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Statement on the Public Procurement Bill 2023

Issued by the Procurement Reform Working Group (PRWG)

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1. On 22 May 2023, the Public Procurement Bill [B 18-2023] was introduced into Parliament. The primary purpose of the Bill is to create a single piece of national legislation that regulates public procurement, including preferential procurement. This Bill stands to give effect to the entirety of section 217 of the Constitution. It therefore goes without saying that its introduction is the most significant development in Public Procurement Regulation in South Africa.
2. For many reasons, simplifying the legal framework is the most effective step government can take towards improving the public procurement system. Therefore, the introduction of the Bill as an overarching legal framework is a good step towards reform: it shows government's acknowledgement of and its response to the need for such a framework. However, the significance of the introduction of the Bill also depends on the strength of its content. If the Bill, once made an Act, does not contain provisions that meaningfully improve the public procurement system, it (despite it being a unifying piece of legislation) will be meaningless. Furthermore, if its provisions fall short of the standards in section 217 of the Constitution, it will fail to achieve its purpose.
3. It is clear from numerous research reports, academic articles, and the Zondo Commission's findings that one of the primary causes of the dysfunctional state of public procurement in South Africa is the complex nature of the regulatory framework. Currently, a wide array of national legislation, regulations, instruction notes, practice notes, policies, "circulars", and guidelines regulate public procurement— over 100 pieces of legislation in total. The issue arises not only from the number of laws that need to be followed, but from the potential for incoherence that is created by the proliferation of subordinate legislation. This is in contrast to, for example, the law regulating all companies in South Africa (the Companies Act 71 of 2008), where the core rules are contained in the Act itself, while the practice notes and guidelines issued in terms of the Act are simply explanatory documents to assist in compliance. Here we see that there is a robust and solid statutory foundation for company law regulation. This does not exist in public procurement.
4. Often, subordinate laws relating to public procurement are not adhered to, or are not applied consistently, or are subject to regular revisions and interpretation challenges that affect compliance. Duty-bearers responsible for adhering to public procurement laws can feel daunted

by the litany of laws, while some pay lip service to them in departments and entities that have weak processes, checks and balances. This state of affairs creates uncertainty and opens the door to abuse by duty-bearers and tenderers who wish to abuse weak procurement systems.

5. Some critical changes still need to be made, and public concerns must be addressed before the current draft is passed by Parliament. We highlight the following critical issues that need to be addressed:
6. The Bill fails to clear up confusion around essential definitions arising from section 217 of the Constitution and the Bill itself. For example, the Bill's definition of preferential procurement is not consistent with the global understanding of "preference" in procurement, which will create challenges of interpretation later. Similarly, the definition of "public procurement" in the Bill adopts a wide definition that includes other aspects of finance expenditure that do not traditionally constitute "procurement" from a global standpoint. Given the nationwide enforceability of the Bill, it must provide clear, unambiguous, accurate and consistent definitions of these and other core concepts.
7. Where it does so clearly, the Bill gives the National Treasury, the Public Procurement Office and organs of state too much law-making powers, instead of providing concrete rules that are then implemented by the various departments and offices. The problem with this is that most of the rules that have to be followed or applied will be contained in various pieces of subordinate legislation such as regulations, instruction notes, circulars and so on. To date, we have no clarity on when these subordinate pieces of legislation will be provided to the public for meaningful input. This will lead to a situation that is not much different to the current state of affairs and will defeat the purpose of the Bill, which is to provide a singular legal framework containing the core rules and principles for public procurement in South Africa. The key legal requirements for all procurement systems should be contained in the Bill and not left to subordinate laws, where these legal requirements may be subject to watering down, softer interpretation, regular reform, and so on - nor should they be left to the discretion of the Minister. In other parts, the Bill is not clear which body holds the power to do certain things. For example, it is not clear who establishes the procurement "policy" that an organ of state will implement.
8. The ultimate point is that the Bill should create a single regulatory framework that gives effect to the Constitution in general, and section 217 in particular. It should clearly and comprehensively define, and articulate the public procurement system as envisaged in section 217 so that the system created is fair, equitable, transparent, competitive, and cost effective. The Bill should further allow for the flexible, strategic, and effective pursuit of policy objectives that redress the imbalances of the past and simultaneously commit to sustainable procurement and economic development. The Bill must serve as a foundation upon which the public procurement system will operate. In doing so, it needs to contain a series of core principles and rules that are essential for an efficient and effective system, including the nature, extent, scope, enforcement, and limitations on competition; pricing, quality and value-for-money considerations; points-systems; proactive transparency of tender processes; oversight and accountability mechanisms and enforcement.

9. The Bill cannot rely on regulations and Public Procurement Office instructions to interpret the intent of the Act while the same bodies who create such subordinate legislation hold the responsibility to implement it. The Act needs to establish clear procurement principles, allowing for effective and strategic action by procuring institutions, and facilitating inter-government coordination.
10. Accounting officers/authorities and procuring institutions should be allowed to develop and implement their procurement system provided it aligns conclusively with the requirements, objectives, provisions, and principles embedded in the Bill, and the various overarching procedures that it establishes. They should be sure that their decisions and actions will be scrutinised, with data and document disclosures at specified points within the procurement cycle on an open online platform managed by the Public Procurement Office. In addition, while the procurement system should not be over-determined by the objective of anti-corruption, the law must be one that advances transparency and accountability while combating corruption. The Bill must include the principle of open contracting to advance these objectives as well as efficacy and cost-effectiveness. The Bill must be drafted in a manner that incorporates these principles and promotes public procurement that is developmental in its economic nature and outlook, aspiring to expand the productive base of the economy and to support innovation and investment.

#PublicProcurementBill

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About PRWG:

The Procurement Reform Working Group, formed in 2020, includes representatives from a range of civil society organisations as well as independent researchers who collaborate on research and advocacy towards reforming the public procurement system in South Africa (procurement law reform, mechanisms for enhanced transparency in the public procurement system, and more).