Statement on the Public Procurement Bill 2023

Issued by the Procurement Reform Working Group (PRWG)

12 December 2023

The Public Procurement Bill is deficient and dangerous

Parliament's National Assembly has passed the Public Procurement Bill, sending it to the National Council of Provinces. This Bill is among the most consequential statutes advanced by President Ramaphosa's administration. It will govern South Africa's trillion rands of annual procurement expenditure, a precious fifth of gross domestic product. Despite legislative drafting proceeding since 2014, in recent months we've borne witness to a rush to get the Bill through Parliament before the 2024 elections. This rush has been attended by unclear, unstudied, and un-consulted eleventh-hour changes, which through their ramifications for state functions and the economy, will have profound implications for the basic rights of all South Africans.

The Bill is deficient. To address systemic issues in public procurement, to avoid actually amplifying existing legal, operational, and economic chaos, there are serious corrections to be made to the Bill before it advances further. In this statement, we focus our concerns on participatory procedure, integrity and transparency, and preferential procurement.

Participatory Procedure

The parliamentary participation process has been problematic. On 18 August 2023, the National Assembly's Standing Committee on Finance opened the Bill for public comments. Despite short notice, the stakes are such that by close of comments on 11 September, a total of 112 submissions had been made. Two months later, when the Treasury responded to these submissions, it appears from records to have given cursory attention to only 36% of them; 64% had not been processed at all. Treasury's subsequent recommendations - often with opaque origins outside of the participatory process itself - retained serious flaws in the Bill, rolled back integrity provisions, and included an entirely new preferential procurement chapter.

This treatment of submissions mocks the efforts of participating stakeholders. The last-minute imposition of sweeping changes to the Bill, where impact on rights requires further consultations between social partners in Nedlac and with the public in Parliament, contradicts the participatory spirit of the Constitution, the Nedlac Act, and broader law. The Standing Committee on Finance's

own superficial engagement in participatory procedures and executive oversight erodes its status as the people's assembly and violates the separation of powers.

When compared with participatory processes conducted for Bills with a similarly far-reaching public impact (such as the Basic Education Laws Amendment Bill and the Traditional and Khoisan Leadership Act), it is apparent that Parliament has put much less effort into involving as many affected parties as possible. Stakeholders who have participated have often not been given meaningful opportunity to address issues in the Bill. A process of minimal consultation and only marginal rewriting in the National Council of Provinces will not sufficiently remedy these defects.

Integrity and Transparency

South Africa is experiencing runaway corruption across public procurement. This corruption has become a clear and present threat not only to the well-being of our people but also to the foundations of our Republic. It is widely understood that the consequences of going forward as we have, indeed of expanding opportunities for corruption and undisciplined, unproductive rent-seeking, will be dystopian. In this context, it is worrying to see the National Assembly ignore or defer Zondo Commission recommendations, disregard sensible stakeholder suggestions, and erode the Bill's integrity provisions.

The Zondo Commission argued for the creation of a robust and independent public procurement regulatory authority, but the Head of the Public Procurement Office will still be appointed through the existing, politicised process. The Zondo Commission came out in favour of the incentivisation of whistleblowing in procurement, but this decision will now be deferred to promised amendments to the Protected Disclosures Act. These amendments will likely take years. The Department of Justice and Constitutional Development, responsible for formulating them, is already publicly dismissive of incentivisation. This does not augur well for anti-corruption efforts

Stakeholders in the participation process suggested further minimal, consequential, but sensible changes. The beneficial ownership transparency provisions, which should be applauded, are among the Bill's most positive advances. Various stakeholders called for these provisions to be aligned with recent amendments to the Companies Act, but the National Assembly's version of the Bill does this incompletely. We reiterate that beneficial ownership is recorded, for different categories of business, under both sections 56(7)(a) and (12) of that Companies Act, 2008.

The Bill's assertion that "'confidential information' means… personal information protected in terms of the Protection of Personal Information Act" (POPIA) could be interpreted too expansively, generating costly litigation. Under the definitions of POPIA, this provision could be construed as rendering the names of directors and owners of government suppliers confidential, which would significantly undermine the Bill's transparency measures. The Promotion of Access to Information Act (PAIA) and the Constitution regulate access to information, constructing a careful balance between privacy and transparency rights. The scope of confidentiality for personal information established by the Bill should be clearly, statutorily circumscribed to what is legitimately non-disclosable under PAIA and the Constitution.

