

# THE DRAFT PUBLIC PROCUREMENT BILL: ENCROACHING ON THE LEGISLATURE AND LOCAL GOVERNMENT

**Mitchell J. Brooks**

**(2020) 7 APPLJ 88**

## ABSTRACT

This paper examines the provisions of the 2019 draft public procurement bill through the constitutional lens of principles concerning the separation of powers and spheres of government. It will be seen that the bill sets out to delegate constitutionally ordained law-making and oversight powers to the executive, whilst bestowing a wide and unguided discretion upon the executive to establish a framework for preferential public procurement. The role of Provincial Treasuries is also unclear in the bill and may facilitate the usurpation of local government powers in practice. The impact of the bill on local government thus requires further consideration with deference to the above-mentioned constitutional principles.

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# THE DRAFT PUBLIC PROCUREMENT BILL: ENCROACHING ON THE LEGISLATURE AND LOCAL GOVERNMENT

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## 1 Introduction

The actual acquisition of goods and services can be referred to as the operational component of public procurement where the state procures what it needs. These needs are informed by its public functions and stakeholders on whose behalf it procures. To balance these stakeholder interests and improve the efficacy of the procurement, public procurement also consists of a regulatory framework with prescribed procedures and rules to be followed in conducting the procurement. Sections 195 and 217 of the Constitution of the Republic of South Africa, 1996 (“the

Constitution”) envisage both components.

The draft Public Procurement Bill (“the Bill”) aims to codify the historically fragmented regulatory component.<sup>1</sup> Conversely, the Bill’s intentions are unclear concerning the currently decentralised operational component and autonomy of the different spheres of government as Constitutionally mandated. This paper opines that the Bill may be unconstitutional to the extent that it encroaches on the branches and local sphere of government.

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\* To my principal, Mr AZ Khoza who encouraged my interest in Public Procurement Law, I will always be grateful to you for your support and kindness. It would be impossible to thank you for all the ways that you have helped me in my career.

<sup>1</sup> Quinot 2020:5.

## 2 Powers and spheres of government

Horizontally, the Constitution recognises the executive, legislature and judiciary as the branches of government each with separate powers and functions.<sup>2</sup> This separation of powers ensures proper oversight and accountability between branches. For example, section 55(2) of the Constitution requires the legislature to provide mechanisms to maintain oversight of the executive and ensure that the executive is accountable to it by enacting primary legislation. Vertically, the Constitution recognises national, provincial and local spheres of government with each sphere respecting the powers and functions of the other and not encroaching upon their geographical, functional or institutional integrity.<sup>3</sup>

## 3 Horizontal encroachment

The Bill enables the executive branch of government to encroach upon the legislature's law-making and oversight powers concerning regulatory procurement. Section 217(2) of the Constitution allows organs of state or identified institutions to implement a procurement policy to provide "categories of preference in allocating contracts" as well as to "protect or advance categories of persons disadvantaged by unfair discrimination." In turn, section 217(3) of the Constitution instructs that "National legislation must prescribe a framework" within which the preferential procurement policy must be implemented. Legislating a framework is thus the legislature's oversight mechanism envisaged by section 55(2) of the Constitution.

### 3.1 *Secondary legislation*

The Preferential Procurement Policy Framework Act 5 of 2000 ("PPPFA") is the current legislative framework establishing such mechanism. The Bill repeals the PPPFA but fails to replace its framework. Instead, section 26 of the Bill empowers the Minister of Finance ("the Minister") to "prescribe a framework for preferential treatment" by enacting secondary legislation. This apparent delegation is contrary to the Constitution's requirement of primary legislation.

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<sup>2</sup> Sections 42, 55 and 165 of the Constitution.

<sup>3</sup> Section 41(1)(e)-(g).

The requirement for primary legislation is likely twofold. First, the promulgation process of secondary legislation is subject to less oversight and public scrutiny than primary legislation.<sup>4</sup> Therefore, section 217(3) of the Constitution likely intends to subject the framework to the more robust legislative process in Parliament. Second, primary legislation may only be amended by the legislature thereby entrenching the legislature's ability to maintain oversight of the executive in developing regulations and policies. Without considering ministerial discretion, this delegation alone may contravene section 217(3) of the Constitution as it encroaches upon Parliament's legislative powers and oversight function. However, even with the level of guidance provided in the Bill, section 26 of the Bill may still be unconstitutional.

