THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: **CCT103/25**

CCT144/25

In the application for intervention of:

AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	First Intervening Party

In 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

AND

In 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
THE MINISTER OF FINANCE	Third Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent

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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	Ninth 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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AMABUNGANE'S CONSOLIDATED FOUNDING AFFIDAVIT

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I, the undersigned,

CAROLINE JAMES

do hereby make oath and say as follows:

1. I am the Advocacy Coordinator of amaBhungane Centre for Investigative Journalism NPC ("**amaBhungane**"). I am duly authorised to depose to this affidavit on behalf of amaBhungane.

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

3. The facts contained in this affidavit are true and correct and are, save where otherwise indicated, within my personal knowledge or derived from documentation under my possession and control.

4. Where I make legal submissions, I do so on the advice of amaBhungane's legal representatives, which advice I accept.

INTRODUCTION AND OVERVIEW

5. On 5 August 2025, amaBhungane sought leave to intervene as an applicant in the consolidated applications of *Premier of the Western Cape Government v Speaker of the National Assembly* CCT 103/25 and *City of Cape Town v Speaker of the National Assembly* CCT 114/25 ("**the consolidated applications**").

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6. The consolidated applications before this Court concern the failure by Parliament and the Provincial Legislature to facilitate meaningful public participation in the passing of the Public Procurement Act 28 of 2024 ("**Act**").

7. On 2 October 2025, amaBhungane was granted leave to intervene in the consolidated applications and was directed to file this consolidated founding affidavit.

8. In this affidavit, I will address the following issues:

   8.1 First, I set out a brief overview of the consolidated applications, from amaBhungane's perspective;

   8.2 Second, I provide a chronology of the National Assembly and National Council of Provinces' ("**NCOP**") public participation processes;

   8.3 Third, I explain the consequences of Parliament's failure to meaningfully engage with the public submissions received regarding the Act.

9. This consolidated founding affidavit attempts to provide this Court with a clear and concise overview of the Act's passage through Parliament. To avoid repetition, and where necessary, reference is made to specific averments contained in the founding affidavit in amaBhungane's intervention application. That affidavit should be read in conjunction with the contents of this affidavit.

10. In paragraphs 91 to 139 of our intervention application, we explained the following facts regarding Parliament's failure to facilitate meaningful public participation:

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10.1 The inadequate timeframes and meaningful opportunities for public comment provided for by the National Assembly and the NCOP;

10.2 The National Assembly's failure (acting through National Treasury) to consider the majority of the submissions made before it;

10.3 The NCOP's failure to address and remedy significant issues in the public participation process; and

10.4 The NCOP's failure to consider all the public submissions made before it.

11. As highlighted in paragraphs 34 to 42 of our intervention application, the regulation of public procurement is an issue of significant public importance and of relevance to almost every facet of the public administration. Both the National Assembly and the NCOP have acknowledged the importance of the Act from the genesis of its passage through Parliament.

12. Within the context of the Act, amaBhungane contends that this ought to have required that the general public be allowed to make further submissions on the Act after National Treasury elected to drastically alter the substance of Chapter Four.

13. amaBhungane also contends that a meaningful public participation process requires proof of Parliament's open engagement with or consideration of all public submissions received regarding the Act. Parliament must demonstrate that it seriously considered all of the submissions it received. Parliament was duty-bound to seriously and meaningfully consider the substance of each submission.

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CHRONOLOGY OF PARLIAMENT'S PUBLIC PARTICIPATION PROCESS

The Legislative Process at the National Assembly

Informal Presentation by National Treasury on the Draft Public Procurement Bill: 23 May 2023

14. While the National Assembly's Standing Committee on Finance ("**Standing Committee**") was responsible for processing the Act, it relied heavily on National Treasury to collate, summarise and comment on the various submissions received during the public participation process.

15. On 23 May 2023, National Treasury was briefed by the Standing Committee on the draft Public Procurement Bill ("**the Bill**"). A summary of this briefing is attached as **CFA1**.

16. As the Standing Committee had not yet been provided with the final copy of the Bill, the briefing was considered informal.

17. However, during the briefing, the Chairperson of the Standing Committee, Mr Maswanganyi, spoke to the importance of the Bill, stating that:

> "The Committee had been impressing upon the Minister the need to introduce the Bill. It was an important piece of legislation in the transformation agenda of South Africa."

18. On 30 June 2023, the Public Procurement Bill Version B18-2023 was tabled before Parliament.

19. On 18 August 2023, a call for public comments was issued, calling for the submission of public comments by no later than 11 September 2023. A copy of

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amaBhungane's written submissions on the Bill is attached to our intervention application as **FA1**.

Briefing by National Treasury on the Public Procurement Bill: 5 September 2023

20. On 5 September 2023, the Standing Committee was formally briefed on the Public Procurement Bill that had been tabled in Parliament on 30 June 2023. A copy of the summary of the briefing is attached to our intervention application as **FA9**.

21. At the close of the meeting, Mr Maswanganyi indicated that the Committee would respond to requests from stakeholders requesting the delay of public hearings. He indicated that "*the Bill was now the responsibility of the Committee and [the Committee] would deliberate and make changes where necessary.*"

22. Public hearings for the Bill were held in a hybrid format on 12 September and 13 September 2023, with amaBhungane presenting its oral submissions on 13 September. Over the course of these two days, 21 organisations made oral submissions.

23. A copy of our presentation is attached to our intervention application as **FA11** and a copy of the summary of the hearing on 13 September 2023 is attached hereto as **CFA2**.

24. Mr Maswanganyi opened the meeting re-emphasising that:

> "The Public Procurement Bill was a very critical piece of legislation. It would have a serious impact on the procurement regime in the country. [I do] not want to disadvantage or prejudice any stakeholder that was going to make a submission."

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25. However, during the hearing on 13 September 2023, several civil society organisations (**"CSOs"**), including amaBhungane, encountered unwarranted resistance from members of the Standing Committee in response to their submissions. While it is permissible for Parliament to disagree with public submissions, public submissions should not be dismissed on an *ad hominem* basis.

26. In response to the submissions we had made regarding the inadequacy of the Bill's provisions regarding transparency in public procurement, Mr Manyi, a member of the Standing Committee, condescendingly stated that:

> "In terms of transparency, was amaBhungane willing to have the same rigour that they were espousing, placed on themselves? Were they willing to disclose their sources in the spirit of transparency? It was easy to demand something be done, but [I am] interested to know if [amaBhungane] applied these same conditions to their own functions."

27. He also questioned the ability of state actors to make representations during public participation processes during the hearing in response to a presentation from the Department of Defence, stating that:

> "[I feel] that time should not be wasted on this because the [Department of Defence is] a government department, and in government there was a structure where all [Director Generals sit and co-ordinate] policy."

28. Finally, when following up on the comments made by CSOs later during the hearing, Mr Manyi also spoke dismissively about the role of CSOs during public participation processes, characterising their involvement in these democratic processes as patronising. He stated that:

> "[I] become annoyed when institutions like Corruption Watch and the [Institute for Race Relations], which [are] not known for transformation, come

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> to Parliament and [play] advocate for the poor. [I do] not like to be patronised. If these institutions want to show interest in the poor, they should reflect this in their work."

29. Another member of the Standing Committee, Ms Abraham, responded to our submissions, asserting that it was not for stakeholders to question the objectives of the Bill. She stated that:

> "[amaBhungane] should not question the objects of the Bill. The Bill sought to deal with transformation. There should not be an assumption that because the Bill was transformative, it would be ineffective."

30. The Chairperson's silence in response to both members' mischaracterisation of the nature and purpose of public participation in the legislative process is significant. Mr Maswanganyi's failure to call either member to order left their incorrect and unconstitutional assertions about the perceived validity of civil society's participation in the legislative process unchecked and uncorrected.

31. The Chairperson's lack of response can be contrasted to his response to submissions made by Mr Manyi during the Standing Committee's meeting on 24 November 2023 where he called Mr Manyi to order for stating that the women's organisations who had made presentations had been lied to by the President who had committed to ensuring 40% participation for women-owned businesses. There Mr Maswanganyi stated that the relevant women's organisations "*were representing their constituencies and their submissions should be respected*" and Mr Manyi was called on to apologise for his utterances which were "*undermining the input of women.*"

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National Treasury Response to Public Submissions and Stakeholder Input: 17 and 24 November 2023

32. On 17 November 2023, the Standing Committee held a virtual meeting with National Treasury and various stakeholders during which National Treasury delivered its responses to specific public submissions. A copy of the meeting report is attached to our intervention application as **FA12**.

33. National Treasury's revelation that it had, due to time constraints, only considered approximately 20% of the submissions received is set out in greater detail at paragraph 51 of our intervention application.

34. National Treasury only responded to twenty-five of the 112 submissions it had received.

35. During the meeting, representatives of National Treasury stated that National Treasury's "*response emanated from the public hearings that were conducted on 12 and 13 September 2023.*" Thus, the response from National Treasury presented to the Standing Committee during the meeting only dealt with approximately nineteen percent of the total number of submissions received from the public.

36. Based on the submissions that were considered, National Treasury proposed certain amendments to provisions in the Bill for the consideration of the Standing Committee. Treasury presented an entirely new Chapter 4 of the Bill, which was materially and substantively different and new.

37. National Treasury provided the Standing Committee and the relevant stakeholders with a copy of the comment matrix of the submissions received,

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National Treasury's report on the public comments received on the Bill, a list of the stakeholders who made submissions, and a revised version of Chapter 4 of the Bill a day prior to the meeting on 16 November 2023, less than a single day before the virtual meeting.

38. The impact of this on stakeholders and the Standing Committee's ability to engage with the revised Chapter 4 is canvassed fully in paragraph 53 of our intervention application. This tight timeline also meant that the Standing Committee had less than a day to consider not only the revised Chapter 4, but also the 112 submissions received from the public and the response provided by National Treasury to twenty-five comments.

39. In the approximately two months that had passed since National Treasury received these submissions, they had not managed to consider all of them. Yet the Standing Committee and the other participants in the hearing were expected to, in less than a day, consider these submissions and be familiar enough with the content thereof to engage with both National Treasury and the various stakeholders present at the meeting.

40. This expectation was clearly articulated by Mr Maswanganyi, who, before calling on stakeholders and the Standing Committee to comment, stated that:

> "Members [of the Standing Committee] should have an understanding of what is contained in the documents because it had been distributed earlier."

41. The outcry from the stakeholders in attendance at the meeting at the short amount of time given to them to respond to National Treasury is canvassed in more detail at paragraph 57 of our intervention application.

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42. Significantly, only the stakeholders present in the meeting were given the opportunity to consider and comment on what amounted to a substantive redrafting of Chapter 4, ostensibly presented as a response to public comments received regarding preferential procurement in the Bill.

43. Several members of the Standing Committee also voiced their concerns regarding the time constraints.

43.1 Mr J De Villiers stated that:

> "The idea of public participation is to allow everyone a fair chance of a response to their submissions. The time being granted to stakeholders [does] not [comply] with the public participation standard. To ensure transparency, National Treasury should respond to all submissions."

43.2 Mr Manyi suggested that "*the stakeholders were being short-changed*" and suggested that another round of feedback be allowed. He also indicated that it "*was unfair to expect National Treasury to respond to public utterances.*"

44. On 24 November 2023, a further meeting was held. A copy of the summary of the meeting is attached to our intervention application as **FA13**.

45. As reflected on the comment matrix presented to the Standing Committee just prior to this meeting, National Treasury had in the preceding week responded to a further sixteen submissions.

46. National Treasury failed to review all the stakeholder comments received from the public by 24 November 2023. This is discussed in more detail at paragraph 54 of our intervention application.

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47. By the end of these two meetings, National Treasury had responded to a total of 41 submissions, effectively ignoring the remaining 71 submissions. These 71 commentators were denied the opportunity to give input on the Bill and to meaningfully influence the Standing Committee and the National Assembly.

Deliberations on the Public Procurement Bill: 28 and 29 November 2023

48. The Standing Committee met to deliberate on the Bill on 28 and 29 November 2023. These deliberations are discussed in more detail in paragraph 58 of our intervention application. It must be emphasised, again, that National Treasury was unable to adequately consider and respond to the public submissions received in response to the Bill in little over two months. Yet the Standing Committee was ultimately expected to consider all the public submissions received in response to the Bill, National Treasury's responses thereto, and the revised Chapter 4 of the Bill in approximately twenty-two days.

Adoption of the Public Procurement Bill: 1 December 2023

49. On 1 December 2023,[1] the Standing Committee met to finalise the processing of the Public Procurement Bill. The Standing Committee's adoption of the B-Version of the Bill and passing of a motion of desirability on the Final Bill is discussed in paragraph 59 of amaBhungane's intervention application.

50. Before adopting the Bill, the Standing Committee considered amendments to the Bill that had only been submitted to the Committee two hours prior.

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[1] Note: at paragraph 59 of amaBhungane's founding affidavit in its application for leave to intervene, we erroneously stated that the Standing Committee adopted the bill on 06 December 2023 – the correct date is 1 December 2023 as stated in this paragraph.

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51. The Bill was also adopted without the Committee discussing and finalising its report on the Bill. Dr Hlope, the Standing Committee's Content Advisor, indicated that the report was not yet completed as it did not reflect the amendments made to the Bill during its previous deliberations. It presumably also did not reflect the most recent amendments to the Bill mentioned above.

Adoption of the Standing Committee's Report on the Bill: 4 December 2023

52. The Standing Committee subsequently met on 4 December 2023 to adopt its final report on the Bill.

Debate and Adoption of Public Procurement Bill: 6 December 2023

53. After the Standing Committee adopted the B-Version of the Bill, the Bill was sent to the National Assembly. The National Assembly met to debate the Bill on 6 December, where the Bill was passed and sent to the NCOP for concurrence.

Progression of the Bill to the NCOP

54. The NCOP considered and facilitated a public participation process in respect of the Public Procurement Bill Version B18B-2023.

Publication of Call for Comments: 30 January 2024

55. As mentioned in more detail in paragraph 62 of our intervention application, the NCOP's Select Committee on Finance published its call for comments on the Bill on 30 January 2024. The submission period closed on 22 February 2024.

Briefing by National Treasury on the Public Procurement Bill: 6 February 2024

56. On 6 February 2024, National Treasury briefed the Select Committee on the Bill.

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57. The Chairperson of the Standing Committee, Mr Carrim, also used the briefing to impress on the committee members the urgency of processing the Bill. He stated that:

> "[I] have 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 [are] two opposing imperatives. The majority party need 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."

58. He also highlighted the time constraints the Standing Committee would have to operate under, stating that:

> "The time constraint in the requirements [for the NCOP to process the Bill] was six weeks, but [I] do not make the rules and would have been more lenient if [I] had the authority."

59. He also discussed the nature of the Bill, stating that:

> "The Bill was complex, difficult and challenging. It involved other departments beyond National Treasury – primarily the Department of Trade, Industry and Competition."

Public Hearings: 23 February 2024

60. After receiving a total of 27 written public submissions, the Standing Committee heard oral submissions from twelve stakeholders on the Bill on 23 February 2024. While amaBhungane put in a written submission, attached hereto as **CFA3**, we elected not to make an oral submission before the Standing Committee.

