of a multiparty committee in a multiparty Parliament and were much more aligned on issues than believed.

He believed the Committee could vote on the Bill by Tuesday the 7th if it sat for four hours from 09:00 to 13:00 on Tuesday, three hours on Thursday and another three hours on Friday. If it can conclude its deliberations by Friday, the Committee will send out the Bill on the same evening to civil society organisations to receive comments on Monday morning.

However, he stressed that the Committee would not sacrifice its legislative responsibility to conclude the process within time.

The meeting was adjourned.

PUBLIC PROCUREMENT BILL

[B18B – 2023]

COMMENT MATRIX – NATIONAL TREASURY'S RESPONSES TO WRITTEN SUBMISSIONS TO SELECT COMMITTEE ON FINANCE, NATIONAL COUNCIL OF PROVINCES

14 March 2024 & 18 March 2024

NOTE: Due to time constraints-

(a) a quality check of the responses to ensure alignment and correct textual errors should still be done; and

(b) some instances not all comments of a particular commentator have been responded yet (e.g. clause-by-clause comments of the Western Cape Government).

"FA24"

LIST OF COMMENTATORS

1. Construction Industry Development Board ("CIDB")
2. Pharmaceuticals Made in South Africa ("PHARMISA")
3. Pharmaceutical Task Group ("PTG")
4. GS1 South Africa trading as the Consumer Goods Council of South Africa ("GS1 South Africa")
5. Perishable Products Export Control Board
6. South African Medical Technology Industry Association
7. AmaBhungane Centre for Investigative Journalism ("AmaBhungane")
8. South African Institute of Chartered Accountants ("SAICA")
9. Solidarity Trade Union ("Solidarity")
10. Western Cape Government
11. African Procurement Law Unit
12. A Group of Civil Engineering Contractors
13. Sakeliga (formerly Afribusiness)
14. Health Justice Initiative
15. Webber Wentzel
16. Construction Sector Charter Council
17. Public Affairs Research Institute
18. Equal Education and Equal Education Law Centre
19. City of Cape Town
20. Congress of South African Trade Unions ("Cosatu") and Southern African Clothing and Textile Workers' Union ("Sactwu")
21. Venter, Quinot and Scott
22. Budget Justice Coalition ("BJC") and Imali Yethu ("IY")
23. Public Service Accountability Monitor (PSAM)
24. Michael Freema
25. Black Business Council ("BBC")
26. IRR Legal NPC
27. National Research Foundation (NFF) – summary
28. Joint Strategic Resource ("JSR")
29. Busa
30. Corruption Watch