### **3 2 Ministerial discretion**

The Constitutional Court is instructive that the legislature must act with care in drafting legislation in a manner that limits any risk of the executive unconstitutionally exercising any discretionary powers conferred by it.<sup>5</sup> Yet, in substance, the Bill delegates the legislature's constitutional mandate to the executive with inadequate measures to mitigate this risk. Section 26(2) of the Bill provides some guidance to the Minister by listing women, youth and persons with disabilities as categories of persons to be preferred. However, Reyburn identifies that other categories listed, such as businesses and sectors, are unsubstantiated.<sup>6</sup> Reyburn also identifies the lack of conceptual clarity in the distinction drawn by section 26(2) of the Bill between preferential treatment and set-asides.<sup>7</sup> The latter of which may be unconstitutional.<sup>8</sup> In further deference to the Minister, section 26(2) of the Bill requires only consideration of the Broad-Based Black Economic Empowerment Act 53 of 2003 in formulating this framework.<sup>9</sup> Simply put, the Minister establishes the legislature's oversight mechanism as envisaged in section 217(2) of the Constitution and, in doing so, exercises a broad discretion.

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<sup>4</sup> Smit 2017:79.

<sup>5</sup> *Dawood* para 48.

<sup>6</sup> Reyburn 2020:47.

<sup>7</sup> 47.

<sup>8</sup> *Afribusines NPC v The Minister of Finance* (Case no 1050/2019) [2020] ZASCA 140 (2 November 2020).

<sup>9</sup> Reyburn 2020:48.

Broad discretionary powers alone may not be unconstitutional.<sup>10</sup> However, the Bill expects the Minister to exercise its discretion in a manner consistent with sections 4 and 217 of the Constitution without any direct guidance.<sup>11</sup> It is also difficult to conceive how it may be inappropriate or impossible for the legislature to identify the relevant factors to guide the Minister if it was able to do so under the PPPFA.<sup>12</sup> In *Afribusiness NPC v The Minister of Finance* (“*Afribusiness*”),<sup>13</sup> it was held that the 2017 Preferential Procurement Regulations issued in terms of the PPPFA failed to provide a framework to guide those institutions upon which it conferred a discretion to apply pre-qualification criteria. *Afribusiness* thus illustrates the importance of legislating a clear framework to guide discretionary decisions. Moreover, the need for clear guidelines was also highlighted in *Case v Minister of Safety and Security* (“*Case*”) in similar circumstances where secondary legislation preferred or affected constitutional rights, albeit freedom of expression.<sup>14</sup> The Court in *Case* warned that historically the executive “ruthlessly wield[ed] its ill-checked powers to suppress” sexual expression and freedom of expression as values embodied in the Constitution.<sup>15</sup> In my view, this warning and historical context are equally applicable to the reservation of public procurement contracts as well as the right to equality and non-discrimination embodied in section 4 of the Constitution. Clear guidelines are thus necessary, but absent.

In effect, section 26 of the Bill entails the Minister and, by implication, the executive encroaching and usurping the legislature’s power to establish a framework under section 217(2) of the Constitution. The executive is, in effect, promulgating secondary legislation in terms of an empowering provision that relinquishes the legislature’s oversight function of the executive. Consequently, section 26 of the Bill may contravene and circumvent section 217(2) of the Constitution as well as the constitutional principle of separation of powers.

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<sup>10</sup> *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8 53 (“*Dawood*”).

<sup>11</sup> Para 44.

<sup>12</sup> *Dawood* para 53.

<sup>13</sup> [2020] ZASCA 140 (2 November 2020) para 37.

<sup>14</sup> *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others* (1996) 3 SA 617 (CC).

<sup>15</sup> Para 63.

## 4 Vertical encroachment

The powers of national government, via the Public Procurement Regulator (“the Regulator”), and provincial government in terms of the Bill may encroach upon the constitutionally ordained powers and functions of local government. Although section 217 of the Constitution may not be the source of the state’s public procurement powers, section 217(1) of the Constitution assumes an existing capacity by organs of state to contract for goods and services, which contracting assumes an element of procurement.<sup>16</sup> The capacity of local government to procure, and implement procurement systems, may derive from section 156 read with Schedules 4 and 5 of the Constitution.<sup>17</sup> Section 156 of the Constitution provides municipalities with the executive power to administer affairs listed in, among others, Part B of Schedules 4 and 5 of the Constitution. Whilst procurement is not expressly listed, it may fall within the ambit of section 156(5) of the Constitution as:<sup>18</sup>

“...a power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.”

