

AN UNCERTAIN FUTURE FOR DEBARMENT IN SOUTH AFRICA: AN ANALYSIS OF THE DEBARMENT PROVISIONS IN THE 2019 DRAFT PUBLIC PROCUREMENT BILL

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(2020) 7 APPLJ 34

ABSTRACT

This paper examines the debarment provisions of the 2019 draft public procurement bill. It will be seen that whilst the bill creates a new debarment system that will be implemented by the proposed Office of the Public Procurement Regulator, the provisions of the bill are unclear and may create several problems in practice. Some of these problems will arise from the expansive list of offences that will lead to debarment in the draft bill, the mandatory nature of debarment in the draft bill, the lack of clarity on the debarment process and the proposed centralisation of debarment. It is hoped that some of these issues will be addressed during the public consultation process on the bill.

AN UNCERTAIN FUTURE FOR DEBARMENT IN SOUTH AFRICA: AN ANALYSIS OF THE DEBARMENT PROVISIONS IN THE 2019 DRAFT PUBLIC PROCUREMENT BILL

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1 Introduction

The long-awaited draft public procurement bill (the draft bill) was finally issued for public comment on 19 February 2020. Although the bill had been several years in the making and was expected to result in holistic reforms and provide a more coherent legislative framework for public procurement, the draft bill as it stands, is somewhat underwhelming. Whilst it succeeds in aggregating the disparate procurement imperatives that were dispersed across several pieces of legislation,¹ and provides for a new regulator and tribunal, it does not succeed in bringing meaningful systemic reforms to the procurement in SA, and appears to leave a lot of detail to be addressed by future ministerial regulations.

This paper addresses one aspect of public procurement enforcement that is changed by the draft bill, which is the debarment system. Debarment is a measure through which government contractors are prevented from accessing or obtaining public contracts for committing various infringements/offences.² In different jurisdictions, such measures are referred to as disqualification, debarment, exclusion, suspension, rejection or blacklisting.³ This paper will compare the current debarment regime in SA

* This work is based on research supported in part by the National Research Foundation of South Africa (Grant Number 119893).

¹ National Treasury, 2015. *Public Sector Supply Chain Management Review*, which highlights the various laws that regulate public procurement in SA. Available at <<http://www.treasury.gov.za/publications/other/SCMR%20REPORT%202015.pdf>> [Accessed 30 April 2020].

² Williams-Elegbe 2016: 71.

³ Williams-Elegbe 2016: 71.

with the provisions of the draft bill, and analyze some of the potentially problematic debarment provisions in the draft bill.

2 The current debarment regime in South Africa

The current debarment regime in SA has been addressed by different authors,⁴ and operates as a decentralized system, under which debarment is implemented by the courts and organs of state. Debarment ensues where a contractor is in breach of certain provisions of the Prevention of Corruption Act 2004 (the Corruption Act), the Preferential Procurement Policy Framework Act Regulations 2017 (PPPFA Regulations), the Public Finance Management Act Regulations 2005 (PFMA Regulations) and the Municipal Finance Management Act Supply Chain Management Regulations 2005 (MFMA Regulations).

First, the Corruption Act creates two procurement-related offences, for which a person may be debarred. Section 12 of the Corruption Act criminalizes active and passive bribery in public contracts, whilst section 13 criminalizes bribery in relation to the tendering process. By section 28, where a person is convicted of these offences, the court may also direct that the particulars of the convicted person be endorsed on the “Register for Tender Defaulters”, which is the name for South Africa’s list of court-debarred contractors.

Second, the PPPFA regulations provide that a bidder may be debarred from conducting business with any organ of state for “a period not exceeding 10 years” where the bidder has submitted false information regarding its BBBEE status level, local production and content, or failed to declare any subcontracting arrangements, under a procurement contract.⁵

Third, the PFMA regulations provide that a bid or a proposal for the award of a contract may be rejected where the bidder has committed a “corrupt or fraudulent act in competing for the particular contract.”⁶ In addition, a bid may be rejected and the

⁴ See Williams-Elegbe 2012: 48; Williams-Elegbe 2016: 71-90; Williams & Quinot 2008: 246-256; Williams 2007: 1; Williams & Quinot 2007: 339; Bolton 2006: 25–48.

⁵ Regulation 14 of the PPPFA Regulations.

⁶ Regulation 16A9.1 (e) PFMA Regulations.

bidder excluded where the bidder fails to provide evidence of compliance with tax legislation, or has failed to perform on a previous contract, or has committed any improper conduct in relation to the supply chain management system.⁷

Fourth, the MFMA regulations provide that a bid may be rejected where a bidder's municipal rates or taxes are in arrears for more than three months, or where a bidder did not perform satisfactorily on a previous contract, or where a bidder has been convicted of fraud and corruption in the previous five years, or has abused the public sector supply chain management system.⁸ Similar to the PFMA regulations, a proposal for the award of a contract may also be rejected where the bidder has committed a "corrupt or fraudulent act"⁹ in competing for the particular contract.

