New bill on public procurement is flawed but fixable

By **RYAN BRUNETTE**

South Africa's public procurement system is inefficient and corrupt. Because it handles a fifth of GDP and plays a central role in redressing inequality, this crisis is central to our political, public administrative and economic problems. The new Public Procurement Bill moves to address this by advancing efficiency and integrity measures. But if it does not align with the constitution, these will come to nothing.

Section 217 of the constitution requires procurement to proceed according to a fair, equitable, transparent, competitive and cost-effective system. It adds that these principles do not prevent procuring institutions from implementing policies that establish categories of preference and protect and advance those disadvantaged by discrimination. The section concludes, cognisant of the stakes of these policies, by requiring that national legislation prescribe a framework within which they must be implemented.

The bill fails to establish this framework. It is a trite principle of legal interpretation that every word in a clause must be given meaning. The constitutional provision in question asserts that "national legislation must prescribe a framework". It follows that not any old national legislation will meet this provision, only that which prescribes a "framework".

A statute that enables procuring institutions to formulate whatever policies they wish does not provide such a framework. The Oxford English Dictionary defines a framework as "an essential or underlying structure" which "encloses" and "supports". To measure up to this, a statute that empowers procuring institutions must go on to guide and limit the exercise of that power. Only then can we assert, as the constitution says, that procurement policies will be implemented "within" the framework.

The bill needs to clearly instruct the minister of finance, Enoch Godongwana, to elaborate a framework for it, says the writer. Picture: GCIS

This interpretation finds traction in the courts. In the Preferential Procurement Regulations, 2017, regulation 4 gave procuring institutions discretion to apply (the meaning of the phrase need not detain us) pre-qualifying criteria to advance designated groups. When brought up for review, appeal court judge Dumisani Zondi said: "The discretion which is conferred on organs of state under regulation 4 to apply pre-qualification criteria in certain tenders, without creating a framework for the application of the criteria, may lend itself to abuse." These words distinguished an enabling legal provision from an enabling, guiding framework.

The court also gave a reason for that distinction being of bedrock importance. An enabling provision creates a power, but a framework sets up guardrails against its abuse. The constitution requires a framework because, in a constitutionally circumscribed, complex and contentious domain, it fortifies the principle of legality.

The bill's preferential procurement clause does not do this. Clause 17 simply throws open-ended preferential procurement policy powers into the hands of procuring institutions. The terms in which it does this are so broad as to make it difficult to conceive of any policy that would not fit. These boundless possibilities are only "framed" by "the objects of this Act, this Chapter and section 10(1)(b) of the Broad-Based Black Economic Empowerment Act". These vague and nebulous provisions cannot do the work that is required of them.

The bill proposes that procurement policies must include the promotion of citizens and permanent residents, black people, women, people with disabilities, youth and small enterprises. It continues to advantage enterprises based in townships, rural areas, underdeveloped areas, specific provinces and municipalities, and any other category conceivable within the constitution. People or enterprises within these categories can be advanced through the application of preference points, set-asides (where only people or enterprises in that category can make bids), subcontracting conditions on suppliers or any other measures. The permutations are practically infinite.

Many procuring institutions will not understand what to do with these new powers or where to draw their legal limits. The corrupt will find ample room to abuse them. Denel might set aside a tender to purchase semiconductors for only businesses based in Bulpan. Aggrieved parties could claim in court that such a process does not accord with constitutional principles of fairness and competition, but this is beside the point of my argument: the clear purpose of the framework required by the constitution is to guide procuring institutions to within the bounds of legality, but the Public Procurement Bill does not do this. It does not even oblige the minister of finance to do so in its stead.

South Africa, therefore, has two paths before it. The bill could be passed without necessary changes. Then this preferential procurement section will be constitutionally challenged. Pressure will build on the courts. Uncertainty will cloud the legal landscape. The procurement system will continue to evolve without democratic direction. Public administrations and businesses across a fifth of our country's economy will be seized with hesitancy and malaise.

Or parliament will apply its mind and the participation process now unfolding will help it. South Africa needs transformation. It also needs procurement to move forward according to a framework that maintains state functionality and promotes economic productivity. This is in the interests of all of us and the bill can lead the way. The constitution defines national legislation as including regulations, so the bill needs only to clearly instruct the minister of finance to elaborate a framework. Then that framework must be constructed with the careful attention and consultation it deserves.

* Brunette is a research associate at the Public Affairs Research Institute at the University of Johannesburg and a doctoral candidate at the Graduate Center of the City University of New York