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61. The public hearings are discussed in more detail in paragraphs 64 to 67 of our intervention application, with the meeting report attached thereto as **FA15**.

62. During the meeting, the Chairperson acknowledged that the committee had been approached to extend the timeframes for the submission of comments on the Bill as they did not have enough time to submit. He, however, declined to do so, stating that:

> "Many things can be said about Parliament's lack of public consultation but sometimes civil society fails to participate and does not get their act together. It was not possible to organise a programme based on the subjective views of subjective stakeholders with their subjective needs. The stakeholders are clustered among NGOs, businesses and related organisations etc."

National Treasury Response to Public Submissions: 19 March 2024

63. As discussed in greater detail in paragraph 67 of our intervention application, National Treasury was originally scheduled to present to the Select Committee on Finance ("**the Select Committee**") on 14 March 2024. However, this was postponed.

64. On 19 March 2024, the Select Committee and certain stakeholders were briefed by National Treasury in response to some of the public submissions received. While we had submitted a written submission on the Bill, we did not receive an invitation from the Select Committee to attend the briefing.

65. The briefing is discussed in more detail in paragraphs 69 to 71 of our intervention application. A report of the meeting is also attached hereto as **CFA4.**

66. During the briefing, Mr Carrim noted the importance of allowing the Select Committee to hear from stakeholders, stating that many of the stakeholders were

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technical experts. He acknowledged that "*committee members were politicians and did not have the expertise the stakeholders had in procurement.*"

67. He also criticised National Treasury's failure to substantively engage with the submissions received from the public stating that:

> "Treasury could not keep saying "noted". Where does this come from? When you say "noted", what do you mean? What is your response? This was needed. This was an inadequate presentation; Treasury could not be serious. Yes, it was a Section 76 Bill and it had to carry nine provinces with it."

68. He also sought to silence discussion from other participants about the nature of the inadequacy of National Treasury's responses, stating that:

> "[Can there be] agreement not to repeat that the Treasury presentation was inadequate, this was clear. [...] When [I] looked at the presentation last night and this morning, [I] thought it was inadequate. [I do] not care which party said what about it. [I do] not know what the majority thought, perhaps they [are] happy with it."

69. As acknowledged at paragraph 69 of our intervention application, Mr Carrim did allow civil society representatives to send supplementary submissions. However, amaBhungane was not invited to the meeting even though we had made written submissions. We were only able to make further submissions as other stakeholders who we work with in the Procurement Reform Working Group ("**PRWG**") had been invited and attended the briefing. A copy of the email invite, which I did not receive, is attached hereto as **CFA4A**. It was at this briefing that the PRWG earned its right to make supplementary submissions.

70. He placed significant limitations on the submissions that could be made, stating that they should be in bullet-form and only a few pages long.

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71. He told National Treasury that it could not come before the Select Committee again "*until it had a proper, comprehensive response*" to the public submissions. However, he qualified this, stating that "*this did not have to be on every issue.*"

72. On Mr Carrim's own version, the Select Committee had received very little to date in response to the public's submissions. Despite this, he also stated that:

> "At this stage, the Committee wanted to pass this Bill for a variety of reasons, most of which had nothing to do with the election. The Committee could say it was a transitional temporary Bill. There would be a new term of Parliament and people would have to find their feet. [...] [How] many Committee members [will] return in the new Parliament [?] [Think] realistically and see how much could be processed in the Bill. Issues that were too contentious should be removed. Ultimately, the Bill [will go] back to the NA, which could reject what the NCOP Committee said."

73. These comments from the Chairperson of the Select Committee are significant. They demonstrate the rushed nature of the participation process and illustrate Parliament's self-created urgency, which motivated the haste in processing the Bill.

74. These comments must be understood within the context that they were made. They were not made by a mere member of the Select Committee. They were made by the Chairperson of the committee, whose responsibility it is to guide members of the committee in the execution of their obligations. Comments made urging committee members to remove provisions from the Bill because they are contentious must have had a significant impact on the mindset of committee members when engaging with the submissions made by the public on the Bill.

75. In response to Mr Carrim's call for further comments, amaBhungane submitted a short supplementary submission to the Select Committee on 25 March 2024

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as part of the PRWG. This is discussed in more detail at paragraph 72 of our intervention application.

National Treasury Report-Back on Stakeholder Consultation: 17 April 2024

76. A virtual meeting was held on 17 April 2024 for the Select Committee to hear National Treasury's response to the submissions made following their previous engagement with stakeholders. This is discussed in more detail at paragraphs 73 to 74 of our intervention application, with the meeting report attached thereto as **FA18**.

77. During the briefing, Mr Carrim urged the Select Committee to consider that:

> "There was no need to make final decisions at the moment because [the process] 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."

78. At the end of the briefing, Mr Mathebula, the General Manager from National Treasury, indicted that National Treasury had not been able to consider a 300-page submission received from the National Research Foundation. He explained 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."

Deliberation on Civil Society Concerns and Constitutional Matters: 23 April 2024

79. Dissatisfied with the Select Committee's facilitation of public participation regarding the Bill, several civil society organisations wrote a joint letter to the Select Committee outlining our concerns. This letter is discussed in more detail at paragraphs 75 to 76 of our intervention application.

80. The Select Committee met on 23 April 2024 to discuss the concerns raised in our letter and National Treasury's responses to the public submissions received on the Bill. This meeting is discussed in more detail at paragraphs 77 to 78 of our intervention application. The report of the meeting is attached hereto as **CFA5**.

81. During this meeting, Mr Carrim again spoke dismissively of the concerns raised by CSOs, both during the NCOP's participation process and regarding the participation process itself.

82. He stated that:

> "[I feel] that the civil society organisations [have] been unfair towards the Committee through their letter as it hosted public hearings, engaged with stakeholders during the meetings, and requested the department to provide responses. The Committee went even further, which it was not obliged to do, and advised that either they could meet with the department, engage further with them, or have consultations in NEDLAC."

83. This directly demonstrates the Select Committee's failure to effectively supplement the public participation process before the NCOP to remedy certain inadequacies. Instead of seeking to provide stakeholders with the opportunity to engage directly with committee members, the Select Committee relied on referring stakeholders to National Treasury or NEDLAC. Neither of these

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avenues amount to the Select Committee fulfilling *its* obligations to engage with the public's views on the Bill.

84. He further asserted that:

> "Civil society had sought to co-govern and not assist Parliament in executing its fiduciary duties. This was incorrect as civil society was not united on the Bill, with some advocating for it and others disagreeing."

85. The characterisation of CSOs' involvement in the public participation demonstrated in both these quotes is incorrect. By seeking to have their input on the Bill duly considered by the Select Committee, the stakeholders were not seeking to be "unfair" or "co-govern". Rather, they were seeking to exercise their constitutional right to participate in the legislative process. For the Chairperson of the Select Committee to state otherwise ultimately impacts the manner in which stakeholders' submissions would be understood and considered by the Select Committee.

National Treasury Response to Public Submissions: 25 April 2024

86. The Select Committee met virtually two days later to continue to discuss National Treasury's response to stakeholders' submissions on the Bill.

National Treasury Response to Public Submissions and Briefing on Procurement and B-BBEE Statistics: 26 April 2024

87. The Select Committee met virtually the following day on 26 April 2024 to discuss the remainder of National Treasury's responses to the stakeholder submissions received on the Bill. National Treasury also briefed the Select Committee on

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certain statistics relevant to B-BBEE within the procurement space. A copy of the report of that meeting is attached hereto as **CFA6**.

88. In discussing Business Unity South Africa's submission that the public participation process that had accompanied the Bill thus far had been marred by various shortcomings, Mr Carrim discussed the need for pre-public engagement workshops with Adv Jenkins, the Senior Parliamentary Legal Advisor.

89. Adv Jenkins advised Mr Carrim that it was necessary to consider whether the public understood the legislation before them and the purpose of public participation when assessing whether pre-public participation workshops were necessary. Concerningly, despite highlighting the complexity of the Bill previously, Mr Carrim asserted that "*those who made submissions on the Bill were experts so they did not require workshops.*"

90. This misconstrues the key issue entirely, which relates more accurately to the ability of those who are not experts on the Bill to understand the Bill and its proposed impact and make submissions accordingly.

Discussion of Negotiating Mandates and National Treasury's Response: 30 April 2024

91. On 30 April 2024, the Select Committee met virtually to hear and discuss the various provinces negotiating mandates on the Bill. This is discussed in more detail at paragraph 79 of our intervention application.

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Discussion of Proposed Amendments to the Bill and Deliberations: 2 May 2024

92. The Select Committee met virtually on 2 May 2024 to continue its deliberation on the Bill. This is discussed in more detail at paragraphs 80 to 81 of our intervention application. A copy of the meeting report is attached hereto as **CFA7**.

93. Mr Carrim's mischaracterisation of the involvement of interested stakeholders throughout the public participation process continued into this meeting. In response to the concerns raised regarding the standard of public participation accompanying the Bill, he remarked that:

> "Stakeholders would always argue that they did not have enough time when they opposed a bill or felt they had a more expert opinion on the matter."

94. Acknowledging the fatal defects in the Bill, he proposed that:

> "The Committee, in its report, state that more measures had to be implemented to prevent undue challenges of bids. As such, it was believed that the transparency provisions in the Bill needed to be reviewed in two years."

National Treasury Response to Additional Public Input and Presentation of Final Mandates on the Bill: 7 May 2024

95. On 7 May 2024, the Select Committee met to hear National Treasury's final response to additional stakeholder input on the Bill and to vote on the Bill. This is discussed in more detail in paragraphs 82 of our intervention application .

96. The Bill was passed and returned to the National Assembly for concurrence on 8 May 2024. A copy of the Select Committee's Report on the Bill is attached to our intervention application as **FA20** and discussed in more detail at paragraph 84 therein.

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Adoption by the National Assembly

Consideration of Amendments by the NCOP: 10 and 13 May 2024

97. The Standing Committee met virtually on 10 and 13 May 2023 to consider the NCOP's amendments to the Bill. The Bill was adopted and sent to the President for his assent. Copies of the reports of both meetings are attached hereto as **CFA8** and **CFA9**, respectively.

98. Issues regarding the adequacy of the public participation process accompanying the Bill were raised in both meetings, with several members of the Standing Committee stating that the parliamentary process had been rushed and left them with limited time to engage with certain aspects of the Bill.

99. While summarising the amendments to the Bill, Dr Hlophe, the Standing Committee's Content Advisor, explained the committee's role in the session. He stated that the committee needed to concur or reject the amendments. However, he cautioned that "*if rejected, it would involve a protracted mediation process.*"

The President's Assent

100. On 18 July 2024, the Bill was signed into law and became Act 28 of 2024.

101. The President's assent to the Bill and our attempts to engage with him regarding the constitutionality of both the contents of the Bill and its public participation process are discussed in more detail at paragraphs 86 to 88 of our intervention application.

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DEMONSTRATION OF THE CONSEQUENCES OF PARLIAMENT'S FAILURE TO MEANINGFULLY ENGAGE WITH PUBLIC SUBMISSIONS

102. The above chronology of facts plainly demonstrates that Parliament failed to properly carry out a genuine and reasonable public participation process. Parliament's failure to consider and engage with various submissions received from the public deprived a significant number of commentators of the ability to meaningfully influence the legislative process.

The Impact of the National Assembly's Failure to Meaningfully Engage with Public Submissions

National Treasury's Failure to Consider All Submissions

103. Many public submissions were not considered by National Treasury, with no response thereto presented to the Standing Committee.

104. For example:

104.1 At line 1924 of the comment matrix presented on 23 November 2023, the Budget Justice Coalition ("**BJC**") and Imali Yethu ("**IY**") proposed that bodies such as the Procurement Tribunal, Auditor-General, Special Investigating Unit, and the Hawks be allowed to recommend suppliers for debarment to the Public Procurement Office. These bodies are well-placed to uncover suppliers who may meet the requirements for debarment outlined in the Bill by virtue of the nature of their work.

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104.2 At line 2053 of the same comment matrix, Equal Education ("**EE**") and Equal Education Law Centre ("**EELC**") proposed the removal of clause 22(2)(b) of the Bill which limited access to certain categories of procurement information or procurement above a prescribed threshold. This clause affords the Minister significant powers to restrict the public's access to procurement information, restricting their exercise of both their right of access to information and the achievement of true transparency within the procurement system.

104.3 However, there is no evidence that any of these comments were responded to by National Treasury and consequently considered by the Standing Committee. As a result, the issues that they raised were not reflected in the Standing Committee's amendments to the Bill.

105. In contrast, where National Treasury engaged with comments, they were sometimes reflected in the Standing Committee's amendments to the Bill.

106. For example, at line 37 of the same comment matrix, the South African Institute of Race Relations NPC ("**SAIRR**") made a comment on clause 26 which was noted by National Treasury. The proposed amendments accompanying the comment were subsequently reflected in National Assembly's amendments to the Bill.

107. The absurdity of this approach to engagement is particularly well-reflected in the Standing Committee's engagement with issues raised regarding the independence of the Public Procurement Office ("**PPO**").

108. The Act placed the PPO, a body tasked with overseeing the public procurement process, within National Treasury. In its report on the public comments received, attached as **CFA10**, National Treasury stated that:

> "Most comments in this chapter were raised around the independence of the Public Procurement Office. Stakeholders raised concerns of possible conflict of interest if the Public Procurement Office is placed within the National Treasury, which, they felt, would dilute the level of impartiality expected from the Public Procurement Office."

109. The SAIRR's comment on the location of the PPO is the first to appear in National Treasury's comment matrix at line 10. In response to the SAIRR, National Treasury indicated that "*Parliament should provide guidance in this regard taking into account public comments received on the independence of the PPO and the Constitution*."

110. National Treasury thus clearly acknowledged the need for the Standing Committee to engage with the comments received regarding the independence of the PPO. However, National Treasury subsequently failed to provide the Standing Committee with any summary of or response to the remaining comments dealing with PPO's location, including those of:

110.1 PHARMISA at line 132 of the comment matrix;

110.2 The State-Owned Enterprises Procurement Forum at line 1577 of the comment matrix;

110.3 The Public Procurement Reform Project at line 1722 of the comment matrix;

110.4 The African Procurement Law Unit at line 1741 of the comment matrix;

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110.5 Corruption Watch at line 1858 of the comment matrix;

110.6 BJC and IY at line 1985 of the comment matrix;

110.7 EE and EELC at line 1998 of the comment matrix;

110.8 The South African Energy Efficiency Collective and line 2167 of the comment matrix.

111. Consequently, the Standing Committee was not fully appraised of the public's submissions on the independence of the PPO. It thus could not provide the guidance required of it on the issue and although it proposed amendments to certain parts of the chapter in the Act establishing the PPO, none of these amendments dealt with the PPO's independence.

National Treasury's Weak Engagement with Public Submissions

112. As detailed more fully in paragraph 91.6 of our intervention application, Parliament bears the onus to prove it facilitated a reasonable public participation process. It must also keep the records necessary to execute this onus.