Under the various laws and regulations described above, debarment is implemented by the courts as part of the sentence for the relevant offences under the Corruption Act, and by accounting officer or accounting authority under the PFMA Regulations and the MFMA regulations. Under the PPPFA regulations, debarment is implemented by the "organ of state" or the contracting authority. In terms of the procedure for debarment, the debarments imposed under the Corruption Act are subsumed within the criminal trial where the rules of fair hearing are an integral part.¹⁰ In relation to the debarment under the PFMA, MFMA and PPPFA regulations; the Promotion of Administrative Justice Act 2000 (PAJA), and the regulations made thereunder require that all administrative decision making, including debarment decisions must guarantee a minimum level of procedural fairness to affected persons.¹¹ This includes a notice of the proposed action, including the reasons for the action, an opportunity to be heard, and a right to review of the action.¹² Where a contractor is not granted adequate

⁷ Regulation 16A.1 and 16A.2 PFMA Regulations.

⁸ Regulation 38 MFMA Regulations.

⁹ Regulation 38 (1) (e) MFMA Regulations.

¹⁰ Williams-Elegbe 2016: 86.

¹¹ Williams-Elegbe 2016: 86.

¹² Section 3 (2) PAJA; Regulation 23 of PAJA: Regulations on fair administrative procedures, 2002, published in Government Notice No. 1022 of 31 July 2002.

procedural rights in the debarment context, the courts have been willing to strike down the debarment decision.¹³

3 The proposed debarment regime under the draft public procurement bill

The draft bill attempts to aggregate the debarment provisions that existed in the several pieces of legislation as discussed above. However, in doing so, the legislation also creates some internal inconsistencies, which will hopefully not survive the public consultation process.

Section 22 (1) of the draft bill provides that:

“The Regulator must issue a debarment order against a bidder or supplier, if the bidder or supplier—

(a) knowingly provided false information in a bid or any other document submitted to an institution in connection with a procurement process or contract;

(b) connived to interfere with the participation of other bidders;

(c) committed a corrupt, fraudulent, collusive or coercive practice, price fixing, a pattern of under-pricing or breach of confidentiality relating to procurement by an institution;

(d) accepted, delivered against, or made a claim for payment against, an order knowing that the order had not been authorised or was not in a proper format or had been issued by a person not authorised to do so;

(e) refused to sign a contract or furnished a performance security in accordance with the terms of the invitation document bid if required to do so;

¹³ *Supersonic Tours (Pty) Ltd v State Tender Board* [2007] JOL 19891 (T) affd; *Chairman State Tender Board v Supersonic Tours (Pty) Ltd* 2008 (6) SA 220 (SCA). Williams-Elegbe 2016: 86. See also Block 2018: 1316.

(f) has not performed a material contractual obligation not due to circumstances beyond the control of the supplier;

(g) has been convicted of an offence relating to—

(i) obtaining or attempting to obtain a contract or subcontract; or (ii) business or professional activities;

(h) attempted, or conspired with, aided, abetted, induced or incited another person to contravene a provision of this Act; or

(i) contravened a provision of this Act.”

3 1 Centralization of debarment

The draft bill appears to centralize debarment decision-making in the office of the public procurement regulator (the regulator), meaning that debarment system will move from a decentralized system where debarment officials are located within the organs of state to a centralized system where debarment is imposed by the regulator. This may create delays and blocks in the system. As at May 2020, there were 200 active cases of firms and individuals who have been debarred by organs of state across the country.¹⁴ It is not clear how the regulator will be set up to timeously deal with the volume of debarment cases, given that a debarment procedure necessarily entails some degree of investigation or knowledge about the offences and a form of hearing before a debarment may be imposed. While centralized debarment systems are not unknown and are for instance utilized in the multilateral development banks,¹⁵ these systems often operate as a two-tier system, with the second tier acting as either a de novo review or appeal of the first-tier decision.¹⁶

¹⁴ See the National Treasury. *The Database of Restricted Suppliers*. Available at <<http://www.treasury.gov.za/publications/other/Database%20of%20Restricted%20Suppliers.pdf>> [Accessed 4 May 2020].

¹⁵ Williams-Elegbe 2012; Williams-Elegbe 2017.

¹⁶ Williams-Elegbe 2017: 203-205.

3 2 *Due process requirements*

Section 22 (2) states provides that an “institution must inform the Regulator in writing of any bidder or supplier who commits any of the acts listed in subsection (1) for possible debarment.” From the brevity of this provision, it is not clear how the fair hearing requirements for a debarment decision will be met. Two scenarios are possible. The first is that the debarment procedure will be conducted by the organ of state who will meet the requirements for a fair hearing and will submit a recommendation for debarment to the regulator who will then decide whether the record warrants a debarment. A second scenario is that the regulator obtains the evidence of the commission of the offence from an organ of state, conducts the debarment hearing and imposes the decision to debar the bidder, in which case, the due process requirements are the responsibility of the regulator.

