

PRELIMINARY COMMENTS ON THE DRAFT PUBLIC PROCUREMENT BILL

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ABSTRACT

In this short note, I identify three key objectives which the draft Public Procurement Bill (Bill) aims to achieve. Two of these are substantive: the advancement of preferential procurement, including local production and opportunities for local suppliers; and value for money, which includes innovation and efficiency, and the maximising of competition. The third objective is to achieve regulatory coherence through the consolidation of all public procurement laws in a single statute. The note then examines relevant provisions in the Bill in order to assess the extent to which they support these objectives and are likely to result in improvements in the targeted areas. Ultimately it concludes that none of the key objectives are clearly met by the Bill. Regarding preferential procurement, the Bill provides only a light framework without adequate guidance on how it should be populated through the making of regulations. The provisions which give effect to the concept of value for money by regulating the considerations for contract award, are unclear in regard to the role of pricing relative to other bid evaluation criteria. Finally, although the Bill repeals a number of provisions in other statutes dealing with public procurement matters, and at least one statute in its entirety, it also provides for a multitude of new regulatory instruments that may be promulgated by a number of State actors, which is likely to result in another complex web of procurement laws and instruments which organs of state and prospective suppliers will have to navigate.

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1 Introduction

The long-awaited and long-drafted Public Procurement Bill has finally seen the light of day.¹ This means that South Africa's community of procurement law practitioners can begin to engage with the text and to offer proposals and suggestions to strengthen the current text.

The Bill currently has several key objects: to address preferential procurement, including local production and opportunities for local suppliers; to provide value for money, innovation and efficiency, and maximise competition; and to create, through a process of consolidation, a single regulatory framework for public procurement. Does the Bill achieve these objects, through this text's operative provisions? This comment discusses this question, taking each broad objective in turn.

2 Preferential procurement

Preferential procurement as contemplated in section 217(2) of the Constitution,² and local manufacture / supply, and the promotion of small business, is all provided for in one chapter of the Bill. However, this chapter consists of just one section – section 26. Here, were this version of the Bill to be passed, Parliament delegates the authority (its legislative authority) to prescribe the preferential procurement and localisation framework, to the Minister of Finance. The Bill also pursues two complementary

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¹ Hereafter referred to as "the Bill".

² Constitution of the Republic of South Africa, 1996.

objects: to repeal the whole of the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA), and to effectively take the procurement provisions included in the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act) out of that legislation.

There are some guidelines given in section 26. The Minister's framework as mandated by the Bill must be aimed at preferential treatment for categories of preferences, and the protection or advancement of persons previously disadvantaged by unfair discrimination (as per section 217(2) of the Constitution). The section explicitly includes women, youth and people with disabilities as persons in categories of potential preference. However, the remaining categories of preference, whether persons or businesses or sectors, are unspecified.

This approach, of delegating to the Minister the task of prescribing the framework, is arguably insufficient to meet the requirements of section 217(3) of the Constitution. That section requires Parliament to enact legislation which prescribes that framework. It was in terms of s 217(3) that the PPPFA was enacted.

Furthermore, some aspects of the mandate given to the Minister in section 26 are conceptually unclear. Section 26(2)(c) permits the Minister to prescribe by regulation, "measures for preference to set aside the allocation of contracts to promote [various categories of suppliers / goods referred to therein]". A preference-based system is different from a system of set-asides. The intention of this parameter is not obvious.

There is conceptual unclarity elsewhere as well. Section 26(2) states that the framework to be prescribed by the Minister must include "measures to advance a category or categories of persons or businesses or a sector", but also "measures for preference to set aside the allocation of contracts to promote, amongst others, a category or categories of persons or businesses or a sector". Again, the intention of this distinction is not clear. And section 26(2)(d) permits the Minister to prescribe "measures regarding the participation of a manufacturer of goods in a bid to supply the goods it manufactures". The meaning of this provision is unclear. Does it mean that manufacturers could be obligated to supply Government through intermediaries, or that they may be prohibited from doing so? The reader does not know and it thus appears that the provision does not give adequate guidance to the Minister.

While the repeal of the PPPFA is clearly accomplished, the Bill's treatment of the B-BBEE Act remains vague. Section 26(2) requires the Minister to "consider the Broad-Based Black Economic Empowerment Act" in designing the preference system to be prescribed. This is not sufficient guidance on how the preferential procurement regime should interact with the regime provided for in the B-BBEE Act and codes of good practice. If bidders and suppliers are faced with a B-BBEE Act and codes regime on the one hand, and another regime for measuring preferences in procurement on the other, this will be very burdensome for businesses when transacting with the State, and would undermine the work done to date on standardising the methodology for calculating B-BBEE credentials and the ability to compare the credentials of competing business entities.

Overall, the preferential procurement and localisation provisions are surprisingly thin. The text of this Bill actually gives little direction. There is no sense of the Bill taking the objectives of preferential procurement or localisation forward, nor of a careful weighing up of the trade-off between those objectives and price.