113. To National Treasury's credit, it provided a full outline of the methodology it used to assess public submissions. As it says in its report:

> "The assessment methodology included:
>
> 1. Whether the comment was aligned with the principles contained in section 217 of the Constitution and whether or not the comment flouted any other provisions of the constitution or potentially limited any rights protected under the constitution, without adhering to the grounds under which such rights may be limited.
> 2. Where proposals were made, whether they could be included in the PPB in terms of what is within the ambit of the PPB and what it seeks to

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achieve. This was an assessment which required verification on whether what was proposed falls within the mandate of procurement and the Minister of Finance, including whether it potentially conflicts with other pieces of legislation.

3. An assessment of whether or not what is proposed should be contained in primary legislation or if it belongs in subordinate instruments by virtue of the comment being too operational in nature and too detailed to be provided for in the primary legislation, thereby inhibiting flexibility and being overly restrictive.

4. Whether the comment or proposal amounts to a matter which should form part of the bid documentation (for example, bid specific requirements and conditions) based on the goods or services being procured, and therefore may not be appropriate for inclusion in the PPB."

114. If followed correctly, this thorough methodology could demonstrate reasonable consideration of the public's submissions, provided that Parliament considers all the submissions and approves of National Treasury's responses to them.

115. However, the comment matrix provided by National Treasury provides no evidence that National Treasury applied its outlined methodology. Were it to have been, the relevant documentary evidence thereof would have been maintained by National Treasury and disclosed accordingly.

116. Given the high volume of comments that National Treasury merely "noted", evidence of actual consideration of these comments cannot be distilled from the comment matrix alone. Further evidence of National Treasury's application of its assessment methodology is required. Given the unseemly haste with which it conducted the consultation process, National Treasury could not feasibly have applied this methodology to all of the submissions it received.

117. As the Standing Committee relied on National Treasury to act as an implementing agent during its public participation process, National Treasury's disregard of multiple public submissions is highly significant. All public submissions discarded by National Treasury were not considered by the Standing Committee. This is a fatal flaw in the public participation process.

The Impact of the NCOP's Failure to Meaningfully Engage with Public Submissions

118. Flaws in the National Assembly's public participation process cannot be remedied through the NCOP's facilitation of public participation. As discussed in more detail in the other affidavits before this Court, each bears distinct obligations to facilitate public participation in the legislative process.

119. Moreover, the Bill processed by the NCOP differed from the Bill processed by the National Assembly. As the Bill was revised across its various iterations, certain stakeholders' comments would be rendered textually irrelevant, irrespective of whether or not they were of broader relevance to the underpinnings of the Bill.

120. Unlike the Standing Committee, the Select Committee was provided with a response from National Treasury to all commentators. However, not all the submissions received from commentators were addressed.

121. Moreover, many of the issues raised in these submissions were merely noted by the National Assembly, rejected seemingly out of hand, or deferred to coverage in the regulations. Astonishingly, approximately 38% of comments were merely noted.

CFJ

122. Instead, National Treasury focused mainly on comments regarding errors in clause numbering and typographical mistakes. Moreover, from pages 236-350 of its comment matrix, no responses or proposed amendments to the comments are included.

CONCLUSION

123. In the circumstances, amaBhungane prays for an order as set out in the notices of motion in the consolidated applications.

CAROLINE JAMES

SIGNED and SWORN to before me at JOHANNESBURG on this 22ND day of OCTOBER 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 consider the oath to be binding on their conscience.

COMMISSIONER OF OATHS

Commissioner of Oaths
Ex Officio
Practising Attorney - RSA
JAGGA & ASSOCIATES
Equity House
18 Bompas Road, Dunkeld West

PMG PARLIAMENTARY MONITORING GROUP

CFA1

Public Procurement Bill: National Treasury briefing

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Finance Standing Committee

23 May 2023

Chairperson: Chairperson: Mr J Maswanganyi (ANC) and Acting Chairperson: Ms M Mabiletsa (ANC)

Meeting Summary

Video

Public Procurement Bill: Explanatory summary

The Standing Committee on Finance and the Select Committee on Finance met to receive a briefing from National Treasury on the draft Public Procurement Bill.

Members were informed that the new Bill envisages that the preferential procurement policies of state entities include the following:

- A preference points system for black-empowered businesses;
- Measures to provide preference for certain categories of people and for local manufacturing and services;
- Measures to set aside contracts for specific groups or domestic manufacturers and suppliers; and
- Measures to subcontract to specific categories of people or businesses as a precondition for bidding.

The Bill has been in the making since 2014 when Cabinet directed the Treasury to modernise and reform state procurement. A draft bill was approved in February 2020, revised in 2021 after public comments, and finally submitted to the National Economic Development and Labour Council (NEDLAC) for consultation in May 2022. On 25 October 2022, NEDLAC submitted its final report to the finance minister. It was finally approved, with modifications, on 10 May.

It emerged that the draft Bill was a preview, this was an informal presentation and that the bill was awaiting certification by the Office of the Chief State Law Advisor. National Treasury indicated that it did not anticipate that the Bill would change significantly. It may change the wording in a particular clause or if there is a problem with a clause from a constitutional perspective, it would raise it, and there would have to be an amendment.

While Members expressed their support or concerns about the draft bill, they agreed to postpone the meeting so that they can engage on the final introduced bill when it is ready.

It was highlighted that the sooner National Treasury came back with the certified Bill, the better because Members still needed to process that Bill before Parliament rose for elections in 2024.

Meeting report

The Chairperson observed that he had been told the Minister would not be attending the meeting as he was attending an African Development Bank meeting in Egypt.

The apologies were then read out. There was a standing apology from Mr Masualle, who was recovering from an illness.

Chairperson's Opening Remarks

The Public Procurement Bill was a "long-awaited" Bill and had been processing for some time. The Committee had been impressing upon the Minister the need to introduce the Bill. It was a very important piece of legislation in the transformation agenda of South Africa. The Bill derived its existence from section 2(17) of the Constitution, which made provision for procurement. That section stated categorically that when an organ of state (in the national, provincial or local sphere of Government) or any other institution identified in national legislation, contracted for goods and services, it must do so in accordance with a system that was fair, equitable, transparent, competitive and cost-effective. Section 2 went on to say that subsection 1 did not prevent the organs of state or the institutions referred to in that subsection from implementing a procurement policy providing for categories of preference in the allocation of contracts, and the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination. That was very important because broad-based

black economic empowerment (B-BBEE) had been "under attack". The Constitution made a clear provision that there must be protection or advancement of persons in all categories who were disadvantaged by unfair discrimination. Members were aware of where South Africa came from with apartheid, where there were those who benefitted and those who were disadvantaged. It was now time that those who were disadvantaged benefitted from the state. The state was the biggest procurer of services in the country. The Committee hoped that the Bill would live up to what was in the Constitution because that was what was very important.

Briefing by National Treasury's Chief Procurement Officer on the Procurement Bill

Mr Ismail Momoniat, Director Director-General (DDG): Tax and Financial Sector Policy, National Treasury (NT), lead the delegation. He said that the Minister was in Sharm El-Sheik, Egypt, for the African Development Bank meeting. The Deputy Minister (DM) was in Washington, USA. He agreed with the Chairperson that the Bill was long-awaited.

He was joined by the following NT officials: Ms Mendoe Ntswahlana, Chief Procurement Officer (CPO); Ms Laura Mseme, Acting Chief Operations Officer (COO); Ms Empie Van Schoor, Chief Director (CD): Legislation; Mr Willie Mathebula, CD: Supply Chain Management (SCM) Policy, Norms & Standards; Ms Estelle Setan, CD: Strategic Procurement; and Ms Mpho Nxumalo Director: SCM Policy.

Mr Momoniat said that the version of the Bill that Members received the previous day would not be the version that would be tabled. When the Bill was presented to the Cabinet, changes were made, so the NT had to go back to the Office of Chief Law Advisor (OCSLA). Although the Cabinet had approved the Bill, the version of the Bill presented that day was subject to the certification of the State Law Advisor, and some clauses would be amended. The draft was largely close to what the Bill was; it was not going to change materially. It would be more technical changes that the Committee would see.

Mr Momoniat presented.

Problem Statement: What is wrong with our procurement system

• Public Procurement System is not working!

• Government is unable to deliver services efficiently and effectively.

• Zondo Commission has demonstrated how it is being abused, is opaque and prone to massive corruption.

• Many goods and services are overpriced, often many times over the price available to a private retail customer.

• Complicated (e.g. there were many steps in the process, which could take months to years), fragmented, and inconsistent legal prescripts that results in operational inefficiency; noncompliance and confusion in application.

• Too complex, highly decentralised or delegated to tens of thousands of divisions, field offices, schools, hospitals.

• Hundreds of thousands of registered suppliers entering into over two million transactions annually.

Mr Momoniat added that even in state entities, there were highly-paid procurement officials who did not quite understand the system. He did not regard that as the officials' failure, but as the NT's failure, where it was not making the system easy enough for even highly-paid officials to feel confident that they understood it. The NT was responsible for the procurement framework, and it should have anticipated (even after many officials came into office after 1994) that if left to spontaneous action, then the NT "should not be surprised" at the results that it had seen.

• Inflexible, incoherent and rigid prescripts that hamper development and service delivery.

• A lack of capacity at both regulatory and operational levels Lack of sufficiently skilled public procurement personnel employed within poorly designed organisational structures.

• An overburdened procurement system that causes a mismatch between applying the rules of

procurement law and achieving government's commitment to social and developmental

objectives.

Approach to Problem

-Establish a single regulatory system and oversight authority (Public Procurement Office) with jurisdiction over the whole public procurement system, including all organs of state currently under the Public Finance Management Act and the Municipal Finance Management Act.

-Improve and compel more data transparency Compel reporting on various aspects of the public

procurement system Facilitate the use of information technology to improve transparency and comparability.

Mr Momoniat added that the system was not geared to getting certain information, unless one went to look for it in the current systems. Anybody could join the system, and five or more companies could be registered by two individuals, for example, and they would get the contract the next day. If the data transparency was out there, then there could be many more red flags picked up; that was something that

the Department hoped the Bill could do.

-A strategic and differentiated approach to procurement Strategic procurement often involves a more pragmatic, flexible and differentiated approach to procurement.

-Capacitating and professionalising public procurement in the area of professionalisation, a roadmap is developed for public sector supply chain professionalisation.

-Enhanced compliance and enforcement mechanisms. Currently enforcement is done through various law enforcement agencies and a combination of legal mechanisms scattered throughout the administration and remedies enforced only via the courts need for enhanced compliance measures, and a dispute resolution and enforcement mechanisms.

Mr Momoniat felt that the NT should have done more to take stronger preventive action because if one left it to spontaneous action, one would find that the system would be abused. There needed to be active measures to prevent abuse. The NT thought it did that through the Public Finance Management Act (PFMA) by having internal controls, audit committees, by looking at the oversight system through Parliament, etc., but "clearly that was not enough".

Mr Momoniat presented slides from the World Bank on public procurement reform, where an overarching idea was to "Transform public procurement into a strategic function for better public infrastructure and service delivery with a focus on growth and sustainable development outcomes". He recommended that Parliament invite World Bank officials to present on public procurement reform.

Mr Mathevula presented that the aim of the Bill is to regulate public procurement and to prescribe a framework within which preferential procurement must be implemented.

Process followed before finalising Bill for Tabling to Parliament

• In December 2014 Cabinet directed NT to accelerate the modernisation of the public procurement system through a legal framework that introduces broader policy reforms.

• Office of the Chief Procurement Officer (OCPO) developed a conceptual framework for the draft Public Procurement Bill for discussions with stakeholders.

• Engaged with stakeholders at national, provincial and local spheres of government including professional bodies in auditing accounting to obtain ideas, consider the pros and cons of policy proposals and obtain consensus on the strategic intent of Bill.

• Cabinet approved a Draft Bill in February 2020 for publication for public comment for a period of

three months.

• Comment period was extended to June 2020.

• NT assessed more than 4 000 submissions received and a revised Bill was prepared.

• Bill revised in 2020 21 to take account of submissions.

• The Bill was submitted for engagement at NEDLAC on 13 April 2022 The NEDLAC Public Finance and Monetary Policy Chamber in collaboration with Industry Chamber established a task team of Government, Business and Labour.

• The task team held 15 sittings from 06 May 2022 to 07 October 2022.

• The actual deliberations on the Bill commenced on 02 June 2022.

• In addition to these engagements, there were several 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.

• Final National Economic Development and Labour Council (NEDLAC) report was signed on 25 October 2022 and submitted to the Minister of Finance.

• The Bill has been legally vetted by OCSLA and issued with a preliminary opinion for the Cabinet process.

• The Presidency also issued a socio-economic impact assessment study (SEIAS) certificate, subject to consultation with FOSAD prior to submission for the Cabinet consideration

• Forum of South African Directors-General (FOSAD) engagement was conducted on 4-8 May 2023.

• Cabinet approved the Bill on 10 May 2023 to be tabled to Parliament.

The Public Procurement Bill addresses the Zondo Commission's recommendations with respect to:

-A Code of Conduct setting out the ethical standards which apply in the procurement of goods

and services for the public;

-Protecting Accounting Officers or Accounting Authorities from criminal or civil liability for anything done in good faith unless such person acts negligently;

-Harmonisation of the legislation applying to public procurement;

-Better guidance and training of public procurement officials;

-Regulations to provide clear guidance on the processes to be followed when procuring from a sole source;

-Setting standards of transparency for inclusion in every procurement system;

-Providing appropriate management, contracting, reporting and enforcement guidelines for those who implement projects on behalf of the government;

-Ensuring compliance with transformation imperatives;

-Institutionalising lifestyle audits for all senior managers and officials involved in supply chain management;

-The establishment of a professional body to which all officials who work in the area of public procurement should belong.

The Bill sets the basic parameters within which transformation should take place It provides a menu of enabling provisions such as allowing institutions to implement their own procurement policy that provides for categories of preference in the allocation of contracts and the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination.

The 80/20 and 90/10 systems will become redundant. The preference point system can now be customised based on what is critical for the institution for a specific commodity, whether it be specific socio-economic goals, quality, price, etc. It is however advised that the price element should not be lower than 50.

• Example:

• 70/30 where 70 is for price and 30 which can be broken down into 20 for specific goals and 10 for quality (70/20/10).

• 50/50 where 50 is for price and 50 can be broken down into 15 for local content, 10 women, 25 for quality (50/15/10/25).

• The choice of the preference point system will depend on the criticality of what the institution will want to promote (not a one-size-fits-all) An institution may have more than one preference point system.

Conclusion

• Procurement Bill is part of a broader PROCUREMENT MODERNISATION PROCESS, involving a more strategic, differentiated and flexible approach, built on technology and big data and a modern IFMS system.

• Procurement Bill lays the framework for a better and more modern procurement system, but does not provide all the answers (e.g. best balance between different objectives, extent of centralization/decentralisation)

• More important question to answer is how will any new procurement system protect the public sector from corruption and abuse?

• The National Treasury welcomes a deep consultation process via Parliament before finalising and adopting this bill, as there are many views on how and what the public procurement system should be implemented.

(See Presentation)

Discussion

Ms M Mabiletsa (ANC) took over as Acting Chairperson.