Whilst municipalities may not need operational control over every element of the procurement cycle to perform their scheduled functions effectively,<sup>19</sup> section 12(a)-(i) of the Bill envisages municipalities conducting each element.<sup>20</sup> Yet, the interventionist

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<sup>16</sup> Quinot 2009:42.

<sup>17</sup> Brooks 2016:53.

<sup>18</sup> 53.

<sup>19</sup> 54.

<sup>20</sup> Section 12 states that “[a]n institution must—

- (a). conduct procurement in accordance with this Act and a supply chain management policy referred to in section 52;
- (b). plan and document requirements for procurement;
- (c). obtain authorisation from the accounting officer or accounting authority for procurement;
- (d). define procurement needs by compiling a statement of requirements which includes a correct and complete description of the goods, services or infrastructure and the statement of requirements must be included in the invitation documents, evaluation process and contracts;
- (e). identify the appropriate standard bid documents to be used by the institution and suppliers or potential bidders;
- (f). clearly state the methodology and criteria to be used in the evaluation of bids and the determination of the best evaluated bid;
- (g). provide procurement information as may be prescribed or as the Regulator or the relevant treasury may require;
- (h). ensure that all communications with bidders and suppliers are in writing; and
- (i). keep confidential the information that comes into its possession relating to procurement proceedings.”

measures recognised by sections 13,<sup>21</sup> 5(1)(d)<sup>22</sup> and 95(2)(b)<sup>23</sup> of the Bill are not restricted to any particular mechanism or element of the procurement cycle and could enable provincial or national government to usurp the entire procurement function and the potentially exclusive procurement powers of local government.

#### **4 1 Instructions**

Section 13(1) of the Bill requires an accounting officer, accounting authority and any municipal official to abide by an instruction issued by “any other person with authority over the affected person.” Even if an instruction emanates from a different level of government to “do or omit anything” in respect of a particular procurement, accounting officers are obliged to carry out the instruction irrespective of any objection process followed under section 13(2) of the Bill. In substance, instructions could be used to centralise procurement processes or usurp the decision-making powers of municipal officials. It may also deem the instructor as the real decision-maker for purposes of

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<sup>21</sup> Section 13 provides as follows:

- (1) “If an accounting officer, an accounting authority, a member of an accounting authority or an official of an institution (herein called “the affected person”) is directed by—
  - (a) a public office bearer; or
  - (b) any other person with authority over the affected person, to do or omit to do anything in respect of procurement and disposal of assets, which the affected person believes he or she is not authorised to do in terms of this Act, he or she must not comply with the direction but, immediately submit in writing to the public office bearer or other person in authority, as the case may be, his or her objections and the reasons for the objection.
- (2) If after receiving objections and reasons envisaged in subsection (1), the public office bearer or other person instructs the affected person, in writing, to comply with the direction concerned, the affected person must comply with the instruction and immediately submit a written report to the Minister responsible for administering this Act. (3) If the public office bearer or other person fails or refuses to provide the instruction in writing, the affected person must not comply with the instruction and, despite any term or condition of his or her employment, may not be subjected to any disciplinary measures due to the non-compliance or failure to comply with the instruction.”

<sup>22</sup> Section 5(1) provides that “the Regulator must, in accordance with this Act—

- (a) to (c) ... [omitted];
- (d) develop and implement measures to ensure transparency in the procurement process and promote public involvement in the procurement policies of institutions.”

<sup>23</sup> Section 95(2) provides as follows:

“Despite subsection (1), if urgent public interest considerations require the procurement of goods, services or infrastructure—

- (a) ... [omitted];
- (b) in the case of an institution in the provincial or local sphere of government, the relevant provincial treasury,

may upon request by the institution authorise an award of a contract or an extension to an existing contract prior to the lapse of the period referred to in subsection (1)(a) or completion of the review process.”

section 6(2)(a)(i) of the Promotion of Administrative Justice Act.<sup>24</sup> In my view, this provision invites unlawful encroachment on local government's operational procurement and should be removed in its entirety.

