

30 June 2020

The Director General
National Treasury

EMAIL: CommentDraftLegislation@treasury.gov.za

Dear Sir / Madam

FRAMEWORK FOR COMMENT ON THE DRAFT PUBLIC PROCUREMENT BILL

1. We thank you for the opportunity to comment on the Draft Public Procurement Bill ("the Bill").
2. The Bill is valiant attempt at ensuring that public procurement is undertaken in a more transparent and uniform way across the country. We applaud the philosophy behind the Bill.
3. The Bill is clearly still a working document as there are still many provisions that require re-working and sharpening up. We accept that inputs from various disciplines with an interest in public procurement will be made, and we therefore do not propose to point out each and every section we felt requires further polishing. We concentrate rather, and comment briefly, on those provisions that might be of relevance to the construction and development industries.
4. Our comments are ordered according to the sections to which our comments relate.

CHAPTER 1 DEFINITIONS, OBJECTS, APPLICATION AND ADMINISTRATION OF THE ACT Part 1

Definitions

5. "*transversal term contract*": A transversal term contract is defined as a contract for goods of services that are required by one or more institution. It means that there may be instances where the goods or services are required by one institution only. If it is required by one institution only, how does it differ from any other contract?
6. Many words or concepts are used in the Bill, which are not defined. They include the following, which may over time have acquired colloquial meanings, but which are in need of firm definitions to avoid uncertainty, disputes and, ultimately, litigation:
 - a. Close relatives or close associate of an official (e.g. in section 18(1));
 - b. Collusive or coercive practices (e.g. section 19(b));

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- c. Price fixing (e.g. section 22(1)(c));
 - d. A “pattern of under-pricing or breach of confidentiality” (section 22(1)(c));
 - e. An “order” (last word in first line of section 22(1)(d));
 - f. Performance security (see e.g. section 22(1)(e));
 - g. Most economically advantageous bid (see e.g. section 37(6));
 - h. Non-responsive (see e.g. section 38(2)(a);
 - i. Supply chain management practitioner (e.g. section 58(b));
 - j. End user of the institution (e.g. section 60(a)(ii));
 - k. Cross-functional of the activities of the institution (e.g. section 60(b));
 - l. Relevant policy department (section 66(2));
 - m. Electronic reverse auction (defined in section 91(2)(c) but in terms that few people will understand);
 - n. Restricted bidding (section 91(2)(d));
7. Clauses 5(1)(j), 20 and 117: a national database for the appointment of consulting engineering services might prove problematic [2020-06-09: centralisation is not always a good answer: if one will be expected to select only consulting engineers registered in a national database, not knowing them nor what criteria have been used in assessing their competence (not as engineers but as specialists in one's field), it gives one pause] : the regulator should be encouraged to delegate the creation of such databases to provincial and municipal spheres on a more local basis (not to say that providers from other provinces should be excluded, merely that control should be in the hands of those using the services). Decentralised databases can then be collated into a single national database allowing parties registered at a specific regional level to also work in other jurisdictions.
8. Section 7 (Access to information held by Regulator): Some of the qualifications to the right to access to information held by the Regulator, encroaches in our opinion on the fundamental right to information held by the state, entrenched in section 32(1)(a) of the **Constitution of the Republic of South Africa, 1996**. See for instance:
- a. section 2(b): *(Information envisaged in subsection (1) may only be made available to an institution referred to in subsection (1)(a) to (e)— ... Regulator reasonably believes such information is required to investigate suspected unlawful activity);*
 - b. section 2(5): *(A person who obtains information from the Regulator may use that information only—*
 - (a) within the scope of that person's power or duty; or*
 - (b) for the purpose specified in the request.*
- (The qualifications above are of the kind that section 32(1)(b) caters for in the case of information held by private individuals, not information held by the state)

CHAPTER 3 Procurement Integrity

9. Section 22 (Debarment)
- a. Section 22(1)(b) lists as one of the instances when a debarment order must be issued against a bidder, where s/he “*connived to interfere*”. We submit that the words “*connived to*” should be omitted. If someone interferes with the process, consequences should follow, and it should not be necessary to show that s/he has connived with someone to do so.

- b. Section 22(3) states that a debarment order applies for “the period specified”. Some guidance should be given by the legislature as to what would be an appropriate period so as to avoid arbitrary decision-making.