Mr F Shivambu (EFF) felt that the presentation was "one of the worst presentations" the Committee had received. The Acting DG had spoken for 43 minutes and "said nothing". In the process, he punctuated his presentation by saying that he was not an expert in procurement. The Bill was not the version that the NT had originally submitted because the Cabinet had made changes, so that was why it only sent the Bill to the Committee that morning. What version of the Bill was the Committee dealing with now? If there was going to be a presentation of the Procurement Bill, there first had to be an illustration of the legislation that currently existed on procurement, and an illustration of whether the Bill sought to unify all procurement legislation, and would therefore repeal certain sections of those pieces of legislation. The NT also needed to show what sections would be repealed and illustrate that in a coherent way. Would the Procurement Bill repeal all the legislation that dealt with procurement, including the PFMA (Public Finance Management Act) and the MFMA (Municipal Finance Management Act)? Answering that would clarify what the Bill was going to achieve. What was the difference between what the NT was presenting and what existed? He felt that there was a lack of coherence in the presentation. Even in his own presentation, the Acting DG kept on saying that he "did not know what he was talking about". He did not know the purpose of the Acting DG talking that day. One of the observations that Members made in the past was that people just wanted to be seen to be appearing in Parliament every day, even when it was not necessary. The NT was just causing confusion on what needed intervention, and on what needed the provision of

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guidance. He observed that the key issue that should constitute the procurement framework in South Africa was that there needed to be routine functions of the Government which were not subject to procurement or assistance by external service providers. If Government knew that it was going to need security in its own buildings, why would it want to have a private company providing security? The government knew that it would need cleaners in its buildings every day, so why would that be done by an external company, consisting of workers who had to work for the Government permanently? If it knew that it needed landscaping in certain instances on its properties, why would that be externalised? That could be a situation where money was "paid to a middle person", who later paid workers meagre, or no salaries, just a stipend was not recorded properly, because people were not in a tax bracket that could be taxed. With a legislative framework that dealt with procurement for Government, Government first had to set aside functions that were routine in terms of what happened daily. The functions of the state could then be grouped together, and not subject to external procurement. Besides the areas that Mr Shivambu had just mentioned, there were many other areas that would require attention in terms of what the Government dealt with in relation to procurement. The state could perform far more complex functions with its own internal capacity. He felt that the Committee needed to look into that. The issue that needed to be clear was that of the functions which it was agreed that the state would not be able to build the internal capacity to perform, there should be agreement on localisation. Procurement by the state needed to be about localisation, local beneficiaries, and local industrialisation. South Africa was not developing industrially in a significant way because it had been using state money to buy goods and services made elsewhere. It was essentially financing the jobs of people in America, Germany, China, Vietnam, and many other parts of the world. Of course, there was a global trade environment. But in terms of the current world trade dynamics, there was no WTO rule that regulated state procurement. The state was perfectly positioned to say that if it was going to purchase vehicles for municipalities, provincial government, national government, and the police (who had a fleet of "more than 200 000" vehicles), then those must be made in South Africa. Not assembled in South Africa, but made in South Africa. Localisation should determine how procurement happened. There were so many other industrial products and finished products which the state could procure, and which could be made in South Africa. There was no other meaningful way to industrialisation, and therefore, poverty reduction through job creation, than through using the state's procurement power to localise and industrialise. He did not think that the legislation that had been presented, in an "incoherent way" was a radical departure from the inability of the state to use fiscal policy to drive industrial expansion and localisation. The manner in which that had been handled was "extremely out of order".

Mr Shivambu suggested that the Committee should "ideally stop this meeting" because the opening remarks already said that the NT was presenting a different version of the legislation, to which the Cabinet had made changes. Since the Committee had been sent the Bill that morning, it did not have time to deal with what was being presented. He felt that the Committee should get a better and more qualitative presentation, other than what was presented that day. It was "disappointing".

Mr D Ryder (DA, Gauteng) observed light-heartedly that if Mr Shivambu felt that the presentation was the worst presented to Parliament, he should watch the previous week's recording of the Joint Standing Committee on Defence. By contrast, the NT gave a "sparkling" presentation. But he agreed with Mr Shivambu that the presentation appeared to be premature. Slides 15 and 16 referred to how detailed the processes of finalising the Bill before it came to Parliament were. Yet the Committee was told that the Bill had not been finalised. He was not sure if it was normal to bring a draft Bill to Parliament.

Mr Ryder talked about the Chairperson's opening remarks in introducing the Bill. He felt that the Committee needed to acknowledge that "by far, the best way to redress the imbalances of the past" was not to give one or two connected people tenders and contracts, but rather to make sure that the tenders and contracts that the Government issued were to the benefit of the majority of South Africans. Members had seen what giving tenders for the construction of Reconstruction and Development Programme (RDP) houses to connected individuals did – it gave people broken houses that did not last and "f[e]ll down around their ears within three to six months", and had no benefit. There was massive overcharging for certain projects, which meant that only a few beneficiaries could be identified instead of many. He felt it was important that the issue of value for money was highlighted in the Bill, and that it became a priority that the committees dealt with, and then ensured that value for money was achieved. He did a calculation on the previous draft that the Committee received, and the phrase value for money was mentioned 11 times in the Bill, and he welcomed the highlighting of that issue.

He then asked about the prohibitive processes that had made it so difficult for many people, and certainly entry-level people, to get into doing business with the state. The barriers to entry had been substantial in the past, and therefore tendering had been left to a very select group of people, who seemed to get tenders for everything. One found that the expert on sports clothing in Vereeniging suddenly became an expert in road-building and construction. The issue was that the real road construction experts were kept out because of the prohibitive processes. He was not merely talking about racial requirements or similar things. He was also talking about the volumes of paperwork, and the ability to get that paperwork to the right person, on the right desk, at the right time. That often caused "brown envelopes to be delivered, etc., etc.". If Parliament could get rid of those prohibitive processes, that would only benefit the people of South Africa. Members needed to remember that the majority of South Africans are whom the Bill was supposed to be protecting. Parliament could not design a bill that would advantage a few, as had been the case in the past. It had learned that lesson, and such a model had failed; it needed to be reinvented.

On value for money: The issues around cost consultants were not new. There was certainly no need these days to go to great expense to hire or take on cost consultancies. The Fourth Industrial Revolution (4IR) was upon South Africa, and as soon as it could start accessing information from across the internet, life became simpler in terms of evaluating transactions against each other. He mentioned in a speech the previous week how three years ago, the ANC mentioned the 4IR at every chance that it got. It had stopped doing that, as "the electricity ministers had pushed us back towards the conditions that surrounded the first Industrial Revolution". He encouraged finding a way into the third Industrial Revolution, and to start using the resources available to start checking value for money, because it was something that South Africa really needed to get a handle on.

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The ability to bundle transactions together and get bulk discounts was important. With each individual municipality doing their own procurement of, for example, pens. He agreed with Mr Shivambu that bulk procurement would help with localisation of the economy and the generation of jobs, etc. When it came to achieving value for money, buying in bulk should be bringing prices down. With the simpler things, South Africa needed to start looking at that.

He felt that the Bill needed scrutiny. The fact that the Committee was dealing with a "moving target" made it difficult for Members to get into the details. He was sure that the Committee would be getting into that detail in the next few weeks, but he felt that the NT needed to unpack the value for money issue, and the way it was envisioned to take place going forward.

Mr J De Villiers (DA) said that although the Bill seemed premature, it had the right idea at the core of it. The reason for doing it against the background of the Zondo Commission, and how the state procurement system had been abused, was easy to understand. He felt that the single regulatory system, or the Public Procurement Office, that was envisioned in the Bill, could create more data transparency and ensure enhanced compliance. He hoped that that would translate into making sure that people who had abused the procurement system in the past were identified and blacklisted. Another hope was that the "know your client (KYC)" processes of Government were improved to such an extent that a person who had been identified as being part of tender fraud, or as being part of the abuse of the procurement system could be identified even though he was using trusts or companies to hide his identity as a beneficiary or shareholder. Mr De Villiers also hoped that that transparency, which he assumed the Public Procurement Office (PCO) was driving as part of data transparency, would make sure that those individuals were kept out of future procurement. It was just as important to him that supply chain management officials, municipal managers, etc., who were the people in charge of making those decisions, and who influenced those procurement processes or abused them, were also subject to the same type of transparency and systems. Such systems could help in ensuring that it did not happen that an official could abuse the supply chain management process, get caught, and then move to another municipality or sphere of government, without "having his offence hung around his career", and being kept from abusing taxpayer money again. Making sure that officials got regular lifestyle audits, and that they declared all of their interests, were some of the simpler ways of keeping officials in line and keeping them accountable for the way they use the procurement system.

He then posed a scenario on empowerment: If any South African citizen had access to working service delivery; if the road they drove on worked; if the school they went to functioned; if the hospital worked; if the street lights were working; if they were getting the best service delivery; if they were getting the best value for money; if taxpayers' money was being used to the best effect; and if the service provider was using that money to give the best service or product that taxpayer money could buy, then surely that was the most effective way to do empowerment? That was the most effective way to transform society. Somebody who had access to a functioning hospital, a functioning school, a functioning road infrastructure, and a functioning water and electricity infrastructure, then that person had the best chance to develop their own talents, partake in the economy, and take part in empowering themselves. For him, the preferential procurement, the set asides and all of the rules that were being proposed in the Bill were, "quite frankly, unnecessary". The only two factors that would create transformation in society when it came to the public procurement system were when procurement was done to such an effect that the best services for the least amount of money, by the service provider that could achieve that service or product the best, was achieved. He felt that there was nobody in the meeting or anywhere else who did not understand that the moment one gave any government sphere in its procurement process the opportunity to "tinker with rules of procurement" in any way, whether it was cloaked as transformation, or local content, one was opening the door for manipulation of the procurement process. One was creating a system where one could legalise through the procurement system where the specifications were so narrowly defined that only a preselected service provider qualified for that tender. That basically came down to the manipulation of the procurement process. For him, there was only one way to get transformation in society, to get value for money through the procurement system, and that was when taxpayer money was used to deliver the best value for money service that money could buy.

Mr S du Toit (FF+, North West) wanted to differ from the previous speakers' views on centralisation. He believed that decentralisation was the way to go because when centralised bulk buying, one would have situations like the one where the Government bought electrical meters that were "dumped" in municipalities. Those purchases were made at exorbitant prices which the municipalities could not afford, and the infrastructure did not allow for that to happen. Members had seen over the years that decentralisation worked better. He believed that there needed to be transparency. But what was baffling him was the fact that the whole Bill was redirected and compiled around the Constitution, which said that transformation must be put first. He believed that the racial gap would keep expanding and get larger and larger as the years went by, "because of the population growth that we currently find in South Africa". One could bring in however many racial laws and amendments to current legislation to try and narrow that gap. But that would not work at all until "the population growth is under control". Worldwide, it was common knowledge that when one stimulated an environment that was conducive to economic growth, then everyone (irrespective of their race and gender) would definitely benefit. It had been seen over the past 30 years that focusing only on racial advancement was not to the benefit of South Africans at all. Only a select few benefited from that. He thought that the Bill needed a lot of work, and he thought that the focus was not where it was supposed to be. However, he supported the fact that there needed to be transparency and that the process needed to be a lot easier to monitor. The focus on transforming in the way that the NT wanted to transform was not going to work.

Mr G Skosana (ANC) observed that the Bill was long-awaited. Members hoped that the Bill would assist in dealing with the challenges in procurement. He was concerned that the NT was not presenting the Bill with the necessary confidence that the draft Bill would address most of South Africa's challenges with procurement. Members noted that it was a draft Bill, and there would still be inputs from stakeholders, Members, etc. However, the NT still needed to present the Bill with the necessary confidence, having noted all of the challenges that South Africa was having, having noted issues that emanated from the Zondo Commission, having noted the commitment that the President made at the Commission, Mr Skosana thought that what the NT was presenting were things that would address the

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challenges. Different stakeholders would have an opportunity to make an input and want to change things. From the NT's side, it must present with the necessary confidence, and not as if it was doubting the Bill. He was not sure if it was because the Bill was a draft, and the draft was later withdrawn. He understood that the new draft included input from the Cabinet. However, he noted a number of progressive elements in the draft Bill, for instance, chapter 6 dealt with dispute resolution, and it provided for the establishment of a public procurement tribunal, as a mechanism to deal with disputes in relation to procurement. Chapter 7 proposed that the Minister may make regulations for different categories of procurement institutions, and for different categories of procurement, and that specific regulations must be made for infrastructure, capital assets, and goods and services related to infrastructure and capital assets. He felt that most of the challenges were with projects related to infrastructure and capital assets.

[Mr Ryder wrote in the chat box: It is irregular to have a bill presented without the Political Head representing the Executive.]

Mr Skosana observed that the Bill also dealt with the issue of set asides, and the need for a policy that would include measures to deal with set asides on the awarding of bids to give preference to categories of persons, enterprises, or a sector, including black people, women, youth, people with disabilities, co-operatives (co-ops), etc. Was the NT expecting the committees to take the process to the next level, having made that presentation, or would it still come back again with a more refined presentation?

The Acting Chairperson was concerned because Mr Momoniat said that the version the Committee was discussing was not going to be the one that was tabled; was the Committee part of the consultation process; would it have the clean version with all the inputs from the meeting so the Committee could discuss it?

Mr Momoniat said that the NT had been asked to make an informal presentation. The choice was for the Committee to wait for the final Bill, which would be tabled as soon as the SLA gave it the go-ahead. It hoped that within the next month, the SLA would provide the Bill. The Minister would present the Bill in the National Assembly (NA) as soon as the NT got approval from the SLA. The NT presented the version that it had submitted to the SLAs. He observed that the Cabinet had made changes as well. The versions that went to the Cabinet were also certified at some point, and then there were changes made. The NT was awaiting the version that would be tabled. That happened with many bills; that was part of the process.

[Mr Ryder wrote in the chat box: Asked by whom?]

Mr Momoniat said that because the NT was asked to make a presentation on a bill that was not certified, it presented the version that it submitted to the SLA. The Bill would probably not change significantly. He anticipated that the SLA might change the wording on a particular clause. If there was a problem with a clause from a constitutional perspective, the SLA would raise it, and there would have to be an amendment. The NT could have made the presentation without presenting the Bill and just given the Committee the presentation, but it wanted to give the Committee the latest version of the draft Bill. The NT was not providing the Bill to Parliament for further consultation. The Bill would be tabled in the next few weeks. The Minister's expectation was that the Committee would then put the Bill out for public comment, have hearings, and process the Bill. That day's presentation was a forerunner to that, and a preview of the Bill. When the Bill came, it would be a very short presentation, because it would say which were the main changes done by the SLAs. The NT would bring such changes to the Committee's attention.

The Acting Chairperson said she understood what Mr Momoniat was saying. The current version of the Bill was a preview, and the presentation was informal. Members were also able to make inputs.

Mr Shivambu said that Members were very busy in Parliament, and they were too busy to be entertaining an informal talk about legislation. He asked if the Committee could please postpone the meeting, and only meet once the SLA had brought in the proper legislation that the Committee needed to deal with. The Committee did not know what the final product of the draft would be. How could the NT waste Parliament resources for an informal talk? That informal talk was a "waste of time", and it "meant absolutely nothing".

