

# **SOUTH AFRICAN INFRASTRUCTURE PROCUREMENT UNDER THE NEW PUBLIC PROCUREMENT BILL**

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**(2020) 7 APPLJ 26**

## **ABSTRACT**

The long awaited Public Procurement Bill was finally published in February 2020 and was intended to streamline the public procurement regulatory system. The aim was to regulate public procurement in one Act in order to remove the challenges and difficulties caused by the current fragmented regulatory system. This paper aims to address how the Bill regulates infrastructure procurement, identifies certain gaps in the Bill, and makes recommendations for improvement.

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## **1 Introduction**

At long last, after years of speculation and anticipation, the Public Procurement Bill was finally published for public comment in February 2020. The Bill is meant to consolidate all public procurement legislation and provide a more streamlined legal framework in which the government can procure goods, services and infrastructure. The Bill is further intended to address a number of contradictory legal rules and it was hoped that the Bill would address the legal nature of the various instruments published by the National Treasury, which are meant to provide practical guidelines for the implementation of procurement rules. This paper looks at the various new provisions suggested by the Bill, specifically for the regulation of infrastructure procurement. Possible gaps in regulation are discussed and recommendations for improvement are made.

## **2 New regulation of infrastructure procurement**

The new Public Procurement Bill defines “procurement” in section 1 as “the acquisition of goods, services or infrastructure by purchasing, renting, leasing or other means”. This is a welcome change in definition as it specifically places the procurement of infrastructure within the purview of section 217 of the Constitution.<sup>1</sup> It further addresses the uncertainty of whether leased goods and services are subject to

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<sup>1</sup> Section 217(1) provides that organs of state when contracting for goods or services should do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

procurement rules. Therefore, this definition is a welcome change to the procurement regulatory regime.

The new Bill addresses infrastructure procurement in Chapter 7 in various parts. It provides a rather convoluted definition of “infrastructure” which is at odds with “construction procurement” provided for in the Construction Industry Development Board Act (CIDB Act)<sup>2</sup> which is the legislation that regulates the construction industry as a whole, including construction procurement. There is no indication in the Bill that it repeals the CIDB Act. In fact, it makes reference to compliance with the CIDB Act in section 52(d) and 84(2) which means that the Bill will exist alongside the CIDB Act and its prescripts.

In terms of its arrangement, Chapter 7 is divided into four parts: Part 1 deals with the application of the chapter and Parts 2 and 3 provide for infrastructure procurement and delivery management by departments, constitutional institutions and entities found in Annexure 3A and 3C of the Public Finance Management Act (PFMA),<sup>3</sup> major public entities, government business enterprises, municipalities and municipal entities respectively. Lastly, part 4 provides for what is referred to as a gateway review process. Section 81(3)(b) specifically excludes public-private partnerships and the disposal or letting of land, conclusion of any form of land availability agreement or the leasing or rental of fixed assets from the Bill.

As is prudent in a procurement setting, the Bill provides in section 82(1) that an accounting officer or authority must develop, document, maintain and implement an effective procurement system for infrastructure procurement and delivery management. Section 81 (2) then provides that the procurement system in terms of subsection (1) must provide for matters that comply with *any standard* for infrastructure procurement and delivery management as may be determined by instruction.<sup>4</sup> The word “instruction” is in turn defined in section 1 of the Bill as an instruction issued by the Regulator in terms of section 5. The binding nature or legal status of the instruction is, however, not addressed. The “Regulator” means the Public Procurement Regulator

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<sup>2</sup> 38 of 2000.

<sup>3</sup> 1 of 1999.