3 Value for money, innovation and efficiency, and maximum competition

Regarding value for money, it is not clear from the Bill itself on what basis a successful bidder will be selected, and what role price plays in bid evaluation. This can be seen in examining three particular sections or sub-sections. Section 37(6) requires that the aim of the bid evaluation process is to "determine the most economically advantageous bid". Section 37(7) refers to the process of "identifying the bid with the lowest evaluated price that meets the qualification criteria". Section 42, dealing with award of contracts, states that the institution must award a contract to the compliant bidder with the "highest score", subject to Chapter 4 which deals with preferential procurement (discussed above). In an important omission, the methodology for scoring a bid, including how preferential procurement will be applied, is not provided for in the Bill.

These concepts, of the most "economically advantageous" bid, the "lowest evaluated price[d]" bid, the "highest scor[ing]" bid, and the manner in which preferential procurement figures in the calculations, are enormously important in procurement

practice and should be clearly defined or described. The importance of clear definition of these concepts is heightened by the inclusion of provision for evaluation of functionality / technical credentials, as the relationship between technical competency and price, in the comparative assessment of bids, is a key consideration in any evaluation methodology.

Another area of perceived potential cost-saving and efficiency is transversal contracting. The Bill makes more of transversal contracting than is the case under the current Treasury Regulations.³ It provides for National Treasury to contract for goods, services and infrastructure which have been designated as being transversal in nature, on a transversal basis. Moreover, provincial treasuries can also engage in transversal contracting for goods, services and infrastructure not already contracted for by National Treasury, and after consultation with National Treasury.

As proposed by this Bill, institutions to which a transversal contract applies will be obligated to participate in the transversal contract unless exempted by Treasury. Each institution will have to conclude a service level agreement with the supplier. This is potentially a big change; the current practice on transversal contracts is not nearly this prescriptive. Also the level of administrative efficiency required to develop, maintain and operate a central database of transversal contracts and to manage exemption and approval requests is considerable. This substantial change towards central contracting may also have unintended consequences, for example adverse impacts on local or regional suppliers, small businesses, and competition.

Other areas where value for money, affordability and pricing are always a concern are public private partnerships (PPP) and infrastructure delivery / procurement. PPPs seem to be regulated under the Bill in more or less the same terms as they are currently regulated under the Public Finance Management Act 1 of 1999 (PFMA).⁴ The current regulatory regime for PPP procurement may be a rigorous process with plenty of checks and balances, but the general experience to date has been of

³ GN R225 in *Government Gazette* 27388 of 15 March 2005, issued in terms of the Public Finance Management Act 1 of 1999.

⁴ Treasury Regulations, regulation 16.

expensive projects and a sector in the doldrums. So, more of this same type of regulation does not breathe life into the PPP market.

Similarly with infrastructure procurement, the Bill makes a meal of distinguishing the provisions which apply to departments and non-business public entities, on the one hand, and those that apply to the major public entities and government business enterprises, on the other, but then defers all the regulatory detail, in both cases, to a “standard” for infrastructure procurement. In my view the definition of “infrastructure” is confusing and unclear. It also does not clearly delineate between what is infrastructure and what is goods and services, which means that it will be difficult to discern when the “standard” applies and when the general procurement rules apply. I am also unclear about what the distinction between the various categories of institutions is intended to cater for. Finally, the relationship between the Construction Industry Development Board Act 38 of 2000 (CIDB Act) and the myriad regulatory instruments issued under that Act, which surprisingly appear to have been left intact by the Bill, and the Bill with its infrastructure delivery standard, is something of a mystery.

Regarding the use of technology and innovation, section 15 of the Bill encourages institutions to use ICT to implement any of the procurement methods under the Bill. Of course, the procurement methods are also not in this Bill and are, rather, to be prescribed by the Minister. So it remains to be seen whether the methods prescribed by the Minister facilitate the application of high-tech solutions which may achieve efficiency, cost-savings and innovation.

The Bill has an extensive coverage of bid process requirements. However, there is nothing in the bid process requirements, including those relating to bid opening sessions, checking bids for compliance, verification of suppliers, the bid committee system, the contents of bid invitation documents, etc., that lends itself to innovation. It will thus be interesting to see how the Minister can give effect to this technology-forward mandate, within the confines of the very traditional procurement process parameters which are entrenched in the Bill and which apparently (and inappropriately) apply in the same way to all procurement methods.

