



AFRICAN PROCUREMENT LAW UNIT



TARGETED PROCUREMENT/PPP DISCUSSION POINTS

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1. Is it mandatory to implement Preferential Procurement Policy?
2. Who must develop the PPP?
3. What must be the scope/threshold for PPP?

- Should organs of state have an option not to implement PPP?

“17. (1) **When** implementing a procurement policy providing for—

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons or categories of persons, disadvantaged by unfair discrimination,

a procuring institution must do so in accordance with the objects of this Act, this Chapter and section 10(1)(b) of the Broad-Based Black Economic Empowerment Act”

- Oxford dictionary meaning of “**when**”: “at or during the time that” eg *I liked Admin law when I was a student*”
- Does this suggest that there might be a time when a procuring entity does not implement a preferential procurement policy?
- If so, this means that the implementation of a preferential procurement policy is not mandatory.

- Non-mandatory nature of implementing PPP might stem from the wording of section 217(2)
 - “2. Subsection (1) **does not prevent** the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for.....”
- This suggests that an organ of state, when it procures for goods and services, is simply not prevented from applying a policy that provides for preferential procurement.
- Section 217(2) does not make it mandatory for organs of state to implement a preferential procurement policy. Suggestions that the obligatory nature must be left to legislation (P Bolton – Government Procurement as a Policy Tool in Journal of Public Procurement (2006) 6 *Journal of Public Procurement*).
- PPPFA section 2(1) organ of state must determine its PPP....
- Ideally procuring institutions should **not** be given an option not to implement targeted procurement. This must be prescribed in the Bill.
 - “When procuring for goods and services, procuring entities **must** implement procurement policy...”
- Option must be limited to the extent/basket of PPP they may wish to implement

- Language of the current bill not unequivocal/explicit as to who must determine PPP.
- Juxtapose this with the emphatic wording of PPPFA:

*“2(1) **an organ of state must determine** its preferential procurement policy and implement it within the following framework....”*
- All that Section 17 of the Bill does, is to insinuate that this must be done by the procuring institution.
- But for the unclear drafting style, there is no doubt that the intention of the Bill is to empower procuring entities to develop PPP.
- Proviso:
 - the Regulations will still guide some aspects of the PPP developed by procuring entities[see s 17(3)].
 - Procurement Office to determine model procurement policy [section 5(2)(c)].
- All this leads to the Decentralised vs Centralised debate. i.e At what level must PPP be set?

Decentralised (Procuring Entity)	Centralised (Regulations/Procurement Office prescribing)
More flexibility to procuring institutions	Uniformity in the PPP dispensation
PPP informed by realities/circumstances at the procuring entity level	
Fragmented and disparate implementation of PPP	Setting PPP framework that doesn't accord with peculiar circumstances of procuring entities.
Quality of PPP reliant on the appetite/strength of procuring entity	

- Current 80/20 and 90/10 model enables cheaper but unempowered big entities to score higher points than small/medium sized empowered entities who had higher prices
- This narrow 80/20 and 90/10 placed undue restriction on the empowerment scope afforded to organs of state in terms of section 217(2) of the Constitution.
- Procurement Bill has jettisoned the restrictive effects of :
 - 80/10 and 90/20 points for PPP
 - SCA judgement in the ***Afribusiness NPC v Minister of Finance*** [see bouquet of measures in section 2(c)] i.e set asides, subcontracting etc
- What will be the appropriate threshold for PPP?
 - 60/20/20 being Price/BBBEE/SD? This happened when some PFMA schedule 2 entities were exempted from PPPFA.
 - Should we be fixated on thresholds when other options i.e. SD, set asides etc are available?

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THANK YOU