CHAPTER 4 PREFERENTIAL PROCUREMENT

10. Clause 26: One wonders if the promotion of the advancement of small, medium, and micro (is micro larger than medium?) enterprises in high value procurement will ensure the efficient use of resources. Also, the intensification of labour absorption, which is not appropriate for all types of contract.

CHAPTER 5 PROCUREMENT METHODS AND BIDDING PROCESS Part 2 Bidding process

11. Clause 35: The bid validity not exceeding 180 days gives one pause. As pointed out by Nigel Cornfield in the 2018 Snape Memorial Address to SAICE Western Cape Branch, if a civil engineering contractor has to keep construction plant available but idle for long periods of time on the off-chance of a bid being successful, it must still be paid for and does not come cheap. Perhaps the 180 needs review or the state needs to look at ways of compensating parties who are forced to sterilise equipment in the hope of being awarded a tender.
12. Section 37(4)(b): It is stipulated that if a bid contains “*a discrepancy between figures and words, the institution must consult the bidder and make a decision regarding the error of the discrepancy*”: It is not clear what this decision-making power entails.
13. In terms of section 38(2)(d)(ii) a bid may be rejected if the bidder is a company as defined in section 1 of the Companies Act, 2008 (Act No. 71 of 2008) and a director of a company is an official or an institution, unless the official is a director by virtue of his or her office or in his or her official capacity. It is not clear when this qualification will apply and how its application will avoid a conflict of interest. This provision should be made clearer.
14. In terms of sections 38(2)(d)(ii) to (v) caters for the rejection of bids where:
- a. a director of the bidding company;
 - b. a member of the bidding close corporation;
 - c. a member of the bidding co-operative;
 - d. a partner in the bidding partnership,
- is an official of an institution. We submit that the disqualification should apply also where the official is a shareholder of the bidding company, or an employee of the bidding company, close corporation, co-operative or partnership.
15. Section 39(3) stipulates that an institution is not liable to a bidder by reason only of cancellation of the procurement process. We understand that it may in exceptional circumstances be necessary to cancel a bid. To avoid liability, though, the institution must be able to show that the grounds for cancellation did not prevail at the time bids were invited, that they were not reasonably foreseeable at the time bids were invited, and that they did not come about because of the institution's wilful or negligent conduct.
16. Section 42(3) stipulates that if a bidder who has been awarded a contract fails to provide any required security for the performance of the contract, within the prescribed period, an institution

may select another bidder from among the remaining bids. It should be made clear that the alternative bidder must be the one that would have been appointed, had the one failing to provide security had not submitted a bid.

Part 3

Transversal procurement

17. Section 43 (Transversal term contracts): The centralisation of the awarding of bids could give rise to the provision of goods or the delivery of services that are not cost-effective, which is one of the requirements that section 217 of the Constitution sets for procurement by organs of state. To ensure cost-effectiveness and that a contractor that has the necessary expertise that the location-specific circumstances require, provision should also be made for institutions to be exempted in terms of section 43(5) where it is justified by location-specific circumstances or costs considerations.

Part 4

Public-Private Partnership

18. Section 46(2) (Feasibility Study for a Public Private Partnership): Standards or guidelines should be imposed with reference to which the Treasury may approve or refuse a feasibility study to avoid arbitrary decision-making.

19. Section 47(2) (Consideration of procurement documentation for public private partnership): Standards or guidelines should be imposed with reference to which the Treasury may approve or refuse procurement documentation to avoid arbitrary decision-making.

20. Section 47(5) (Consideration of procurement process): Standards or guidelines should be imposed with reference to which the Treasury may approve or reject the procurement process to avoid arbitrary decision-making.

21. Section 48(2) (Approval Public-private partnership agreements): Standards or guidelines should be imposed with reference to which the Treasury may approve or decline to approve the procurement documentation to avoid arbitrary decision-making.

22. Section 50(2) This section lays down the circumstances under which a material amendment of a public-private partnership agreement may be made. We submit that an additional requirement must be added, namely that such an amendment should also not be permitted if it will result in the private partner being afforded an advantage over other parties who submitted bids unsuccessfully to become the private partner.

23. Section 51: This section stipulates that an institution is not bound to a public-private partnership if all relevant approvals from treasury have not been obtained. It is not fair that an institution may extricate itself from a contract, to the detriment of a private company, who may have made a substantial investment in complying with the contract. If approvals have not been obtained, the private company must be compensated for losses arising from non-compliance by the state with the relevant legislation. Proceeding with a procurement process where approvals have not been in place is akin to misrepresentation by the State and there should be consequences.