The Bill introduced into the National Assembly gave the proposed Public Procurement Office and provincial treasuries the power to review procurement policies of procuring institutions. The Bill now passed by the National Assembly removes these provisions, which we view as essential for ensuring Treasury control and integrity across the system.

When the Bill was introduced into the National Assembly, leaders of political parties were automatically excluded from participating in procurement as bidders and suppliers. Persons related to officials were also automatically excluded from submitting bids to the procuring institutions within which they are employed. The Bill that the National Assembly passed instead proposes to regulate these potential conflicts through ordinary conflict of interest provisions, but these provisions have been ineffective in the past, are too narrowly conceived to address complex conflicts of interest, and don't incorporate stakeholder suggestions to the effect that state trading with automatically excluded persons or their relations be proactively disclosed to the public.

Preferential Procurement

The most significant changes sustained by the National Assembly were in preferential procurement. We wade into this contentious domain in the following terms: Public deliberations on preferential procurement are unfortunately both starkly polarised and astonishingly simplistic. Debates often hinge on whether to completely phase out or radically expand preferential provisions, but this elides the constitutional, political, and economic reality. This reality requires that we configure preferential procurement in a way that optimally sustains, expands, and deracializes our economy and society. Optimising on these imperatives is complex, nuanced work, pregnant with implications for the future of our country. It has not been given the sustained, technical attention that it deserves.

In the parliamentary process, a number of stakeholders advocated for a clearer, guiding statutory framework that circumscribed procurement practices within the balance constructed by the Constitution's section 217(1) principles of fairness, equitability, transparency, competitiveness, and cost-effectiveness. Treasury returned with a more comprehensive preferential procurement chapter - a potentially positive development - but this chapter has been hastily assembled.

Its language and mechanics are often vague, even impenetrable. The chapter comes with new terms, such as "complementary goals," which remain undefined and unknown in legal precedent and professional practice. The new chapter's expansive and loose provisions for "prequalification" and "set-asides" (the differences between these concepts as they emerge in the Bill are unclear) for certain categories of business may open up a rapid, unmanaged reallocation of state resources throughout the economy. This threatens the chapter's concurrent concern with preserving and promoting industrial capacity, economic development, and job creation.

The provisions are so broad as to empower procuring institutions to move beyond the ambit of section 217(1) of the Constitution, raising the prospect of operational chaos and costly, disruptive litigation. Presumably to guard against this, the Bill requires procuring institutions to investigate the feasibility of their preferential procurement policies in light of their economic environments, but indications are that most will not have the capacity or integrity to do so. Treasury cannot so easily wash its hands of its own, constitutionally inscribed role of centrally steering the public procurement system.

The new chapter is also at odds with other, older provisions of the Bill. Treasury has long asserted its desire to provide for more flexible elaboration of procurement methods in regulations. It has repeatedly affirmed its intention to elevate functionality into an adjudication criterion in the points system. These goals remain under Chapter 5 of the Bill, but details of the new preferential procurement chapter will undermine them.

It is remarkable, considering these and other complications, that the Standing Committee on Finance's deliberations focused on whether price should be a consideration in awarding contracts. Members of Parliament solemnly debated whether the state should weigh how much something costs when it buys it. The most significant change introduced by the Committee, to Treasury's preferential procurement chapter, was to remove sections requiring bidders to compete, in part, on price. This is unserious. It violates public trust in a Committee responsible for exercising oversight over the public's finances.

This Bill will govern annual expenditure of a trillion rands. It is as it stands deficient and, if passed by both houses of Parliament, potentially disastrous for our country.

#PublicProcurementBill
#ProcurementReformAccountability
#PublicProcurementTransparency
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Issued by the Public Procurement Working Group (PRWG), including:

- Ahmed Kathrada Foundation
- AmaBhungane Centre for Investigative Journalism
- Corruption Watch
- Equal Education
- Equal Education Law Centre
- Legal Resources Centre
- Public Affairs Research Institute (PARI)
- Public Service Accountability Monitor (PSAM)
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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).