Mr Ryder thought the fact that the Minister was not there to present the Bill was problematic to start with. One wanted the Executive to give their motivation, and to give their details. Once the discussion got into the political space, as usual when the Minister was not there, it placed some of the officials in a difficult position. It also meant that there would be some questions posed that were not answered.

Mr Momoniat said that the NT was asked to present that Bill and that it had to have an informal discussion ahead of the drafting of the Bill. It was not the normal process that the Committee was "spitballing" before a bill. That happened in the corridors. When a bill is brought to the Committee, it was the final bill. Who was asked for the Bill to be presented at that stage? Who asked for that informal discussion? That would tell the Committee what the motivation was. The Executive and Parliament were "not usually proactive" nor agile. They were not usually ahead of the curve. When one saw someone pushing something, one must ask why. If the question of who asked for the presentation, it would answer the question of why the Committee had it presented that day.

Mr Skosana said that the answer given by the Acting DG was that the meeting was an informal engagement, and that the NT would still come back with a more refined draft which would deal with the inputs from the SLA. At that point, the NT would also come with the Minister, as the political head of the Department to come and formally present the draft Bill. For him, that response answered the questions raised. He felt that the Committee did not have to continue to answer the other questions; it would not assist the Committee, because it was just an informal draft. There would still be a formal draft. It could be that in the formal draft, the answers to certain questions were not captured there the way they were now. He felt that the Committee should end things at that point. He appealed to the NT to speed up the Bill process, because as the NT had indicated, it was a long-awaited Bill. He asked that the NT not waste many days

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before coming back with the Minister to formally present the Bill. Members would then be able to ask questions on a formal draft which had undergone all the necessary processes. Members would then know that from there, they had to take the process to the next step as the relevant committees.

Ms D Mahlangu (ANC, Mpumalanga) asked if the NT took the Committee seriously. The Acting DG was saying that the meeting was an informal discussion, which implied that the Committee had the luxury of time. The Committee did not have the luxury of setting aside time to deal with an informal presentation. Mr Momoniat's presentation and utterances were sending signals - was the NT pressured to come and make a presentation for the sake of it? As other Members had asked, who requested that informal meeting? Members were not informed that they were coming to an informal meeting; they thought they were coming to a meeting where the NT had processed the Bill and was ready to present it to Parliament. Did it mean that there was political discord between the administration and the political head? From the Acting DG's utterances, she felt that he was "disowning the Minister". Hence, she agreed with other Members who said to let the ministry come with the officials when they presented so that they could answer those questions, and clarify things for Members, thus making them feel comfortable to freely engage with the Bill. As things stood, the Committee was just "talking for the sake of talking", and the NT was still going to prepare and come back to the Committee. She encouraged the NT to present when it was ready. There had been conflict over the NT not presenting the bills on time to the Committee, as if it did not know about the timelines. When Members raised concerns about the Bill, then the NT would say that it did have an informal session. She felt that the Committee could not afford to have informal sessions going forward. This was a very serious Bill, which the public had an interest in, and now the Committee was wasting the public's time.

The Chairperson said that the Standing Committee on Finance invited the NT to brief it on how it was with processing the Bill. It was not the first time that Bill had been raised as a serious matter of public importance. There had never been a debate on the budget where Members did not raise that matter "sharply", including the previous week when Members were debating Vote 8 of the NT. The Standing Committee invited the NT to come to Parliament. Upon getting the information that there was going to be a briefing, Mr Y Carrim (ANC, KZN), Chairperson of the Select Committee on Finance, called the Chairperson to say that the Select Committee had an interest in being part of the briefing. Mr Carrim further indicated that he would not be able to attend, as he was presiding over a table tennis championship (of which he was a patron) in Durban, KwaZulu-Natal (KZN). Officials did not come to Parliament on their own, they had to be invited to come.

[Mr Ryder wrote in the chat box: Why a joint meeting then?]

The Chairperson said that as to whether the Bill was informal or not, that was a separate issue. Not all of the bills were presented by Ministers. The Minister had tabled bills in Parliament, but most of the presentations had been done by officials. All Members were aware of that. But if Members felt strongly that the Minister should come, it should not [unclear 2:16:09-2:16:16]. He strongly felt that the Bill was a priority bill. The sooner the NT came back with the certified Bill, the better because Members still needed to process that Bill before Parliament rose for elections in 2024. If Members felt that NT officials should not continue to respond to questions, the Committee could adjourn the meeting, but agree that as soon as the Bill was certified, the NT should come back (since it was a priority bill, as it was agreed previously).

The Acting Chairperson appreciated the preview that the Committee had. NT had the questions that Members asked. When it came back in about a month's time, it would have the final draft. Such a meeting would be short, since questions had already been answered, and the NT needed to try and answer all of the questions that Members asked. The matter would be postponed.

Members agreed to adjourn the meeting.

The meeting was adjourned.

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Public Procurement Bill: public hearings day 2

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Finance Standing Committee

13 September 2023

Chairperson: Mr J Maswanganyi (ANC)

Meeting Summary

Video (Part 1)

Video (Part 2)

Tracking the Public Procurement Bill in Parliament

The Standing Committee on Finance convened in a hybrid meeting to continue its public hearings on the Public Procurement Bill, and received submissions from a wide range of community-based organisations, such as labour unions, legal bodies, advocates for the advancement of blacks and women in business, construction and engineering companies, and government entities. The purpose of the Bill is to regulate public procurement and to prescribe a framework within which it must be implemented. Furthermore, it intends to resolve the lack of clarity on the public procurement regime in South Africa which is currently fragmented, with several laws regulating public procurement across the public administration.

The submissions largely welcomed the establishment of the Public Procurement Office (PPO), but there were concerns that the PPO had not been mandated to monitor the implementation of preferential procurement.

There was conflict over the prioritisation of value for money, rather than the prioritisation of transformation. The conflicting view was that transformation was coming at the cost of value for money, versus the opposing view that transformation should be prioritised as was mandated by the Constitution. Stakeholders were mainly of the view that transformation and value for money went hand in hand. The Committee agreed that transformation should be prioritised, as was mandated in the Constitution.

Stakeholders emphasised that the Bill should have specific provisions for women, especially black women. This would ensure that procurement was gender inclusive and address inequalities faced by women, and black women especially. There was concern that the Bill did not establish a preferential procurement framework, as was mandated by the Constitution, and it was felt that the provision for the Minister to provide for this in regulations was insufficient. It was proposed that the framework should be included in the primary legislation. The Committee agreed.

There was concern regarding Chapter 4, which deals with preferential procurement. The Committee agreed that this needed to be urgently addressed. Stakeholders felt that the Bill did little to address and resolve issues experienced by black people, and criticised it for not meeting the objective it had set out to achieve in terms of developing the framework for preferential procurement.

The Committee indicated that there should be separate submissions from government departments, as the current public hearing process was aimed at public engagement, and government departments had their own means of submission and engaging with the Bill.

It resolved to leave the opportunity for written submissions open so that other stakeholders, especially young people, could make submissions on the Bill.

The overall view of the submissions was that the Bill was a step in the right direction, but needed significant fine-tuning in order to fulfil its objectives and meet the state's transformation goals. The stakeholders highlighted corruption as a huge impediment to transformation, and emphasised the need for transparency throughout the public procurement process.

Meeting report

Opening Remarks

The Chairperson welcomed Members, legal services and guests to the meeting. He indicated it was a hybrid meeting, and welcomed stakeholders who attended via the virtual platform.

Apologies

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An apology was received from Mr E Buthelezi (IFP).

The Chairperson said the first round of public hearings had been held the previous day. He reiterated that it was a hybrid meeting, and submissions would be shared in-person and on the virtual platform.

The meeting would proceed as fast as possible due to possible connectivity issues caused by load-shedding. He would do his best to ensure that all submissions could be made by all stakeholders meant to present. Ten minutes were allocated to each stakeholder to make their submission. He asked that stakeholders stick to their time allocation and indicated that he would request that they end their presentation if they went over time. It would be unfair to allow certain stakeholders to have a longer time to present than others. He suggested that all stakeholders time themselves, and said he would also time the presentations.

The Chairperson said that the Public Procurement Bill was a very critical piece of legislation. It would have a serious impact on the procurement regime in the country. He did not want to disadvantage or prejudice any stakeholder that was going to make a submission.

COSATU & SACTWU submission

The Congress of South African Trade Unions (COSATU) and the South African Clothing and Textile Workers Union (SACTWU) made a joint submission on the Bill, which was presented by Mr Matthew Parks (COSATU) and Mr Simon Eppel (SACTWU).

The stakeholders felt that the Bill was incredibly important, and noted that there were some issues. The proposal moving forward was that Parliament should assent to the Bill with minor but crucial changes. Thereafter, regulations and instructions should be produced through stakeholder consultation at the National Economic Development and Labour Council (NEDLAC). NEDLAC should do a review of the Bill within 18 months of coming into effect to clean up the process if there are any issues.

COSATU and SACTWU proposed changes in transparency. The stakeholders felt that Section 26 imposed limitations on access to transparency and undermined Section 27. There was a proposal to add text to make it clear that Section 26 was not undermining transparency rights established in the Bill. The stakeholders felt that Sections 26 and 27 should be swapped around to avoid unintended consequences. Section 27 should preserve alignment with the General Laws Amendment Act.

COSATU and SACTWU supported the exclusion of political and state employees from bidding for tenders. There was also concern that whistle-blowing had been excluded from the Bill.
See attached for full submission

NEHAWU submission

The National Education, Health and Allied Workers' Union (NEHAWU) made a submission that Mr Barry Mitchell presented.

NEHAWU supported the progressive elements of the Bill that aimed to curb corruption and malfeasance in public procurement processes. The Bill made provision for necessary regulation on preferential procurement.

The union was concerned that the Bill would have issues at the implementation level due to areas of ambiguity. Who would head the Public Procurement Office (PPO)?

It agreed that the Bill should be processed speedily. The stakeholders called for strengthening the Bill's preferential and local procurement aspects.

(Technical difficulties were experienced in connecting to the virtual platform; see attached for full submission)

IWFSA submission

The International Women's Forum South Africa (IWFSA) made a submission on the Bill that Ms Nicqui Galaktiou presented.

IWFSA said government had to create policies and regulations to implement gender-responsive procurement. The President's target of 40% participation in women-owned businesses should be implemented immediately. IWFSA suggested that the percentage should be 50%, because women made up approximately 51% of the population. It said government should commit to upskilling women-owned businesses in industries such as engineering, construction, transport, electricity, logistics, and information technology.

See attached for full submission

IRR submission

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The South African Institute of Race Relations (IRR) made a submission on the Bill which Mr Gabriel Crouse presented.

The IRR felt that the ratcheting up of black economic empowerment (BEE) and other transformation policies would not help overcome the problems faced by the poor and disadvantaged. The IRR recommended that 'value for money' should be the core aim of the Bill, and that ensuring this would enable transformation and other important economic objectives.

The IRR was concerned that individuals appointed to the public procurement office (PPO) would be appointed based on cadre deployment, and that this would affect the performance of the PPO.

The IRR felt that areas of the Bill were inconsistent with Sections 1 and 27 of the Constitution. It was also noted that no socio-economic impact assessment (SEIAS) had been provided.

It suggested that the country needed to adopt a system of 'economic empowerment for the disadvantaged.' This would ensure that race was not used as a proxy for disadvantage, and would promote a focus on disadvantage based on socio-economic status. They felt this aligned with the value of non-racialism embedded in the Constitution.

See attached for full submission

NRF submission

The National Research Fund (NRF) made its submission via the virtual platform, which Ms Lindiwe Nkwe presented.

The NRF made general recommendations, including the elevation of innovation, an innovation-enabled environment, capacity building, categories, methods, rule-making participation, donor funding and the removal of the trumping clause.

See attached for full submission

amaBhungane submission

amaBhungane made a submission on the Bill, which Ms Caroline James presented.

amaBhungane felt that the depth of procurement-related corruption required an innovative approach to solving problems in the systems, and considered the Bill insufficient to establish a system that was cost-effective, transformative and resilient to corruption.

It was concerned that the Bill did not establish a procurement system. The stakeholder indicated that regulations and instructions did not allow for multi-party deliberation and public participation.

The Bill had to establish a balance between value for money and transformation.

amaBhungane was concerned that transparency and access were not entrenched at all stages of procurement.
It was of the view that the Bill failed to address all evidence of procurement inefficiency, failed to transform the economy and failed to limit and punish corruption.

See attached for full submission

Corruption Watch submission

Corruption Watch made a submission on the Bill, which was presented by Ms Nicki van't Riet and Ms Motlatsi Komote.

Corruption Watch was of the view that transformation should be central to the Bill. The Bill should state that it aimed to transform society and eradicate corruption.

It welcomed the automatic exclusions from procurement, but was of the view that further integration and consolidation was required in terms of preferential procurement.

Corruption Watch said that sections in the Bill were vague, ambiguous, unclear and not precise and that this had to be addressed. It was also concerned about the nature of the PPO.

See attached for full submission

BJC & Imali Yethu Submission

The Budget Justice Coalition (BJC) and Imali Yethu (IY) made a joint submission on the Bill, which Ms Komote presented.

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The BJC and IY felt that the Bill was a step in the right direction to address critical issues in procurement processes. They were concerned with the proposed institutional arrangements, and stated that a clear division of functions and responsibilities was necessary to safeguard against corruption and abuse of power.

They were supportive of the Bill, but felt that amendments were necessary. The stakeholders recommended that revisions be carefully considered to ensure that the Bill dealt with the risks associated with concentrated powers, and upheld the highest standards of public service delivery.

See attached for full submission

Discussion

Dr D George (DA) thanked all the stakeholders for their submissions. It was a complex and very important Bill. He acknowledged the work done by stakeholders. Responding to the submission by COSATU and SACTWU, he acknowledged that whistle-blowing was an important issue, given the amount of corruption and theft seen with public finances. Did the stakeholders have any specific proposals regarding a package of possible incentives for whistleblowers?

He agreed with the IRR that South Africa faced several social issues, such as starvation. Starvation resulted from bad decisions being made, and billions of rands had been stolen from the public. South Africa was facing a crisis of systemic corruption. He referred to the R350 grant, and said if more money was available, this grant should be made bigger. There was no provision for the R350 grant in the budget after April 2024. This was a very dire situation.

He said that 'value for money' had been raised in the previous day's meeting as well. Value for money was fundamentally important, because people should not spend money and not get what they should be getting. This was nonsensical. Was the IRR proposing that value for money be the overarching criterion, or was it proposing that there should be an element of the state using its financial muscle in procurement in some way to intervene in society to attract or assist groups to have preference in this regard? Did the IRR think this was mutually exclusive?

Dr George agreed that the Bill used race as a proxy need, rather than need as a proxy for need. This was problematic, and should be addressed.

Ms M Mabiletsa (ANC) agreed that the Bill should be processed speedily. She noted the statement that local manufacturing should be treated as a pre-qualification, and agreed with this. This would encourage innovation, job creation and transformation in the country. If things were being manufactured in the country, jobs would be created.

Responding to COSATU and SACTWU regarding whistle-blowing, she agreed that there needed to be regulation to protect and promote whistleblowers -- they had to be protected.

