

Parliamentary

Overview of the Draft Procurement Bill 7 October 2020

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Introduction

- The PBO supports the Finance and Appropriations Committees with the implementation of the Money Bills and Related Matters Act 2009.
- The purpose of this presentation is to provide Members with information regarding the Draft Public Procurements Bill (Section 76 bill), that has been developed to consolidate the numerous laws and supply chain instructions that inform public procurement and to better 'regulate' the public procurement process.
- The draft bill can be seen as government's response:
 - to procurement irregularities and the associated high economic and social costs that have resulted from it
 - to address public procurement regulatory framework failures
 - to poor compliance that impact service delivery in all three spheres of government
 - to create strong oversight mechanisms

Background: Preferential procurement

- Governments may use preferential procurement policies in response to economic and social needs of a country to:
 - Advance economic opportunities for previously disadvantaged persons and groups
 - Promote specific economic objectives, including:
 - Expanding the local productive base of the economy
 - Supporting innovation and investment in the economy
 - Improving the efficiency and competition of the economy
 - Promote local technology and its commercialisation
 - Promote employment creation
 - Support enterprises based in specific areas
 - Promote the development of small, medium and micro enterprises

Procurement developments in SA

The Constitution on Procurement: S-217. (1) requires that an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

- Several procurement reforms were introduced by the National Treasury to ensure value for money, including the introduction of:
 - A Regulatory Framework for Supply Chain Management
 - Broad-Based Black Economic Empowerment (B-BBEE)
 - Verification Agencies
 - A Centralised Supplier Database
 - An Electronic Tax Clearance System
 - Minimum thresholds for local content production
 - Contract Centralisation of Certain Government Services
 - The Establishment of the Office of the Chief Procurement Officer (CPO)
 - Several amendments to the Preferential Procurement Policy Framework Act, No 5 of 2000 (PPPFA)

Procurement developments in SA

- The current public procurement process involves the following steps:
 - Advertisement of a tender: an invitation to submit an offer
 - Submission of a tender: an offer by the tenderer in accordance with the advertisement to tender and all relevant legislation and regulations
 - Awarding of a tender: an acceptance of the offer in accordance with the original advertisement to tender
- The whole process must comply with relevant legislation and the regulations thereto
- Generally over the years, compliance with SCM processes was weak and about 40 per cent of public sector entities fully complied with SCM processes and failed to comply with local content requirement in procurement (AGSA).

Further reforms are required

- Currently, there are 36 different government SCM systems, which are generally poorly integrated and non-automated.
- Public procurement has been a key vehicle for corruption and misallocation of state resources, wasting billions of rands and leaving many SOEs, entities and government's financially stressed and unsustainable.
- Internal controls are not consistently applied, which contribute to the high levels of non-compliance, as per AGSA reports.
- The current multifaceted requirements make it difficult for political representatives and officials to fully comply.
- Little action is being taken to ensure compliance with the legislation that prohibits employees of departments from doing business with the state.

Procurement trends in other countries

- **Transparency for effectiveness**
 - Simplified and accelerated procurement procedures e.g. in Switzerland
 - Enhanced transparency of the award of framework agreements e.g. in Chile
 - Launched a smart phone bidding service e.g. in Korea
- **Timely resolution for complaints**
 - Introduction of a standstill period e.g. in Turkey
 - Allowing the possibility of lodging a claim before and after the signing of a contract. For instance, in France.
 - Introducing alternative dispute resolution mechanisms. For example, Canada

Procurement trends in other countries

- **Protection of potential bidders from unfair competition**
 - Introducing a “standstill period”
 - More stringent rules against illegal direct awards of public contracts
- **Rationalisation, restructuring and consolidation of procurement**
 - Increased use of framework agreements – for instance, in New Zealand
 - Restructuring of public procurement organisations- e.g. in United Kingdom
 - Use of shared services as well as purchasing alliances to achieve economies of scale – e.g. in the United States.
 - Investment in strengthening the capabilities of procurement officials for example, in Belgium

The draft Public Procurement Bill

- The Bill repeals the Preferential Procurement Policy Framework Act (2000)/Preferential Procurement Regulations of 2017, related procurement law as well as the preferential point system.
- The purpose of the draft bill is to introduce a single regulatory framework for local, provincial and national governments and state-owned enterprises.
- The draft bill proposes the creation of institutions necessary to ensure the integrity of the procurement system and to address potential violations.
 - The establishment of a **Public Procurement Regulator** to address any material breach by an institution, reconsider decisions by institutions
 - The establishment of **Public Procurement Tribunal** to review the decisions made by the Regulator and provincial treasuries

The draft Public Procurement Bill

- Changes in the institutional framework will also elevate the role of the Office of the Chief Procurement Officer from a departmental functionary to an independent regulator.
- In terms of the preferential procurement regulation of 2017, the bill is silent on the system as tenders are currently awarded based on the preferential system that is adjusted depending on the value of the tender.
- The scope for cancelling tenders has been broadened to include factors such as evidence of corrupt and anticompetitive behavior.
- The draft bill requires that all public-private partnership (PPP) concepts and agreements must be approved by the relevant treasury.

