



11 September 2023

The Committee Secretaries: The Standing Committee on Finance
Mr Allen Wicomb and Ms Teboho Sepanya
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Dear Mr. Allen Wicomb and Ms. Teboho Sepanya

RE: PUBLIC PROCUREMENT BILL

1. INTRODUCTION

Master Builders South Africa (MBSA) is the leading voice of the South African construction industry. The organization is regulated in terms of Section 107 of the Labour Relations Act and exists as a national federation of registered employer Associations representing contractors and employers operating in the building and construction industry. The primary role of MBSA is to promote the viewpoints and interests of the industry, to promote the highest quality and standards through excellence in service to our members, and to engage government and legislative bodies on national policies that affect the industry, for the purpose of creating a sustainable building industry in South Africa. Our corporate members and their combined membership of contractors, subcontractors, materials suppliers, and manufacturers is approximately 3 500.

2. CONSTITUTIONAL REFLECTION

The Constitution of the Republic of South Africa No. 108 of 1996 ("the Constitution") is the supreme law of the land, any law or conduct inconsistent with it is invalid, and the obligations imposed by the Constitution must be fulfilled (section 2 of the Constitution).

The mandate to government pertaining to public procurement is highlighted in section 217 of the Constitution. Section 217(1) of the Constitution provides that when 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.

Section 217(3) of the Constitution provides a mandate to government to promulgate legislation to give effect to section 217(2) and a procurement policy to provide for categories of preference in the allocation of contracts as well as advance of persons or categories of persons disadvantaged by unfair discrimination.

The current legislative framework that gives effect to section 217(2) of the Constitution includes the Preferential Procurement Policy Framework Act 5 of 2000 ("the PPPFA") and its accompanying 2022 Regulations.

3. MBSA COMMENTS ON THE BILL

We have consulted with all our member Associations regarding the gazetted Bill. The following reflects responses we received from our members, and we hereby present them as comments from Master Builders South Africa:

3.1. Analysis of the Public Procurement Bill ("the Public Procurement Bill") currently tabled for comment.

The Public Procurement Bill is currently tabled for comment and most notable is the short time frame within which comments are due.

3.2. The objective of the Public Procurement Bill is inconsistent with the mandate of Government in terms of the Constitution.

Section 217(3) of the Constitution mandates government to promulgate legislation to give effect to the principles underlined in section 217(2) of the Constitution in accordance with a system which is fair, transparent, equitable, cost-effective and competitive.

The PPPFA stipulates its objectives are "To give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution, and to provide for matters connected therewith." In this regard, the PPPFA is consistent with the constitutional mandate.

In contrast, the Public Procurement Bill states "(1) The objects of this Act are, with due regard to sections 195, 216 and 217 of the Constitution, to— (a) introduce uniform treasury norms and standards for all procuring institutions to implement their procurement systems as envisaged in section 217(1), read with section 216(1), of the Constitution; and (b) determine a preferential procurement framework for all procuring institutions within which to implement their procurement policies as envisaged in section 217(2) and (3) of the Constitution."

Section 195 of the Constitution addresses issues pertaining to basic values and principles governing public administration and lists the democratic values and principles that must be adhered to. These principles apply to every organ of state, administration in every sphere of government and public enterprises (section 195(2) of the Constitution). The Public Service Commission Act 46 of 1997 gives effect to sections 195 and 196 of the Constitution and constitutes a check and balance on government.

Section 216 of the Constitution addresses "Treasury control. -(1) National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government". The objective of this mandate is achieved through the Public Finance Management Act 1 of 1999 ("the PFMA"). This also constitutes a check and balance.

Section 217 of the Constitution does not make any reference to legislation considering sections 195 or 216 of the Constitution in matters concerning public procurement. The provisions of section 217 of the Constitution make no reference to any treasury norms and standards within which legislation pertaining to procurement must comply with. Therefore, the reference to sections 195 and 216 in the Public Procurement Bill is misguided, outside the mandate of section 217 of the Constitution and interferes with the checks and balances advocated by the Constitution.

3.3. The role of Treasury goes beyond constitutional and legislative mandate.

In terms of section 216(1) of the Constitution "National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing- (a) generally recognized accounting practice; (b) uniform expenditure classifications; and (c) uniform treasury norms and standards."

As highlighted above, Section 217(1) of the Constitution provides that when 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. Section 217(2) mandates a procurement policy to provide for categories of preference in allocation of contracts as well as advance of persons or categories of persons disadvantaged by unfair discrimination.

There is no reference in section 217 of the Constitution to legislation giving effect to section 217 that must comply with Treasury norms and standards within the context of section 216(1) of the Constitution or that Treasury should play a controlling role in the dispensation of public procurement. The role of Treasury and the proposed public procurement office have the impact of centralizing procurement and stifling the independence of organs of state, state entities and other public organizations. In some instances, the constitutional rights of these parties are prejudiced.

National Treasury is established through the provisions of section 5 of the PFMA, and its powers specified in section 6 of the PFMA. None of the powers vested in National Treasury under section 6 of the PFMA give authority to the proposed role of National Treasury under the Public Procurement Bill.