Some innocuous looking provisions in the Bill are stated in very general terms but could nonetheless have huge implications, both for suppliers and institutions. It is not clear to me whether the objective of these provisions is to advance preferential procurement, efficiency, value for money, or something else. For example section 5(1)(j) permits the Regulator to “create and maintain one or more databases as envisaged in this Act”. Then section 117 states, “If the Regulator creates a database in terms of section 5(1)(j) for specified goods or services, institutions may only procure goods or services through written price quotations from prospective suppliers listed in that database”. What exactly does this mean, especially where the process for creating a database is not specified? Is the intention to create a central supplier database, as has been done by National Treasury? If so, why limit the use of it to procurement through “written price quotation”? Is an institution restricted to using those suppliers registered on the database only, for goods and services? Can an institution buy goods or services based on price quotations alone, from a database supplier, no matter the value of the goods and services? What about other bid requirements, relating to preferential procurement, localisation, technical competency etc.? Is this provision designed to promote efficiency, economies of scale, or some other objective which is not explicit in the provisions? What about maximum competition?

Another example of this sort of provision is section 14, which provides that if an institution transfers funds to a person or organisation other than an organ of state to implement a project on behalf of the institution, any procurement arising from the project must be in accordance with the Bill. The parameters of what would constitute “implement[ation of] a project”, and where the requirements apply, are not clear. For example, if an institution appoints a private party on a PPP basis, must the private party procure all goods and services in accordance with the Bill? Or not, because the procuring entity has not already transferred funds to the private partner, when design and construction occur? In another example, if an institution appoints a contractor to design and construct a building, is that contractor appointed to “implement a project”? If so, must the contractor procure all goods and services required to build the building, as per the Bill? Including having all the bid committees provided for in the Bill, etc.?

The conclusion to draw is that on value for money, innovation, and competition, the Bill is at best a mixed bag. Transversal contracting on a grand scale may lead to cost-savings, but it also crowds out competitors, and may harm local economies. For the rest it is difficult to tell whether the Bill advances these objectives in any way.

As a concluding word on the achievement of this objective of value for money, we should touch on the concept of risk. A factor which is widely recognised to impact on pricing in government contracting is the risk associated with procurement processes, in particular the risk of invalidity of a procurement contract even where the contractor is an innocent tenderer. This is currently a material risk borne by such contractors (and thus potentially priced into the bids they offer). This problem is not recognized and certainly not solved by the Bill. There is nothing in the Bill which renders the position of an innocent tenderer which is awarded a contract more certain, as regards contractual validity or limitation on the opportunities for legal challenge. If anything, additional requirements imposed on institutions such as those providing for procurement planning and prohibiting procurement outside of an approved procurement plan, may make the successful bidder's due diligence responsibilities more onerous than before.

4 Single regulatory framework for public procurement

The objective of providing a single regulatory framework for public procurement has long been a cherished hope among the procurement legal community. How far towards this goal does this Bill propose to take us? The Bill does repeal disparate general procurement laws and provisions, such as the PPPFA, the PFMA procurement provisions and the Local Government: Municipal Finance Management Act 56 of 2003 procurement provisions. The last-mentioned repeal is a striking feature of this Bill. And, as noted above, the Bill more or less removes procurement from the B-BBEE Act. It thus appears to represent a move towards a single public procurement framework at this level.

However, appearances may be deceiving. The array of possible sources, and types, of procurement rules under the Bill is extensive. The Bill provides for a wide range of national sources of procurement rules, including: the Bill itself; regulations made by the Minister; National Treasury instructions issued in terms of the PFMA; and

directives, model procurement policies, standard bid documents, instructions, guidelines, codes of conduct, reporting requirements, all made by the Regulator. The sheer variety here is noteworthy. And this is not all. The Bill also permits provincial treasuries to issue provincial instructions on procurement. It is not quite clear which institutions would be bound by provincial instructions – would it only be provincial departments, or also provincial public entities, and what about municipalities in the province? Consolidation may well also be undermined by a further provision. Section 9 permits provincial treasuries to “investigate” the procurement policies of procuring entities and municipalities. What does this mean? What is the consequence of an adverse finding by a provincial treasury?

So although the Bill consolidates a number of statutory provisions regulating procurement generally amongst institutions, it authorises a wide array of regulatory instruments to be generated by a range of public bodies, at different levels of government. All this means that even were this Bill to be enacted as is, public procurement in South Africa would still be a complex regulatory system with the potential for regular change, inconsistency, overlap, layering of rules and jurisdictional issues. At same time, another risk of consolidation is the ‘one size fits all’ consequence – in this case especially stark for municipalities and municipal entities, which had their own system carefully customised to municipal environments.

As mentioned elsewhere, another anomaly is that the Bill leaves the CIDB Act intact whilst also regulating infrastructure procurement in the Bill, which undermines the objective of a single regulatory framework.

5 Conclusion

While it is a clear step forward to have a Bill to comment upon, there remain issues. Not only will there be multiple sources of procurement rules, but, as noted above in the first section of this comment, the tasks allocated to subordinate legislators are serious ones. Much of the substance of those procurement rules has been left to politicians, officials and regulators. And, as noted in the second section, its provisions intending to address and promote value for money are a mixed bag. Finally, the Bill may not succeed in its aim to create a single coherent system for public procurement.

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