Both scenarios are problematic. Whilst the second scenario may lead to delays that may stagnate the debarment system, it is the first scenario that raises the most questions. If in the first scenario, the debarment procedure is conducted by an organ of state (which is contrary to a literal reading of the bill), then it is not clear where an affected contractor or bidder may seek a review of this decision. Under s 7 (2) of PAJA, a person must exhaust internal remedies prior to approaching the courts for a review of administrative action.¹⁷ Will an organ of state provide an avenue (a superior official to the debarring official) to conduct a review of the decision before it submits its recommendation to the regulator, or will the practice be that any review of the recommendation to debar is conducted by the regulator, which will not serve as an “internal remedy” for the purposes of s 7 PAJA. The draft bill further confuses the issue as it provides that the “Regulator may, on application by a bidder or supplier subject to a debarment order—(a) reduce the period of the debarment order; or (b) revoke the debarment order, if the order was made in error of fact or law.”¹⁸

¹⁷ *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality* [2014] ZAECGHC 55, 19 June 2014.

¹⁸ Draft Public Procurement Bill , 2020, s 22 (7).

This can lead to a third additional scenario to the two outlined above:

Scenario 1: the debarment procedure is conducted by organs of state and a recommendation sent to the regulator which includes the proposed length of debarment and the regulator may then impose the debarment on those terms, refuse to impose the debarment, or impose the debarment on different terms in accordance with s 22 (7).

Scenario 2: the debarment is conducted de novo by the regulator on receipt of information and evidence from the organs of state; and subject to appeal by the Public Procurement Tribunal created by s 99 of the draft bill.

Scenario 3: the debarment is conducted by one office/unit within the regulator de novo as in scenario 2, but that the regulator may also provide an avenue (another unit within the regulator) to hear appeals from affected contractors over debarment decisions.

3.3 Temporary debarments

In an odd arrangement of sections, the draft bill in section 23 provides that the “Regulator may provisionally debar a bidder or supplier and must provide the bidder or supplier with a provisional debarment notice stipulating the reasons for the debarment.” Such a provisional debarment notice must indicate the reason for the debarment; the date when the provisional debarment takes effect; and require the bidder or supplier to provide written reasons within 30 days why he or she must not be debarred.¹⁹ Once the regulator considers these reasons submitted by the bidder, the regulator may then issue a final debarment notice and inform the bidder within 10 days from the date of the decision.²⁰ It appears as though a temporary debarment, known as a suspension in the US and the World Bank debarment systems, is not a necessary precursor to a mandatory debarment under s 22. It is then also not clear in what situations a temporary debarment is imposed by the regulator and in what cases it proceeds straight to a mandatory debarment under s 22. In other jurisdictions, a suspension is imposed as means of immediately protecting the government from an errant contractor, pending the completion of investigations and the imposition of a final

¹⁹ Draft Public Procurement Bill , 2020, s 23 (2).

²⁰ Draft Public Procurement Bill , 2020, s 23 (4) and (5).

debarment sanction. Under the draft bill, however, the temporary debarment seems divorced from the mandatory debarments in s 22 and it is not clear how both sections will co-exist in practice.

3 4 Offences for debarment

Another challenge with the debarment provisions relates to the kinds of offences that could lead to debarment. Whilst section 22 covers the expected offences such as fraud, corruption and anti-competitive practices, it also unusually makes a bidder liable to debarment where they “refused to sign a contract or furnished a performance security in accordance with the terms of the invitation document bid if required to do so”.²¹ Although in some cases the refusal to sign a contract might be considered distasteful and a waste of the public sector’s time, it is not the kind of conduct that could or should lead to debarment in any jurisdiction. Similarly, where a contractor is unable or refuses to furnish a security, then there should be other less drastic options available to the organ of state. The rationale for imposing debarment for this type of conduct is unclear and does not accord with international best practices on debarment.

3 5 Mandatory nature of debarment

Section 22 (1) of the draft bill provides that the “Regulator must issue a debarment order...” This suggests that the proposed debarment regime is a mandatory one, and once there is evidence that a bidder has committed the offences listed in the section, the bidder must be debarred. This is problematic for three reasons: first because of the “non-offences” such as failure to furnish a security and failure to sign a public contract included in the list of offences. Most debarment systems utilize a mix of mandatory and discretionary debarments depending on the nature and egregiousness of the offence in question, as does the current regime in SA.²² Second, the proposed mandatory regime makes it all the more important that the debarment process meets all the requirements of administrative justice, as it will lead to more challenges by contractors. Third, the proposed regime does not make exceptions, and in particular, does not provide for rehabilitation or “self-cleaning”, which in debarment systems like

²¹ Draft Public Procurement Bill , 2020, s 22 (1) (e).

²² Williams-Elegbe 2012: 76.

the EU and the US, permit contractors to escape debarment where the contractor can prove that it has in the meantime eliminated the causes for debarment.²³

4 Conclusion

From the above, it can be seen that the proposed debarment regime will be problematic in implementation. From the incongruence between various provisions, to the lack of clarity in relation to the procedure for debarment and the mandatory nature of debarment, it seems clear that the draft bill may create more problems than the current debarment system faces. It is, however, hoped that these issues will be addressed by the public consultation process and/or clarified by the ministerial regulations anticipated by the bill.

²³ Pünder, Priess & Arrowsmith 2009.

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