Therefore, it will be beyond the constitutional and legislative mandate of National Treasury to establish a Public Procurement Office or issue binding instructions in terms of the Public Procurement Bill.

3.4. The Public Procurement Bill fetters the powers of Municipalities.

Section 151 of the Constitution gives local municipalities the vest of the executive and municipal authority of a municipality in the Municipal Council of the municipality and further provides that National or Provincial government may not impede or compromise a municipality's right or ability to exercise its powers or perform its functions. Section 153 of the Constitution states that a municipality must structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community. The administration aspects mentioned under section 153 of the Constitution include procurement administration which are currently governed by the Municipal Finance Management Act 56 of 2003.

The establishment of a Public Procurement Office and empowering National Treasury to issue binding directives on issues relating to public procurement is inconsistent with the above and those issues which are within the sole powers of provincial and local government in terms of the Constitution, e.g. Roads in terms of schedule 4.

3.5. There is no specified legal framework within which the Minister may issue Regulations.

Afriforum NPC previously challenged the validity of the powers of the Minister of Finance to promulgate Regulations outside the scope of the PPPFA. The matter was escalated right up to the Constitutional Court where it agreed that the Minister of Finance cannot enact Regulations outside the scope of the PPPFA.

Section 217 of the Constitution requires that the framework be in the legislation and not the subsequent Regulations. Under the Public Procurement Bill, the discretion of the Minister of Finance is unfettered, and this will be ultra vires and unconstitutional. The role of the Regulations will be to provide guidance to meeting the requirements of the Public Procurement Bill. These criteria are currently met through the PPPFA and 2022 Regulations.

The statutory framework within which public procurement is to be done is therefore not set by parliamentary legislation, it is to be determined in ministerial regulation. The Public Procurement Bill, in particular Chapter 4, does not meet the requirements of section 217 of the Constitution in that it does not provide for a fair, equitable, transparent, competitive and [in particular] a cost-effective system. The Regulations are not legislation passed by Parliament.

3.6. Dilution of checks and balances required by the Executive, Legislative and Judiciary.

The Public Procurement Bill, by allowing the Minister of Finance to promulgate Regulations that provide the framework for Procurement is not only unconstitutional but compromises and dilutes the separation of powers required by the Constitution. The procurement framework is the function of the Legislature and needs to be enacted in terms of the Public Procurement Bill. The role of National Treasury and the establishment of a Public Procurement Office in the Public Procurement Bill further blurs these lines.

Furthermore, as highlighted above, the Public Procurement Bill infringes on the powers vested in the Provincial and Local Governments respectively.

3.7. Public Procurement Office Supplier Database requirements are ambiguous.

The current Central Supplier Database is a system based on the verification of suppliers and service providers to Government. The various input data is verified with SARS, relevant banks, CIPC etc. before a supplier's registration process is successful.

Section 5(1)(i) read with section 11(2)(iii) of the Public Procurement Bill alludes that this process is an application-based process which could be interpreted as granting the Public Procurement Office discretion in connection with registration on the supplier database. This could be tantamount to exclusionary practices and is not supported by the Constitution. Furthermore, even if such an application process is to be accepted, there are no clear guidelines for the application criteria.

3.8. Provisions relating to the Emergency Procurement framework should be clarified.

Section 58(1)(xi) of the Public Procurement Bill empowers the Minister to make Regulations on emergency procurement. Section 217 of the Constitution does not empower the Minister to deal with this aspect in the Regulations and furthermore, the legislation must provide the framework within which the Minister may make regulations to provide clarity.

Furthermore, section 49 of the Public Procurement Bill empowers the Public Procurement Office or Provincial Treasury to authorize conclusion of a contract even during the period of review or reconsideration of an award if request of the procuring institution is based on emergency and complies with providing the information in section 49(4). This is beyond the mandate of Section 217 of the Constitution and does not provide for a system that is fair, equitable, transparent, competitive, and cost-effective and does not meet the requirement for a procurement policy to provide for categories of preference in allocation of contracts as well as advance of persons or categories of persons disadvantaged by unfair discrimination.

4. CONCLUSION

The Public Procurement Bill in its current form is unconstitutional and presents many challenges. The issues with the Public Procurement Bill impact the Constitutional rights and mandates given to Government and attempts to cover far-reaching constitutional mechanisms and overlaps the constitutional checks and balances as well as the requirements of the Constitution.

The Public Procurement Bill does not meet the clear constitutional mandate of section 217 of the Constitution. It goes beyond its mandate and addresses matters outside the confines of section 217 of the Constitution is riddled with constitutional overlaps, is unconstitutional, blurs the lines between the Executive and Legislature, provides the Minister with unfettered power to make Regulation and is beyond the mandate of the Constitution.

It is fitting that a Regulatory Impact Assessment is conducted and the outcome of which is released to the public sphere.

Given our input on paragraph 3.1 above, we would like to request that the comment period be extended so we can secure further inputs from our members. Lastly, we would like to request a slot to make a verbal presentation to the Committee.

Sincerely



Musa Shangase

PRESIDENT