<sup>4</sup> Own emphasis.

established by section 4 of the Bill.<sup>5</sup> This Regulator is meant to form part of the National Treasury which is problematic in that it should not form part of any specific government department, but rather form an institution on its own in order to ensure complete independence and transparency. Perhaps the Regulator could be elevated to the status of a chapter 9 institution like the Public Protector, since it will be responsible for the expenditure of large amounts of taxpayer funds. Although the Bill in section 4(2) calls for impartiality and for the powers of the Regulator to be exercised without fear, favour or prejudice. Such conduct must also be seen to be exercised and not only be in written terms as is the case in many procurement rules. Therefore, it is advisable for the Regulator to be an entirely independent body responsible for the regulation of public procurement in South Africa.

It is important to note that the legislation which currently regulates infrastructure procurement is and remains (in the Bill) the CIDB Act which in turn establishes the Construction Industry Development Board (CIDB) as the body responsible for construction, as opposed to infrastructure procurement. The new Bill does not repeal this legislation, therefore the Act and its subordinate legislation and best practice guidelines remain in force and thus applicable to the procurement of infrastructure. The problem with this is that the standard for infrastructure procurement and delivery provide for rules contrary to those in the CIDB Act, its regulations and best practice guidelines.<sup>6</sup> A further concern is the future role of the CIDB under the Bill which provides in section 4 that a Public Procurement Regulator will be established within the National Treasury. The question then becomes whether the CIDB will continue to operate as a regulatory body under the Public Procurement Regulator or will it be disbanded so that only the Public Procurement Regulator is responsible for all types of procurement. From a practical perspective, the former situation should be preferred over the latter in order to ensure coherence within the industry as a whole and specifically within the procurement sector of the industry. The CIDB is also best suited to manage the challenges of the industry based on its years as regulator for the industry.

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<sup>5</sup> This section provides that a Public Procurement Regulator is established within the National Treasury.

<sup>6</sup> This issue has been traversed in detail in the article Anthony 2019: 1.

Section 53 of the Bill provides that each institution must establish a procurement unit which is responsible for the implementation of procurement. This is the same for infrastructure procurement. Section 84(1) reiterates the requirement of complying with any applicable standards for infrastructure procurement and delivery management.

The Bill provides for implementation of infrastructure procurement by another institution (such as the Development Bank of South Africa) and the use of transversal contracts in sections 85 and 86. These sections can be commended.

Part 3 of the Chapter requires that feasibility studies for major capital projects be conducted. This is a new provision and can be commended as it will go a long way in ensuring that a need for the projects indeed exists and that the capacity for implementing the procurement is present. Part 4 lastly provides for a gateway review process, which is an independent peer review process that examines infrastructure projects at certain key points in the project lifecycle to assess the progress and likelihood of success of the project.

### **3 Gaps in the Bill**

It is disappointing that the Bill does not address some important issues in the current construction procurement regime. For example, the contradictory rules in infrastructure procurement, specifically between rules of the CIDB and the Framework for Infrastructure Delivery and Procurement Management (FIDPM) published by the National Treasury.<sup>7</sup> Another important issue not addressed is that of functionality or quality. The 2017 Preferential Procurement Policy Framework Act Regulations<sup>8</sup> refer to functionality of goods that will be evaluated, however, the CIDB prescripts refer to quality. These two concepts differ in content, therefore, clarity on which one of the two will be evaluated, is sought. In simple terms, quality is the difference in whether a product is made of silver or stainless steel and functionality entails a number of factors to consider in order to determine whether the goods are fit for the purpose for which they are procured. The Bill makes reference to quality in section 10 in providing that institutions must obtain the best value for money in terms of price, quality and delivery,

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<sup>7</sup> See National Treasury Instruction Note 03. of 2019/2020.

<sup>8</sup> Published in Government Gazette 40553 of 20-01-2017.

having regard to set specifications and criteria. However, no criteria are mentioned. The construction industry is in all likelihood the industry in which this concept is used the most. Therefore, it is important that this be clear and unambiguous.