The Bill is also less clear as to who has authority over accounting authorities.<sup>25</sup> Section 31 of the Local Government: Municipal Systems Act 32 of 2000 indicates the MEC of local government has the authority to monitor and support local government. However, the KwaZulu-Natal Municipal Bid Appeals Tribunal (KZN MBAT) illustrates how a Provincial Treasury may establish authority over a municipality's procurement system and is discussed further below. It is also unclear as to whether the accounting authority and accounting officer would remain seemingly jointly liable under section 11 of the Bill or whether they are indemnified by the instructing authority.<sup>26</sup> Alternatively, the instructing party could avoid liability by invoking section 115 of the Bill.<sup>27</sup>

## **4 2 Intervention**

The Regulator is established within and may not be independent of National Treasury.<sup>28</sup> Hence, the Regulator's interventions could be interventions by national government.<sup>29</sup> In turn, section 5(1)(e) broadly empowers the Regulator to "intervene by taking appropriate steps to address a serious or persistent material breach" of the Bill. What constitutes a "serious material breach" or an "appropriate step" remains unclear and open to abuse. Firstly, it is unclear whether a municipality, the Regulator or the Auditor-General of South Africa must establish this breach. Secondly, the Regulator might consider as an appropriate step the reconsideration of a municipal decision by the Regulator or a Provincial Treasury despite such a course of action not being prescribed under the Bill. The KZN MBAT is an example of what a Provincial

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<sup>24</sup> 3 of 2000.

<sup>25</sup> Section 4 of the Local Government: Municipal Systems Act 32 of 2000.

<sup>26</sup> Section 11 provides as follows:

- (1) "An accounting officer is responsible for decisions on behalf of the institution in terms of this Act;
- (2) An accounting authority is responsible for decisions on behalf of the institution in terms of this Act."

<sup>27</sup> Section 115 provides that:

"A person who exercises a power or performs a function or duty in terms of this Act is not liable for, or in respect of, any loss or damage suffered or incurred by any person arising from a decision taken or action performed in good faith in the exercise of a function, power or duty in terms of this Act."

<sup>28</sup> Section 4(1) of the Bill.

<sup>29</sup> Quinot 2020:7.



Treasury has considered as an appropriate step to lawfully interfere with decisions of municipalities.<sup>30</sup>

Intervention by the Regulator or Provincial Treasuries could thus raise constitutional issues concerning the encroachment of local government powers and might unintentionally result in the Procurement Tribunal presiding over municipal procurement decisions reconsidered by Provincial Treasury (via an MBAT) or the Regulator. In my view, the Bill's silence on local government procurement and its lack of guidance concerning these intervention powers aggravate this risk of encroachment on local government's operational procurement.

Lastly, section 95(2)(b) of the Bill may unjustifiably restrict local government's responsiveness and ability to perform its constitutional obligations in terms of section 156 of the Constitution.<sup>31</sup> In terms of section 95(1) of the Bill, a municipality may not award a contract that is subject to review or reconsideration proceedings until a standstill period of ten days has lapsed since the completion of such proceedings. Section 95(2) of the Bill provides an exception to this general prohibition where there are urgent public interest considerations requiring the procurement of goods, services or infrastructure.<sup>32</sup> However, urgent public interest considerations alone are insufficient to justify the award of a contract during the standstill period. A Provincial Treasury's consent is also required in terms of section 95(2)(b) for a municipality to proceed with the urgent procurement. In my view, the purpose for this consent requirement is unclear given that Provincial Treasury does not appear to hold any right of review or reconsideration over municipal procurement decisions to begin with. Yet, a Provincial Treasury is able to veto urgent municipal procurement decisions. This consent requirement may also create an administrative burden and frustrate the responsiveness of local government where urgent procurement is required by multiple

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<sup>30</sup> KZN MBAT appears to formulate its appeal decisions as "recommendations for remedial action" in terms of Treasury Regulation 16A9.3 (GG 27388 of 2005) read with KZN Treasury Practice Note Number: SCM-07 of 2006.

<sup>31</sup> Section 156 provides as follows:

- (1) "A municipality has executive authority in respect of, and has the right to administer—
  - (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
  - (b) any other matter assigned to it by national or provincial legislation.
- (2) - (4) ... [omitted].
- (5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its function."

<sup>32</sup> See footnote 23.

municipalities within the same province. An endemic or natural disaster could necessitate such a response. Therefore, this right of veto by provincial government may be irreconcilable with the urgent need for the procurement and may encroach upon local government powers.

## **5 Conclusion**

The Bill delegates to the Minister the power to establish a framework in terms of secondary legislation. This delegation may be contrary to section 217(3) of the Constitution. This delegation is also coupled with an overbroad discretion and inadequate guidelines. As a result, the Minister may potentially diminish and usurp the legislature's oversight of the executive. Therefore, the Bill may encroach upon the separation of powers principle. Further, the Bill may also enable national and provincial spheres of government to unjustifiably instruct, intervene in and delay local government procurement decision-making under vague circumstances. Consequently, the Bill may usurp the constitutional powers of local government.

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