She agreed with the IWFSA statement that women should be a certainty, not an option. Black women, in particular, should be made a certainty. She said that, in most cases, black women did catering, and she wanted to see black women move up to another level. There should be no fronting at this level, where the black women were there for the sake of it. She had not heard any of the stakeholders address the issue of fronting. Fronting was a big issue in procurement and tenders.

Mr M Manyi (EFF) said South Africa was a constitutional democracy. The Constitution was very clear on the issue of redress. Section 9(5) of the Constitution was very clear, unambiguous and resolute on the issue of racial discrimination. He felt that the presentation lacked resoluteness regarding racial redress, as if the history of colonialism and apartheid had been forgotten. The presentations had been very general in this regard, and he was disappointed by this.

Responding to the COSATU and SACTWU submission, he expressed his support regarding pre-qualification as an issue of localisation. He suggested that the concern should be upgraded and brought into law, rather than regulation. This may result in falling into the same problem of the 2017 regulations, where the Minister had done all kinds of pre-qualifications, but these had not been provided for in the law. He did not want this mistake to be repeated.

He noted the COSATU and SACTWU issue regarding the use of "when," and pointed out that Section 217 of the Constitution made use of "when."

Mr Manyi responded to the submission made by NEHAWU, which had provided a list of unauthorised expenditures. This was a good list, but some crucial cases had been left out. If NEHAWU wanted to be exhaustive, they should be exhaustive. He did not want it to seem as if things had been purposefully left out due to possible association.

He noted that NEHAWU had raised the issue of Clause 22 and the uncertainty between the Director-General (DG) and the PPO. Section 38

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of the Public Finance Management Act (PFMA) was very clear on this issue. The accounting officer -- the DG -- was the head of the department. Unless it was stated that the PPO was given the same status as the DG, the DG was the accounting officer.

Mr Manyi responded to the submission by IWFSA. He supported the proposal for 50% representation. He was concerned that there was no deliberate position on black African women. When the Employment Equity Act was crafted, there had been great caution to make provision for women, but when the result came out, the only women that really benefited were white and Indian women. He did not want to repeat this mistake of referring to women generally. African and Coloured women should be prioritised. The Constitution allowed for this, and made use of the term "equitable."

He shared the IRR's disappointment regarding the increased corruption. There had been hope that the new dawn would bring cleanliness, but instead, it was 'a new nightmare.' However, he disagreed with some of the IRR's statements. It was important, when considering the summary by the Zondo Commission, to consider what had been left out in the summary of Section 217(1), "fair" and "equitable." Fair and equitable brought forward the issue of redress. The Constitution emphasised equitability, and it seemed people had an issue with this. Section 217(3) was a directive that this framework had to be done, and it was clear that it should seek to achieve the objectives of 217(2). Section 217(2) spoke to the protection and advancement of disadvantaged people. The Constitution was very clear on this issue. People who were against transformation, were against the Constitution.

Mr Manyi clarified that the purpose of the meeting was to repeal the Preferential Procurement Policy Framework Act (PPPFA). This was the key issue. Once the processes had been concluded, there would no longer be a PPPFA. Contrary to the statement that there would be a quantifiable misuse of the PPPFA from when the law was enacted, what would be found was that there was a quantifiable marginalisation of black people. 80-90% of the points were given to the lowest price. The lowest price was driven by factors that were a result of the advantages provided by apartheid and colonialism. White-owned businesses are able to provide lower prices because they have a lower cost of funds. Value for money had to be seen in terms of transformation.

He said that, in principle, he agreed with the NRFs proposal regarding the trumping clause. He requested that the NRF make their motive for this clear. His motivation for this was that there could be progressive elements in other legislation, and the trumping clause should not allow for the trumping of a more progressive provision.

Mr Manyi responded to the submission made by amaBhungane. In terms of transparency, was amaBhungane willing to have the same rigour that they were espousing, placed on themselves? Were they willing to disclose their sources in the spirit of transparency? It was very easy to demand something be done, but he was interested to know if the stakeholder applied these same conditions to their own functions. He asked for specifics to be provided in terms of the innovation that had been referred to. What was meant by the suggestion that the Bill should be innovative?

He would have expected Corruption Watch to be an expert in terms of issues of governance. This would be an issue if they wanted the Procurement Officer to be managed by Parliament. He highlighted the separation of powers. He accepted the intention, but was unsure if the proposal was feasible.

Mr Manyi noted the uncertainty as to who was responsible for efficient, proactive systems. He suggested that Corruption Watch should read section 38 of the PFMA. Procurement functions were the responsibility of the DG, and could be designated to a particular official.

He supported Corruption Watch's caution that things should not be left to regulations. It was important to remember that if what was in the regulations was not anchored in the law, it was challengeable in court. These issues should find expression in the law, not in the regulations.

He felt the BJC presentation was not specific, and they had spoken very generally.

Mr G Skosana (ANC) responded to the submission by COSATU and SACTWU, and said he was not convinced on the issue of the use of "when." He read the clause for clarity -- "When procuring institutions must develop and implement a procurement policy," and was not convinced that using "when" was an issue. He invited further clarification from the stakeholders.

He expressed his understanding regarding the issue of protection of whistleblowers, but he had concerns about incentivising whistle-blowing. He requested clarity on what the stakeholders had in mind.

Responded to the submission made by NEHAWU, he noted that the presenter had left the meeting. He referred to the issue of the DG being the head of the PPO. He agreed with Mr Manyi that the DG was the accounting officer. NEHAWU had highlighted that the increased duties and responsibilities would require institutional capacity, but the union was not providing an alternative. The DG, as the accounting officer, remained responsible overall.

Mr Skosana noted that NEHAWU had raised the issue of the lack of inclusion of qualifications of individuals who would work in the PPO. It made a comparison and stated that in the case of the Tribunal, the qualifications needed had been indicated. He did not think this was a fair comparison. The Tribunal would be an independent institution dealing with disputes, whereas the PPO would be employed following

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the recruitment requirements. He did not think including the qualifications in the Bill was necessary. It was an unfair comparison,

Mr Skosana responded to the submission made by IWFSA, noting the proposal for an external and internal resolution process and mechanism. Would this not delay the process of resolving disputes? The timeframes for tribunals resolving disputes should not infringe on the complainants' rights and legal timeframes. An internal dispute resolution mechanism would extend and delay the process.

Regarding the IRR's submission, he noted the issues of value for money and transformation, and IRR's view that the Bill was more focused on transformation. He agreed that value for money was important, but transformation of society should not be shied away from. Transformation was necessary and would not occur automatically. Laws had to be put in place that advocated for transformation. If the focus was placed on value for money and no regulations were put in place for transformation, there would be no transformation. There should be deliberate actions and concerted efforts to achieve transformation. Transformation had to be addressed as much as value for money was important. If transformation was not emphasised, what other mechanisms could be put in place to ensure transformation?

Mr Skosana responded to the submission made by Corruption Watch. He noted the recommendation that Parliament should fund the PPO. He did not think this was possible, in terms of the separation of powers. There were three arms of the state -- the legislative arm (Parliament), the judiciary and the Executive. If Parliament funded the PPO, he was unsure of the implications, because the PPO was a function of the Executive. How would this be done? Parliament's role was oversight.

Ms P Abraham (ANC) responded to the submission made by COSATU and SACTWU, noting two broad statements by the stakeholders -- the public procurement laws should be appropriate, and compliance with minimum wages. She asked for further clarification on these two statements.

She said NEHAWU's submission had been the only one that referred to the private sector. She did not want to make and assumption, but it was her view that NEHAWU wanted the private sector to be added to the legislation.

She appreciated the call made by IWFSA for legislation to enable the 50%. It had raised a point regarding the timeframes for the Tribunal for urgent matters. How would differentiation be made between matters that were urgent and matters that were not?

The IRR had raised some substantive points, but she did not understand why there needed to be a trade-off between value for money and transformation. Value for money and transformation should go together.

The NRF had highlighted donor funding. She asked for more details on this.

Responding to the amaBhungane submission, she said there had been a lot of criticism of the Bill. amaBhungane had raised issues around practicality, instability, ineffectiveness, etc. They should not question the objects of the Bill. The Bill sought to deal with transformation. There should not be an assumption that because the Bill was transformative, it would be ineffective.

Ms Abraham responded to Corruption Watch's presentation, and said that taking the PPO to Parliament would impact the effectiveness of oversight. She appreciated the principle, but Parliament was not the place for this. Departments had to toe the line, because their duty was implementation and the responsibility to do this correctly. The action that should come from the department was the kind of action that would assure the public that they could be trusted. Going forward, this relationship was needed.

The BJC's issue regarding protecting the information versus transparency was a thin line. Protection of information could prevent transparency. These two aspects should go together. Particular information had to be protected, but this should not compromise transparency.

Stakeholders' responses

COSATU and SACTWU

Mr Eppel, on behalf of COSATU, responded to the question regarding the framework in section 17. The Constitution obliged the Bill to set a framework. At this point, there were 20 areas of preference in section 17 and there were approximately 700 public institutions. These public institutions could pick and choose the preferences as they wanted, and if they were combined, there could be up to a million versions of policies. If there was no single framework for monitoring the state, the system would be un-monitorable, which was a constitutional requirement. There was a deficiency in setting the framework.

He responded to the questions regarding the use of "when." He said it may be correct that using "when" was not a problem. The problem with the tender environment was that everyone was battling over tenders, and because 'when' was a loose term, the stakeholder felt that this would result in court cases and litigation. The proposal was an effort to prevent this, and ensure the smooth implementation of the Bill.

Mr Eppel referred to the whistle-blowing incentive, and provided an example. If someone had stolen R100 million through tender fraud

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and someone else came forward as a whistleblower with real evidence of corruption and fraud, the proposal was to ensure the ability of the whistleblower to proceed with action through the state or private prosecution. If substantial evidence was provided and the accused was found guilty and the money was recovered, the whistleblower could be awarded a percentage of the money that had been recovered. This percentage could be set at five or 10 percent, although some countries set this at 50%. This would encourage people to step forward, and would break the corrupt networks. A proposal had been developed at NEDLAC, and this could be provided to the Committee if necessary.

Mr Parks said that COSATU supported the constitutional mandate of transformation. He did not think the country could afford not to include provision for transformation in the Bill. He said COSATU did not support fronting that was abused. White persons held 62% of senior positions in companies, and this needed to be addressed.

He reiterated that regulations were not enough, and that certain things had to be included in the Bill. This would make the Bill as tight as possible, because politicians came and went, and regulations were easy to abuse and repeal.

Mr Parks responded to questions regarding the labour laws. He referred to the Employment Equity Amendment Act, which came into effect on 1 September, which stated that if someone received a state tender, a compliance certificate was needed from the Department of Labour to confirm compliance with the Employment Equity Act. This would help to standardise companies that broke laws.

He said that the Bill could not be over-delayed in terms of processing.

NEHAWU

Mr Parks extended an apology on behalf of Mr Mitchell from NEHAWU. He had to leave due to a personal emergency, and would respond to the questions via a written response. Regarding the Chief Procurement Officer, he felt that NEHAWU's point was that the position should be sufficiently empowered so that politicians could not influence it to turn a blind eye.

Due to technical issues, the NRF was unable to respond via the virtual platform.

The Chairperson invited the NRF to make a written submission.

He requested amaBhungane to respond, but it was indicated that there were sound issues with the virtual platform. The technical team would work to resolve the audio issues that were being experienced. He requested a quick break to resolve the connectivity issues.

The Chairperson indicated that the stakeholder response would proceed with the stakeholders who were present in-person, while waiting for the virtual meeting to reconnect.

IRR

Mr Crouse said that Mr Manyi had raised the law to the letter. Section 217(1) of the Constitution governed the Bill and did include the words "fair" and "equitable." How should 'equitable' be read? The IRR had read 'equitable' non-racially. Reading 'equitable' to mean racially had directly cut black people in the country. He highlighted the Constitutional Court case in 2018 involving Correctional Services, where it had been exposed that government had directly said that for many posts, no black men or women could apply, and that they would not be appointed. He highlighted the case of Adv Ncumisa Mayosi, who had been refused elevation at the Cape Bar specifically because she was a black woman, and it had been said that it would be inequitable to promote a black woman. This was a disgrace, and was not equitability. The IRR had a non-racial idea of equitability, where no one would be discriminated against on the basis of race.

Mr Crouse referred to 'fairness,' and said this went back to the equality clause in Section 9(5) of the Constitution, which had been directly quoted by Mr Manyi -- "discrimination on one or more of the listed grounds, including race, is unfair unless it is established that the discrimination is fair." This meant that the onus was to prove that it was fair. The IRR's submission was that this Bill, like the PPPFA in terms of racial preferencing, was taking money from poor black people and giving it to rich white, Indian, coloured, and black people. It was turning millionaires into centi-millionaires, and centi-millionaires into billionaires, and the poorest of the poor were paying for this. As a result of apartheid, the poorest people were disproportionately black. The IRR felt that this was unfair, and the onus was on the House to show that this was fair.

The IRR agreed that transformation could not happen automatically, and deliberate actions were needed. Independent research done in 2015 had shown that black-dollar millionaires were overtaking white-dollar millionaires in the country. Statistics SA showed that the black top 10% out-earned the white top 10% by a factor of three, and the black bottom 40% by a factor of eight. The black bottom 40% had not moved since 2007. This was the primary concern. The money was going from the poor to the rich. Action was needed, which meant service delivery at maximum value for money, ending load-shedding, improving the education system and addressing poverty. The IRR agreed that redress was needed to address apartheid. At this point in time, the most important way to do this was to protect poor people. When there was bad service delivery and corruption, the rich could afford generators, but the poorest of the poor could not afford this; they could not afford private schools when public schools were not working, and they could not afford private hospitals when the public hospitals were

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not working. Procurement was meant to pay for things for the poor. When they were made more expensive, it meant that there was less for the poor.

Mr Crouse highlighted Mr Manyi's statement regarding the quantifiable marginalisation of black people. This sounded as if, where value for money was achieved, this was perpetuating apartheid. There may have been an argument for this in the 1990s or early 2000s, but this was no longer true. There were now more black-dollar millionaires in the country than white-dollar millionaires. How could the system still be helping the rich to get richer? How could the system provide that a child of a billionaire was said to be disadvantaged, and needed a hand-out from government, where upwards of four million children did not have food to eat to sustain their growth?

The IRR's view was that if it was necessary to find a clear way to line up preferencing and transformation, the Zondo Report should be referred to. If two businesses were equal on value for money, the transformation system would refer to race in America. There had to be a tie on price before race was considered. Rather than helping black billionaires, help should be diverted to poor people who were disproportionately black.

Mr Crouse said another option was to accept that the best way to genuinely transform the country was to do business as usual. Every 'Mandela' (R100 note) should be made to go the furthest or achieve the most, because this would help the poor, rather than giving one man a billion 'Mandelas.' Each 'Mandela' should work for all South Africans. This Bill was an opportunity to do this by repealing the PPPFA and replacing it with a true value-for-money system for all South Africans.

The Chairperson noted there were comments on the virtual platform, but indicated that sound was still an issue.