CHAPTER 6
SUPPLY CHAIN MANAGEMENT POLICY
Part 2
Institutional arrangements

24. Clause 54 et seq: It is a pity that technical advisers have no vote in the committee: if they are worth their salt their views might be of greater value than those of the procurement experts.
25. Section 58(b) and section 60(a)(ii): We submit that a more transparent and informed process will be ensured if the words "where practical" are omitted.
26. Section 59(2)(d): In terms of this section trade barriers in the form of specifications, plans, drawings, design, testing and test methods, packaging and marking or labelling of conformity certification may not be created. We appreciate the need to follow as inclusive as possible an approach to all bidding processes, but we submit that provision should be made for exceptional circumstances where the nature of the required services or goods is such that the institution must necessarily be more prescriptive.
27. Section 61(1) stipulates that a bid evaluation committee must evaluate bids "in accordance with this Act and any criteria in the bid documentation ...". We submit that it must be stated specifically as well that the evaluation must occur in accordance with the relevant institution's supply chain management policy.
28. Section 62(a)(ii): We submit that a more transparent and informed process will be ensured if "the end consumer [*still to be defined*] of the institution" is added to this section.
29. Section 64(b) authorises the bid adjudication committee to decide not to proceed or to start afresh with a bid process. We submit that guidelines or standards must be imposed with reference to which decisions of this nature must be taken to avoid arbitrary decision-making.

CHAPTER 9
DISPUTE RESOLUTION
Part 2
Reconsideration by procuring institution

30. Section 96(3) (Period for reconsideration by institution) – Provision is made for the reconsideration by an institution of the awarding of a tender within 10 days of the date the bidder becomes aware of the circumstances giving rise to the application for reconsideration, or of the date when that bidder should have become aware of those circumstances, whichever is the earlier. A project could be virtually completed by the time an unsuccessful bidder finds out about circumstances based upon which s/he decides to call for a reconsideration. The uncertainty inherent in such a system should be avoided and there must be a cut-off date, beyond which reconsideration will not be possible at all.
31. Section 96 (7) stipulates as follows: "*Nothing prevents an institution from reconsidering its own decision made in terms of this Act relating to any procurement process that the institution has undertaken.*" What is meant with this? If it means that the institution can recall a decision already made and communicated, especially if it is done in a way other than through the 'reconsideration' and 'review' measures, it will lead to immense uncertainty.

Part 5 Review

32. Section 101 (Composition of Tribunal):

- a. Seeing that a review must focus on compliance with regulatory requirements, we submit that it must be an absolute requirement that a retired judge or attorney or advocate with at least 20 years' experience must be on the Tribunal. The vague alternative "persons with suitable expertise and experience in law" should be done away with.
- b. Membership should in our submission be enhanced with expertise from beyond the legal and procurement fields. In the case of the procurement of fixed capital investment projects, whether professional or construction services, membership must include registered and experienced built environment professionals with at least 20 years' experience.

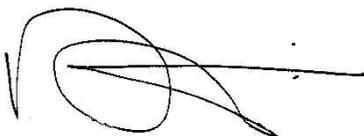
SCHEDULE

33. Act No. 56 of 2003 (MFMA) – In terms of the schedule Chapter 11 of the MFMA will be repealed. There are other relevant sections in the MFMA, which are also relevant in the present context and which are not referred to here, e.g. section 14 of the MFMA.
34. We trust that our comments will assist in the drafting process and confirm that we would welcome the opportunity to provide our inputs on further draft Bills, which we trust there will be.

WCPDF CONCLUSION

35. The WCPDF is of the opinion that the Public Procurement Bill should differentiate between the procurement of day to day commodities and the procurement of fixed capital investment assets and associated services. Although it is fair to procurement lowest price on consumables, the procurement of fixed capital investment assets, which will have to serve the country for decades to come, should carry a strong weighting towards the principle of "fit for purpose" vs lowest price which currently appears to the norm.
36. In conclusion we note the relevant and importance of creating an investment and job creation orientated procurement legal framework. In this instance we reference the recent announcement of President Ramaphosa at the Sustainable Infrastructure Development Symposium held on 23 June 2020, and his statement that the construction industry should be the "fly-wheel" that leads the process of economic recovery. The ultimate test of the new legislation will be whether the change of the procurement legislative framework will support economic growth and job creation.

Yours faithfully



Deon van Zyl
Chairperson



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