Limitations and Concerns

The Public Procurement bill exhibits several limitations, preventing the necessary realisation of the principles of fairness, equitability, transparency, competitiveness and cost-effectiveness as envisaged in section 217(3) of the Constitution.

Lack of transparency will retard aims of the bill

The bill:

- Requires confidentiality of bidder's information
- Makes transparency discretionary to the regulator's judgement
 - Whilst certain bid information is sensitive (e.g. blue prints, supplier specific technology), such a general inclusion favours secrecy and corruption.
 - Non-sensitive bid information (i.e. company name, directors, shareholders, bid price) should be publically available at all stages of the bid process.

Limitations and Concerns

Persons barred from doing business with the state by the bill, requires public disclosure of tender particulars to have intended effects

- The bill importantly automatically excludes certain individuals and entities from the procurement process (CH3 (4))
- To be effective, it requires honest declaration on the part of potential bidders, and knowledge on the part of bid evaluation and bid adjudication committees
- For meaningful effect with the intents of this provision of the bill a transparent, complete and publically available record of bidding companies, their directors and shareholders, parent/holding companies and their respective directors and shareholders is required
- This could be strengthened by a publically available, comprehensive and consistently updated list of persons and entities debarred from doing business with the state

Limitations and Concerns

Failure to ensure high-fidelity procurement systems

- The bill's allowance for manual systems of procurement (sec 36) is concerning given that manual systems are easily manipulated for corrupt ends, and can be destroyed or doctored to evade detection and investigation.
- Given the ubiquity, low cost and integrity of electronic system, e procurement should be mandatory.

Annexures to the Brief

- Annexure A: Provides a detailed comparison of some of the main elements of the Preferential Procurement Regulations, 2017, and how they are amended in the Draft Bill.
- Annexure B includes a summary of *How to Do Business with Government and Supply Chain Management in the Public Sector including the broad objectives of Supply Chain Management in the Public Sector*. (Source: Western Cape Government).

In summary

- The overall objective of the draft Public Procurement Bill is to:
 - simplify processes,
 - maximise value-for-money, and
 - reduce (eliminate) corruption from public procurement.
- The bill attempts to unify the currently disparate and fragmented laws dealing with public sector procurement by creating a single regulatory framework for local, provincial and national governments.
- Limitations identified by several research institutions and institutions representing civil society (Organisation Undoing Tax Abuse, Corruption Watch, Budget Justice Coalition and EU-South Africa) and their comments should be considered for improving the draft Bill.

Comments from interest groups

ADDITIONAL SLIDES FOR INFORMATION PURPOSES

Comments from interest groups

Concerns from civil society groups are mainly with regards to:

- The establishment of the Public Procurement Regulator and its functions [section 4(2) and section 5]
 - In terms of its independence
 - Appointment process and qualifications of the Regulator
- Conflict between different spheres of government and the establishment of a register for debarred suppliers [sections 5(1)(d), 9(1)(c) and 95(2)(d)] [section 22]
- Accountability, specifically:
 - The review process as described in Chapter 9, specifically part 2 that allows for the reconsideration of a decision.
 - Monetary compensation as a remedy for the unlawful award of tenders or loss of profits.
 - Provisions requiring further clarity [section 13, 16, 18, 19 and 115].

Comments from interest groups

- Transparency vs. confidentiality [Sections 5(1)(d) and 5(2), 7(1), 10, 36, 42(5), 46 and 96 (3)] [sections 12, 17].
 - To give meaningful effect to the exclusion of persons and entities automatically excluded from the procurement process a transparent, complete and publically available record of bidding companies, their directors and shareholders, parent/holding companies and their respective directors and shareholders is required.
 - The bill's allowance for manual systems of procurement (sec 36) is concerning given that manual systems are easily manipulated. E- procurement should be promoted and made mandatory as far as possible.

Comments from interest groups

- Equal opportunity [section 10]
 - The bill requires the Minister (of Finance) to present a framework for preferential procurement, informed by current policies including a range of criteria that would inform the preferential procurement. It, however, doesn't qualify how criteria presenting conflicting objectives (For example, lowest cost versus procurement to maximise employment creation) are to be considered.
- Supply chain management, specifically in terms of the bid specifications committee, evaluations committee and the adjudications committee and in terms of an effective and efficient contract management system and record keeping system. [section 54, 73 and 74]
- Preferential Procurement
 - The draft Bill is silent on a minimum threshold for local production and local content