Corruption Watch

Ms Van't Riet said that Corruption Watch supported transformation, but that this should refer to economic transformation. There needed to be a balance between the points system, but it could not come at the cost of value for money or service delivery, and be a breeding ground for corruption. The system has been operating for the last 20 years, and the nation's position was still one of starvation, high unemployment rates, etc, and this was evidence that the system was not working. The system was favouring a handful of elected and elite people. The system needed to be transformed so that value for money was prioritised, so that the poorest of the poor and the most vulnerable were the ones being preferred. The current system could not be allowed to continue as it had.

Ms Van't Riet responded to the concerns about fronting. The primary objective of the Bill, based on Section 217(2) of the Constitution, was that the public procurement system must be fair, equitable, transparent and cost effective. This was consistent with international norms and standards. Section 217(3) of the Constitution established the way South African preferential procurement policies should be implemented -- that national legislation must prescribe a framework within which the preferential procurement policy must be implemented. The downside was that the methodology may not always ensure that the intended beneficiaries benefit directly or indirectly. Previously disadvantaged or vulnerable groups were not automatically guaranteed contracts or participation. Fronting was a corruption risk, and was well established in South Africa. The successful tender was often not the tenderer that enjoyed preferential treatment. Proper measures needed to be put in place to capacitate those for whom the policy was intended to take advantage of the benefits offered. Procurement officers would need to manage this process properly. She highlighted an example that if a tender was granted to a company owned by a black woman, there needed to be checks and balances to ensure that the money paid over was paid into the account of the company beneficiary owned by the black woman. There needed to be strict eligibility criteria, verification of ownership, background checks and ownership transparency.

Ms Komote referred to the questions around section 38 of the PFMA. This was part of Corruption Watch's concern, that currently, there was cross-referencing and fragmentation due to the various pieces of legislation. Corruption Watch wanted to clarify that this Bill should be clear and certain in terms of what it wanted to achieve.

She referred to the concerns regarding the funding of the PPO. Corruption Watch believed that the PPO should be independent and that it should be funded by appropriation, such as other Chapter 9 institutions. The PPO would have independence, but should be funded by Parliament.

Ms Komote said that cooperative governance required that all spheres of government and organs of state had to cooperate with each other and co-ordinate their actions. Corruption Watch strongly believes that the Tribunal and the PPO should be separate and independent in order for them to function effectively and impartially. Best practice showed that being allocated as both decision-maker and oversight body did not work.

BJC and IY

Ms Komote commented that the office of the PPO could be undermined through the full provisioning and shared services with National Treasury. National Treasury was a procuring institution, and the PPO may find it challenging to regulate themselves due to political will. The BJC and IY were willing to contribute to framing the particular section in writing. The stakeholders would require more time to provide concrete solutions. She said there needed to be greater transparency in procurement which supported transformation and prevented

fronting, as this would enable the Bill to be as effective as possible.

amaBhungane

Ms James said that amaBhungane was fully committed to transparency and held themselves to the same standard that they would hold any entity to. Any donation above R10 000 was published on the website, which was accessible to everyone. amaBhungane believed in, and adhered to, transparency.

amaBhungane would elaborate on examples of innovation in their written submission. Ms James highlighted two examples. In Columbia, there was a formalised citizen monitoring system, where groups of citizens created by various entities in government were informed of any public procurement that occurred and were able to elect whether or not to participate in that procurement through a monitoring system. In Brazil, there was a public procurement observatory which had access to all the information around specific procurements, which also linked back to different government databases to flag any potential conflicts or irregularities. Further details on these examples could be provided, if requested.

Ms James said that amaBhungane did not believe the Bill was inefficient because of transformation imperatives, but rather that it was too broad and conferred to much responsibility on the Executive. There was concern that there would be inefficiency in the way that procurement operated and in the way that the transformative priorities were being effected. The faults in the Bill would impact the ability of government to achieve its transformation objectives and be ineffective in creating the ability for better service delivery.

IWFSA
Ms Galaktiou conveyed IWFSAs appreciation of the support for the 50% submission. She indicated that some points had been expanded on in the written submission.

She said that the reference to women-owned businesses did focus on black African women. The submission should be seen in conjunction with the broad-based black economic empowerment (BBBEE) legislation requirements.

She agreed that women excelled and were more heavily featured in the catering industry and aligned industries such as tourism. Women seldom featured in different industries such as engineering, construction and logistics. This was the reason why IWFSA proposed upskilling and financial assistance being provided to assist black-owned and women-owned businesses to be able to participate.

She supported what had been said by Corruption Watch in terms of fronting. Fronting was a reality, seen throughout the years of BBBEE, and was a challenge. This was why transparency and monitoring were a requirement. Putting in proper measures was necessary to challenge and dilute this problem.

Responding to the questions regarding the Tribunal, she acknowledged that the wording may have been poorly chosen in terms of internal and external. What was being referred to was that 'internal' meant the Tribunal, and 'external' meant the court system. The question of urgency had to be considered. How would the Tribunal be able to determine whether a matter was urgent. There needed to be an opportunity and methodology for a complainant to be able to approach the courts on an urgent basis and, if necessary, bypass a tribunal where the courts were able to make the decision on whether a matter was urgent, if the Tribunal could not do so within the timeframe.

Ms Irene Charnley, IWFSA President, said the Forum developed African black women because that was the need. In future, IWFSA would ensure that this emphasis was clearly indicated. She appreciated the Member's inclusion of coloured women. Once the legislation was in place, IWFSA would ensure that they upskilled, developed and ensured that African black women were the ones to develop their businesses and grow these businesses into multi-billion-rand businesses. There was nothing wrong with an African black woman owning multi-billion-rand businesses, because this was what the economy needed. This process was part of the process of black people owning the economy, as currently, only a small percentage of black people owned the economy. Black people had political power, but did not yet have economic empowerment. She reiterated that Members should ensure that the 40% was increased to 50%.

Follow-up questions

Mr Manyi said COSATU had referred to the Employment Equity Act, which spoke to the issue of penalising companies which were non-compliant. The new legislation that had come into effect had removed the turnover threshold for small companies that employ fewer than 50 people. He was nervous about what COSATU would do to ensure the use of that. He felt that the law had created a loophole. This meant that a multi-billion-rand company could ensure that their permanent staff members were under 50 people to evade the law. How did COSATU allow this to happen?

Mr Manyi said that BEE-levels were a farce and easy to manipulate. This had to be changed. He did not take people who referred to BEE levels seriously because of corruption.

He responded to the IRR that it was important to understand that no law would be an omnibus -- each law had a specific purpose. This law was about procurement, not other issues like social development. Other legislation focused on the poor.

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He said that he became annoyed when institutions like Corruption Watch and the IRR, which were not known for transformation, came to Parliament and played advocates for the poor. He did not like to be patronised. If these institutions want to show interest in the poor, they should reflect this in their work.

There had been a lot of reference to the Zondo Report. It was important to understand that no commission of inquiry had binding recommendations. Stakeholders should not posture that Zondo had said something particular, because these recommendations were not binding. This was a legal position and he did not have an issue with Chief Justice Zondo, despite him being the worst performer in the interviews.

Mr Manyi said that while Corruption Watch had been clearer in its concerns and recommendations for the Procurement Officer, its statements had initially been too general. Corruption Watch had highlighted that National Treasury was a procuring institution, so how could a procuring institution have the Procurement Officer located in Treasury? He agreed with this. He had similar concerns with the placement of the internal auditor of a department. If an internal auditor sat in corporate affairs within the department of corporate services, and was expected to audit corporate services – this was a problem. This issue would need to be looked at to ensure that the PPO could apply the same rigour to the National Treasury as it would to other entities.

The Chairperson asked if there were any questions on the virtual platform. He invited the stakeholders to respond.

Mr Parks said public procurement could be a powerful instrument to incentivise employers to abide by labour laws. COSATU was of the view that if a company received public funds, they should be fully compliant. COSATU highlighted the Employment Equity Act and the clause stating that if anyone wanted to get a tender from the state, they needed a compliance certificate from the Department of Labour, per the Employment Equity Act. He stressed that state tenders had to be made to comply with the Minimum Wage Act. Either now or during the 18-month review, it should be expanded into other levels, including health and safety, labour relations, basic conditions, etc. If companies abided by the laws, they should be rewarded; if they did not, they should face the consequences.

He said there was a responsibility on the inspectors in the Department of Labour to deal with abuses. He was hopeful that when meeting with the Committee in November, provision would have been made for the Department of Labour to support this need. There were 1 400 inspectors in the Department of Labour, and it was unrealistic to expect these inspectors to deal with all the cases that arose. Businesses had to do much more to ensure compliance. During COVID-19, many employees were unable to draw from the Unemployment Insurance Fund (UIF) because their employers had not paid the money into the Fund. Last week, it was discovered that 3 200 employers had basically pick-pocketed workers, deducted money for UIF and not paid it into the Fund.

Mr Parks responded to the issue of exemptions for small businesses. This exemption had always been included. He highlighted potentially reducing the number of employees needed to be considered a small business, from 50 to ten. He commented that many of the laws had been passed when Mr Manyi was serving as the Director-General for the Department of Labour.

Mr Manyi said that it was correct that the laws had been passed as an effort to curb the mischief, but the amendment had loosened them. Initially, it had been said that if an employer employed 50 or less, it was a small company and it was unnecessary to submit an employment equity report. The amendment had removed the threshold, and because of this, there were R5 billion turnover companies that had employed 200 people that would begin to bring their number down to below 50 to avoid submitting an employment equity report. Where was COSATU when this had happened? He said that this had occurred in his absence.

Ms Komote addressed the comment that Corruption Watch was not transformative. Only 10% of Corruption Watch's staff were non-black. Corruption Watch did a lot of work in mining-affected communities. It assisted predominantly black women and men in receiving assistance and capacitation around the extractive industry and mining companies, dealing with human rights abuses. Corruption Watch also assisted whistleblowers who were predominantly black people. They worked with different coalitions and advocated for budget transparency and socio-economic rights. They were doing much more than time had allowed them to speak about. The organisation was committed to ensuring that South Africans received the full realisation of their human rights.

Mr Crouse responded to the statement that the IRR was posturing regarding the poor. The IRR had contacted Treasury to find out how much race preferencing had cost the fiscus, meaning all South Africans, especially poor South Africans. It had not yet received a response. Treasury was about accounting and knowing where the money was. This response would provide insight into who was posturing.

Mr Crouse responded that Mr Manyi had said that procurement was not concerned with other issues. He felt that this was an attempt to convey that social issues, such as a low literacy rate, issues related to Eskom and infrastructure, should not be brought up on record, because it was the responsibility of other departments. He emphasised that Treasury and procurement, because it was an area of money, everything that government did go through the Bill. Government expenditure was going to be R1 trillion, which was a huge amount of national wealth. This Bill would determine where the R1 trillion went. When considering the bad outcomes -- and different departments could be seen trying to find new ways to move forward -- the IRR felt that they would be fighting a battle against poverty and bad service delivery with one hand tied behind their backs. This Bill and its very confusing, overladen, multifarious purposes eroded value for money.

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The IRRs submission was simple – value for money first. Every rand should be made to count and go as far as it could go. It was true that this recommendation was based on the Zondo Report. In response to the statement that the Zondo Report was not binding, the IRR had heard promises from various political parties to implement it. The Zondo Report was not a binding document -- the binding document was the Constitution. Section 217 was on procurement, section 9 on equality and section 1 on the founding values of non-racialism, and the IRR had based its submission on this. In its current form, it felt that the Bill would take money from the poor and give it to the rich. This would make businesses very happy, and established big businesses would get even bigger by selling less for more. The poor would continue to get poorer. If the Bill was passed as it was, it would be challenged in court, and held up against the Constitution. This would be an expensive exercise, as the lawyers would want to make money and time would be wasted. This whole court process could be avoided if lawmakers addressed issues in the Bill ahead of time so that the poor could stand a better chance and the country could fulfil the promise of growing together.

The Chairperson thanked the stakeholders. He indicated that the meeting would proceed with submissions by other stakeholders.

BBC submission

The Black Business Council (BBC) made a submission on the Public Procurement Bill, which Mr Elias Monage and Mr Kganki Matabane presented.

The BBC emphasised that transformation was a national project which sought to address the core issues plaguing black South Africans. They suggested that the Bill should define 'transformation,' because it had a different meaning to different people.

The BBC were pleased with the establishment of the PPO, but was concerned that the PPO was not mandated to monitor the implementation of preferential procurement. They submitted a preferential procurement policy framework which consisted of pre-qualification, the application of primary categories of preference and the application of secondary categories of preference.

The BBC noted that the Minister was empowered to prescribe a procurement system through regulations, but felt that the principles needed to be included in the legislation.

The Chairperson indicated that the BBC had run out of time, and the meeting would proceed with the next submission.

See attached for full submission

ABASA submission

The Association for the Advancement of Black Accountants of South Africa (ABASA) made a submission, which Ms Linda Maqoma presented.

ABASA indicated that the five principles of public procurement, as defined in the Constitution – fair, equitable, transparent, competitive and cost-effective – were not given the same weight and level of prioritisation.

They supported the establishment of the PPO, but were concerned that the PPO was not mandated to monitor the implementation of preferential procurement, which was a major object of the Bill. They felt that the Bill was insufficient in resolving the issues faced by black people, and that the preferential procurement policy needed to address this.

ABASA noted the Minister's power to prescribe a procurement system by regulations, but believed this should be included in the legislation.

ABASA welcomed the establishment of the Tribunal.

See attached for full submission

DoD submission

The Chairperson indicated that Ms Abraham would step in as Acting Chairperson, while he attempted to resolve the audio and connectivity issues.

Ms Fikile Khumalo, Director: Material Governance Risk and Compliance, Department of Defence (DoD), said the department proposed that the Bill had to expand on the role of the PPO and the processes and procedures that needed to be followed, and that this be incorporated into the regulations.

The DoD was concerned with the potential disclosure of confidential information. It proposed that the information disclosed had to comply with the Promotion of Access to Information Act (PAIA) and the Promotion of Administrative Justice Act (PAJA).

The Acting Chairperson said that the previous day, she had had a question about how Treasury could best deal with departments and other spheres of government, where the municipality had asked a question. She said it was an issue, that departments had made submissions at the same time as other stakeholders. There should be a separate process for departments to make submissions.

See attached for full submission

APLU submission

Professor Geo Quinot, African Procurement Law Unit (APLU), University of Stellenbosch, said ALPU welcomed the Bill, adding that law reform in public procurement was urgent and necessary to address inefficiencies in the procurement process, the high levels of corruption, and to enable procurement to play a role in realising developmental goals.

APLU proposed that no other form of subordinate legislation, other than regulations, be mandated under the Bill. It felt this was a leading cause for fragmentation in the current public procurement law.

The Unit was concerned that the Bill was not wholly compatible with the paradigm of public finance management under the PFMA and the local government Municipal Finance Management Act (MFMA). The accounting officers were responsible and accountable for the public finance management of their institutions. There was concern that this may result in a lack of accountability. This required serious attention.

See attached for full submission

SABTACO submission

The South African Black Technical and Allied Careers Organisation (SABTACO) made a submission, which Mr Clint Koopman presented.

SABTACO supported the establishment of the PPO, but was concerned that it was not mandated to monitor the implementation of preferential procurement.

It noted the empowerment of the Minister to prescribe a procurement system by regulation, but felt that the principles should be encapsulated in the primary legislation.