In addition, the Bill further does not make reference to a specific preferential procurement system for the award of preference points. Such award is mandated by sections 217(2) and (3) of the Constitution therefore the legislation which regulates public procurement must provide the rules for the award of preference points in procurement contracts. This is specifically mandated by section 217 (3) which provides that national legislation must provide for such a system. If the Bill becomes an Act in its current form, it may well be considered to be unlawful in that it lacks the rules in national legislation prescribed by the Constitution. The Bill indicates in section 10 that institutions must ensure equal opportunity for all bidders and the achievement of the highest standards of equity and that bidders may not be excluded from participating in procurement on the basis of nationality, race, religion, gender or any other criterion. However, it does not indicate how preference will be awarded. It also provides in Chapter 4, which is specifically dedicated to preferential procurement that a framework for preferential treatment for categories of persons, previously disadvantaged by unfair discrimination must be prescribed by the Minister.<sup>9</sup> It is noted in section 26(2) that this framework must consider the Broad-Based Black Economic Empowerment Act<sup>10</sup> which includes a preference point system and applicable thresholds. These provisions should be included in the original legislation, in other words, in the Public Procurement Bill and not in subordinate legislation. Further detail as to how the framework prescribed in the Bill will be implemented can be placed in the Regulations to the Bill. The Bill should thus have been published with its Regulations since the Bill refers only to “measures” that will be taken to implement preferential procurement.

The Bill is silent on the various procurement methods that may be used to procure goods, services and works. Since the Bill is meant to repeal all other legislation which regulates public procurement, it is vital that it does in fact prescribe the various methods through which construction works can be procured.

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<sup>9</sup> See s 26(1).

<sup>10</sup> 53 of 2003.

It is disappointing that the Bill does not make provision for the procurement process or even any part of the procurement process to be conducted electronically. The construction industry has started doing so in the form of its Register of Contractors in terms of which contractors that wish to contract with the government should apply to do so while complying with certain criteria in order to be placed on the Register. The only indications of the use of technology are found in section 15 of the Bill which provides that “[i]nstitutions must, to the extent possible use information and communication technology to implement any of the procurement methods of this Act” and in section 57(2) which refers to the proceedings of bid committees which must be recorded electronically or in writing. The Bill further simply says in section 5(1)(k) that the use of technology in procurement must be promoted instead of a rule that compels the South African procurement system to become electronic. The legislator thus missed a golden opportunity to create a streamlined electronic procurement system which the construction industry has already started doing to some degree.

The Bill appears to mirror the requirements of the CIDB by providing in section 30 that a procuring institution may require certain criteria to be complied with in order for the tenderers to demonstrate their capability of effectively providing the goods, services and infrastructure. The criteria may include professional, technical qualifications and experience, financial resources, personnel and managerial capability, record of past performance of similar contracts and registration with the relevant professional body. These are the criteria required by the CIDB for registration on the Register of Contractors. The Bill thus seems to be taking its lead from the construction industry in evaluating tenders.

#### **4 Recommendations and conclusion**

In order to address the above issues, the contradictory rules will need to be attended to first. In other words, the Bill should be re-aligned with the CIDB Act and the mandate of the CIDB. The position of the CIDB should be made clear in order for construction contractors to follow clear, unambiguous rules on which body has regulatory power. Next, the Bill needs to provide detailed rules on the implementation of preferential procurement. The issue of functionality versus quality should also be addressed in these regulations. Rules regarding gender equality, environmental concerns in procurement and human rights violations in supply chains which are currently

excluded from the Bill, should be specifically addressed. The various methods of procurement such as competitive bidding, negotiation procedures, and written quotations should be legislated in the Bill. The rules should further provide for more electronic handling of procurement. In other words, electronic procurement should be incrementally introduced into the South African legal system. With the covid-19 pandemic, both the public and private sector have been forced to conduct their business electronically in order to ensure longevity. Therefore, the transition to electronic procurement should be somewhat easier than it would have been in the absence of the pandemic. Lastly, the Public Procurement Regulator should be an independent entity separate from the National Treasury in order to ensure complete transparency and accountability as required by section 217 and 195 of the Constitution.



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