See attached for full submission

Transnet submission

Mr Macdonald Maluleke, Chief Procurement Officer, Transnet, said that the Bill should not be overly prescriptive in terms of preferential procurement. Organs of state should be allowed to design their policies according to the unique industries they operate in. The Bill should set a uniform minimum framework, rather than focusing on 'norms and standards.'

See attached for full submission

Orizur Consulting submission

Orizur Consulting's submission was presented by Adv Lufuno Khorommbi, who stated that public procurement should drive local innovation, but instead it had been inhibiting innovation. Orizur felt that the Bill did not address issues of local content, localisation and innovation.

Orizur requested that the power of the PPO in terms of Section 5(2)(e) and Section 6 should be clarified.

It felt that a single framework had not been provided by the Bill, so a demonstration that a single framework had been created needed to be provided. Orizur was of the view that the objectives had not been clearly translated into the provisions of the Bill.

See attached for full submission

Group of construction and engineering companies' submission

A submission was made on behalf of a group of construction and engineering companies.

The presenter noted the absence of accountability in the Bill. It was important that businesses and government officials were held accountable for their actions. The Bill provided that this would occur through regulations.

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The group was concerned that the Bill did not provide a legislative framework compliant with Section 217 of the Constitution. It permitted the Minister to make use of regulations. This did not meet the requirements of Section 217 of the Constitution.

The group asserted that the Bill sought to restrain the ability of municipalities and provinces to determine their own procurement criteria. Based on this, it would be unconstitutional.

The Bill did not meet its stated objective. The framework had to be included in the legislation, not in regulations.

See attached for full submission

National Strategic Plan on Gender-Based Violence and Femicide - Pillar 5 submission

Ms Phelisa Nkomo, Co-Chair of Pillar 5 on Economic and Development Economist, NSP on GBVF, said the government should launch targeted awareness campaigns, workshops and training programmes to educate women-owned businesses about the Bill's provisions, to empower them to participate meaningfully in procurement processes.

The stakeholder recommended the inclusion of incentives for private sector engagement with women-owned businesses. This would amplify the Bill's impact.

The stakeholder was of the view that the Bill was a critical step towards promoting gender equality and economic empowerment through the increased participation of women-owned businesses in public procurement. The challenges and loopholes had to be addressed so that the Bill could be an instrument to drive sustainable economic growth, foster gender parity and uplift women-owned businesses.

See attached for full submission

Discussion

The Acting Chairperson thanked all the presenters for their submissions. She reiterated that departments and other stakeholders should have a separate submission process.

Mr Manyi welcomed the presentation of the National Strategic Plan on Gender-Based Violence and Femicide. He said the Bill had framed itself as a value-for-money Bill, but this had to be read in conjunction with Section 217(2) and the equality clause. When referring to Section 217(1), the clauses in the Constitution that spoke to transformation should also be highlighted.

He welcomed the input from the group of construction and engineering companies. He agreed that everything should be included in the legislation, not in the regulations. Ministers could be bought, and therefore the framework should be put into law. If any stakeholder was pushing for regulations, that organisation should be treated with suspicion. This directive for the framework to be included in the legislation was provided for in the Constitution in Section 217(3), and he noted the framework proposed by the BBC.

Mr Manyi said ABASA had highlighted value for money. As an example, he said if someone wanted to secure their house, they would not put a ribbon around their house, they would build high brick walls. Was the brick wall not value for money, because it was more expensive? People should not downplay transformation. Transformation was crucial; an individual could not enjoy their riches if everyone else struggled. Empowering all people was in the interests of everyone.

He said the transformation of the public sector was very important, and noted the BBC's proposal that this should be included in the legislation. He suggested that rather than including this in the Bill, a bill should be created that would address the private sector. The EFF would be able to do a good job with this. The private sector was a complex issue and could not be included as a subsection in the Bill. This would save time, as it would not require sending the Bill back to the drawing board.

He expressed concern regarding the presentations made by state organs. He felt that time should not be wasted on this because the DoD was a government department, and in government there was a structure where all DGs sat and co-ordinated policy. Why was the DoD making a submission to the Committee when there was a structure dedicated to this? By the time Treasury came to the Committee, the DGs had already interacted with the Bill. This process was meant for the public to interact with the Bill. He felt that this was an abuse of the platform.

Mr Manyi said that the PPPFA Section 3 allowed a Minister to exempt state-owned enterprises (SOEs), for example, from all appropriations of the state. Transnet was wasting time, and could just request an exemption. Section 2 of the PPPFA allowed SOEs to develop their own preferential policies, and the Constitutional Court clarified this on 16 February 2022. This judgment clarified that the Minister had no power to regulate SOEs. He was surprised that SOEs had not used this opportunity to highlight that there was case law on the issue. Telkom had used the opportunity to get out of the mess of the PPPFA and PFMA, so why were other SOEs not making use of this? SOEs were collapsing because this legislation was not meant for commercial entities like SOEs. He felt that this demonstrated a lack of

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leadership in the SOEs.

He said the APLU stated that the Minister should prescribe in the regulations, but there was a ruling on this. Something could not be prescribed in the regulations if it was not included in law.

He would have thought that SABTACO would have focused on how the Bill impacted the Construction Industry Development Board (CIDB). This Act was destroying SABTACO members, yet SABTACO was silent on the CIDB. He had expected SABATCO to speak to the disabling features of the CIDB. This was a lost opportunity. He encouraged SABTACO to bring these issues up.

Mr Skosana welcomed and appreciated the submissions. He said the DoD had recommended that the issue of sub-contracting be included in regulations. He noted the statement that the Bill should refer only to regulations, and requested clarity on this -- was the DoD saying that instructions and guidelines should be done away, with and that there should only be regulations?

He felt that SABTACO had made a good submission. It emphasised that there should be no competition between transformation and value for money. Transformation was part of value for money. Value for money could not be prioritised if it meant neglecting transformation.

The Acting Chairperson thanked Members for their engagement. She indicated that any other questions and responses by stakeholders should be submitted in writing due to issues of time caused by load-shedding and connectivity issues.

Chairperson's closing remarks

The Chairperson thanked the Members and stakeholders for the submissions. The past two days had been dedicated to public hearings.

He said that public participation was very important in ensuring the public participated in decision-making and law-making processes. The Bill was important because it addressed the issue of transformation. It was not the first time that the issue of transformation was being attended to.

He quoted former Chief Justice Pius Langa: "Transformation is a social and economic revolution, and anything that we have to do will be insufficient unless we deal with the issue of transformation."

The Chairperson said that former Chief Justice Arthur Chaskalson had dealt with the issue of substantive equality. Equality should be substantive, not just to comply.

He said that transformation should address social injustices and imbalances. During colonialism and apartheid, race had been used to control access to South Africa's productive resources and access to skills. South Africa's economy still excluded the vast majority of its people from ownership of productive assets. Transformation must be effected to redress apartheid strategies of economic exclusion and inequality, bringing black people, who were the majority of the population, into the mainstream of the economy. Dealing with this Bill has to advance the protection of persons disadvantaged by unfair discrimination.

The Chairperson said that women who had made submissions had raised the issue of patriarchy. The Committee could not behave as if everything was equal. Men still held the power, and women were still disadvantaged. Procurement needed to be gender inclusive to address this.

Youth were raising a strong voice that they were also disadvantaged. When considering the statistics on unemployment, youth constituted 74% of unemployed people. Disabled people were also affected.

The Chairperson said the Bill had to respond to all these disadvantaged sectors. The state had to use procurement as a tool of empowerment for the previously disadvantaged. The submissions had emphasised that the state spent almost R1 trillion on procurement, and of that amount, how much did women, youth, the disabled and Africans benefit? It was important for the state to intervene to level the playing field. The issue of transformation needed to be addressed. It was important that Chapter 4 not be left as it currently stood.

The Bill was currently in Parliament, but had been with the Executive since 2014. It could not now go back to the Executive. It had been referred to the Committee, and the Committee could not refer it back to the Executive – this was not how the separation of powers worked. Whatever issues were left by the Executive, if the public raised these issues, it was Parliament's responsibility to address them.

The Chairperson described the process moving forward. While public hearings had been completed, the Committee did not intend to disadvantage those who had not been able to make submissions. The opportunity for written submissions would remain open. He had received a call indicating that young people were concerned that they had not been able to make a submission, so provision for a written submission would be made. National Treasury would have to address and respond to the issues that had been raised by the stakeholders. The issue of Chapter 4 had to be addressed, as well as the framework. Parliament did not want to pass a bill that would be challenged. He noted that legal advice would be received to assist Parliament with any legal issues.

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He said important issues had been raised by stakeholders, including the issue of local content. This was a matter that needed to be attended to. South Africa should not be left vulnerable in areas where it has a competitive advantage. There were issues where consultation with other committees was necessary, such as the issue of whistle-blowing. Parliament would work as a collective to ensure no contradiction between legislations. After the response by Treasury, Parliament would deal with the Bill clause-by-clause and submit the report, which would be sent to the President for assent.

The meeting was adjourned.

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21 February 2024

SUBMISSIONS ON PUBLIC PROCUREMENT BILL, 2023

Introduction

1. The amaBhungane Centre for Investigative Journalism welcomes the opportunity to make written submissions to the National Council of Provinces 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. We appreciate the opportunity to make these submissions.

6. We attach the submissions we made to the National Assembly as 'Annexure A', and the Supplementary Submissions we made as 'Annexure B'. Those submissions contain the entirety of our concerns with the Bill.

7. In these submissions, we highlight only those concerns which had direct relevance to the provinces and which we believe complicate the cooperative governance needs within public procurement.

Fragmentation

8. We believe that the Bill fails in its objective to address the legislative and regulatory fragmentation that has rendered the procurement system unworkable.

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9. While we disagree with the sweeping powers conferred on the Minister to regulate the procurement system, the delegation of seemingly analogous powers to the Public Procurement Office (PPO) and the provincial treasuries is of particular concern here.

10. The Bill empowers provincial treasuries to issue binding instructions for procuring entities *within their provinces* but only when they are not inconsistent with instructions from National Treasury (through the PPO).

11. In theory this may be possible, but in practical terms, this will cause significant problems:

    a. It is not always simple to determine whether an instruction will or will not be inconsistent with a nationally-issued instruction. Seemingly consistent instructions may, in practice, be inconsistent and may result in court challenges to determine their applicability. This causes uncertainty and delays in the implementation of provincial procurement priorities and policies.
    b. This also creates the risk of a proliferation of instructions for procuring officials to follow. As the Zondo Commission noted, the 'difficulties in interpreting the legislative mosaic' was as an 'intractable problem'.[1]

12. The requirement of consistency also removes the opportunity for provincial treasuries to be able to issue context-specific instructions for their province's needs.

13. To avoid the traps of fragmentation that bedevils our existing procurement system, we recommend that the key components of the system be established in the primary legislation.

14. 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.

15. In our submissions to the National Assembly, we referred to the United Nations Commission on International Trade Law's (UNCITRAL) model procurement in law in 2011 which provides guidance on how procurement should be statutorily regulated. We reiterate that the model law should serve as a guide for how South Africa legislation should regulate procurement.

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

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16. If the primary regulation of procurement is done in legislation, the context-specific needs of different categories of procuring entities could be addressed in provincial instructions.

17. This would retain the ability of provinces to mould procurement policy to the extent that it is necessary to give effect to the principle of cooperative governance, without creating the web of legislation, regulation and instructions that we presently have.

Anti-Corruption

18. It is no secret that procurement has facilitated much of the country's corruption. The SIU has stated that 90% of its cases are procurement-related corruption.

19. The Bill's failure to introduce truly effective oversight and accountability mechanisms is therefore one of its key failings.

20. The Bill introduces a Tribunal in section 38:

> *1) The Public Procurement Tribunal is hereby established to review decisions taken by—*
>
> *a. a procuring institution in terms of section 37; and*
>
> *b. a procuring institution to debar a bidder or supplier in terms of section 15.*
>
> *2) The Tribunal—*
>
> *a. is independent;*
>
> *b. must be impartial and exercise its powers without fear, favour or prejudice;*
>
> *c. is a tribunal of record; and*
>
> *d. must perform its function in accordance with this Act and other relevant legislation.*

21. It is not clear from the Bill that the Tribunal will be adequately resourced to effectively fulfil its duties.

22. The structure of the Tribunal is such that it is likely that a majority of the cases before it will be resolving disputes raised bidders and supplies rather than addressing possible corruption.

23. For this, and for the reasons we set out in our submissions to the National Assembly, we do not believe that the Tribunal meets the urgent need to address corruption in procurement.

24. The existence of a centralised Tribunal also calls into question the ability of provinces to create their own dispute resolution and accountability mechanisms.

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25. KwaZulu Natal has had success with their Bid Appeals Tribunal and it is not clear how such a system would operate within the framework created by the Bill.

26. Given the lack of innovation in the Bill's approach to both simple dispute resolution and the more complex problem of combatting corruption, it would be a great pity to remove the capacity of provinces to create their own systems to meet these goals in their jurisdictions.

27. We urge the NCOP to recognise that the Bill simply does not respond to the enormity of our procurement-related corruption problem. As we detail in our submissions to the National Assembly, we recommend that the Bill be redrafted to include innovate ways to include citizen monitoring and independent oversight and monitoring of procurement.

Transparency

28. The Bill does attempt to strengthen the transparency of procurement documents but does not go far enough.

29. We know that individual provinces have introduced open and or electronic procurement systems which have greater transparency than is nationally required. This is extremely positive and we welcome these sorts of developments.

30. One weakness in the Bill is that, although it mandates that information on bidders and the 'date, reasons for and value of an award' be disclosed, it does not require the publication of information from other stages of the procurement process.

31. 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.

32. We therefore encourage the NCOP to push for greater transparency and amend section 27 of the Bill to include the requirement to disclose information throughout the procurement process, including the annual procurement plans and details about the financial and physical implementation of the contract.

33. This would ensure that the provinces that have already taken steps to develop transparency through the procurement chain will have legislative backing to their efforts.

34. We are deeply concerned that the Bill excludes 'confidential information' from the obligation to disclose. The concept of 'confidential information' in

the Bill is far too vague and overly-broad to constitute a legitimate ground for secrecy.

35. As we explain in our submission to the National Assembly, there is no reason for all 'commercial' information to remain confidential and, The Open Contracting Partnership has highlighted the dangers of an over-reliance on 'commercial confidentiality' within procurement legislation, commenting 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."[2]

36. Obligations to disclose commercial information do not hinder commercial practices and do, in fact, improve competition.

37. The Bill also confers blanket confidentiality over personal information.

38. There is no legitimate need for *all* personal information to remain confidential.

39. We urge the NCOP to consider the real benefits – to procuring entities, accountability mechanisms, the tax payer, and citizens – of transparency in the procurement process.

40. We recommend that section 27 of the Bill permit only 'legitimately sensitive' confidential information be severed from what is published, and that there is a statutory public interest override. This would ensure that transparency is prioritised when the public interest demands.

41. We also recommend that the blanket personal information confidentiality be removed.

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

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ANNEXURE A

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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.

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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.

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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.

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

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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;*

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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*

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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

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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.

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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.

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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

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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.

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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.

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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.

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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.

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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

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[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.

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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.

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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.

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