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Select Committee on Finance

National Council of Provinces

Parliament of the Republic of South Africa

Per email: Mr Nkululeko Mangweni, nmangweni@parliament.gov.za

COMMENTS ON THE PUBLIC PROCUREMENT BILL [B18B-2023]

In response to the invitation by the Select Committee on Finance, we hereby wish to submit the comments contained in this document on the Public Procurement Bill [B18B-2023].

About APLU

The African Procurement Law Unit (APLU) is a multi-institutional research unit focusing on the study of public procurement law within an African context. APLU is administered from the Faculty of Law at Stellenbosch University and the College of Law at the University of South Africa. Researchers from ten different universities across Africa and beyond as well as a number of researchers in other public and private institutions are currently actively affiliated with APLU. More details on APLU's objectives, projects and publications can be found at www.africanprocurementlaw.org.

Comments on the Public Procurement Bill [B18B-2023]

APLU welcomes the tabling of the Public Procurement Bill (the Bill). APLU is of the view that law reform in the field of public procurement is urgent in the South African context for a variety of reasons, including the incoherent state of procurement law in South Africa, the inefficiencies in the practice of public procurement, high levels of procurement corruption, but also the major role that public procurement can play in realising developmental goals in South Africa and in particular in support of the National Development Plan. We view law reform as an important enabler of the opportunities that public procurement holds and in many respects as a prerequisite for the realisation of those opportunities. It is in this spirit that we offer these comments on the Bill in order to further refine the text towards an optimal procurement-law regime for South Africa.

We would also like to request an opportunity to address the Committee during its public hearings on 23 February 2024 on the Bill in order to outline our comments.

Kind regards

Prof Geo Quinot
Director, African Procurement Law Unit

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1. COMMENTS

We offer below brief comments on five particular themes relating to the Bill:

1. Consolidation of procurement law
2. Anchoring the Bill in the principles of section 217(1) of the Constitution
3. Compatibility of the Bill with public finance paradigm
4. Co-operative government
5. Capacity and Professionalisation

Our comment focus in particular on provincial and local spheres of government.

1.1 Consolidation of procurement law

The deliberate attempt to consolidate public procurement law into a single regulatory regime is strongly supported. The fragmentation of public procurement law in South Africa and in particular the absence of a central, overarching, comprehensive public procurement statute is one of the main causes of an ineffective procurement regulatory regime in South Africa.

In this regard, we are of the view that some aspects of the Bill can still be strengthened to avoid similar fragmentation in future. We propose that the scope for issuing further, subordinate legislation, such as regulations, instructions and notices, should be limited. In our view, there are far too many aspects currently left to regulations, instructions and notices. The Bill itself should set out all main principles of the new procurement regime and only delegate law-making powers in clear and precise form with adequate guidance (including parameters) on how the delegated law-making powers must be exercised. This issue is most evident in relation to the very large number of matters to be dealt with only in regulations, including key components of the procurement system such as procurement methods and details of the preferential procurement system. On procurement methods the Bill is almost completely silent, essentially abdicating law-making authority to the Minister. This approach is questionable. In our view, the Bill should set out the main principles and framework for procurement methods and only empower the Minister to add details of such methods to the framework.

The new powers granted to provincial treasuries to issue binding instructions to local government poses another threat to new forms of fragmentation. Not only will this subject municipalities to multiple sources of instructions, but it also opens the door to different approaches to procurement in different provinces based on different provincial instructions. While the Bill provides for all provincial instructions to be aligned with national instructions, this is no guarantee that differentiated provincial instructions, albeit all compliant with national rules, may not emerge. Such renewed fragmentation will continue much of the current problems and undermine procurement efficiency for both procurement officials and suppliers to the state.

1.2 Anchoring the Bill in the principles of section 217(1) of the Constitution

A major concern is the lack of guidance on the implementation of the five principles of the public procurement system prescribed by the Constitution in section 217(1). The Bill is completely silent on how these principles should be interpreted and determine procurement decisions in practice. Specifically, the Bill lacks critical guidance on balancing the five principles of section 217(1) for optimal

value for money. It offers no clear direction on managing trade-offs between principles like fairness versus cost-effectiveness or equity versus competitiveness.

This absence leaves procurement officials vulnerable to legal challenges due to uncertainties in achieving 'maximum value for money' as endorsed by the Zondo Commission and the President. Furthermore, in the absence of such guidance, the Minister, PPO, provincial treasuries, and procuring institutions lack clear legal ground to design operational elements, such as policies, methods, and criteria, without facing potential legal challenges.

This is particularly problematic given that many commentators, including the Zondo Commission and the President, have noted that uncertainty about how the five principles in section 217(1) of the Constitution are to be understood and how they interact have been major stumbling blocks in our procurement system.

The Bill should at the very least provide guidance on how the five principles are to be balanced in any procurement function. This applies to how the procurement system is designed and implemented. We recommend that the Bill sets out a clear framework for how value must be determined within the procurement context, including setting out the parameters of criteria, including price, to be used in determining value for money.

1.3 Compatibility of the Bill with public finance paradigm

We are concerned that the Bill is not wholly compatible with the paradigm of public finance management under the Public Finance Management Act 1 of 1999 ("PFMA"), as applicable to provinces, and the Local Government: Municipal Finance Management Act 56 of 2003 ("MFMA").

The paradigm of these foundational statutes in South African public finance management is that accounting officers/accounting authorities are responsible and thus accountable for the public finance management of their institutions. Put differently, the accountability of accounting officers/accounting authorities is premised on their powers to control spending within the entity. Public procurement is obviously an important dimension of public spending in these entities.

When control over spending, such as through public procurement, is removed from accounting officers/accounting authorities, it is difficult to justify their accountability for such spending. We are concerned that the Bill removes in important ways the power of accounting officers/accounting authorities to control public procurement within their institutions, which is in tension with the paradigm of the PFMA and MFMA. We are in particular concerned that this may result in a lack of accountability when it comes to public spending via public procurement, since accounting officers/accounting authorities may legitimately claim that they are no longer primarily responsible for key public procurement decisions within their institutions under the Bill and thus cannot be held accountable for procurement outcomes.

In our view, the Bill fails to introduce public procurement regulation that is institutionally aligned to the public finance management paradigm under the PFMA and MFMA. This is a serious defect in the Bill and requires close attention. We propose that the Bill be carefully scrutinised and revised to remove all provisions that undermine the primary responsibility and decision-making power of accounting officers/accounting authorities in relation to public procurement and to cut back on

powers granted to bodies other than procuring institutions which have the effect of eroding accounting officers/account authorities' procurement powers.

1.4 Co-operative government

Linked to our concerns raised in para 1.3 above, we are concerned that the significant centralisation of procurement functions under the Bill is not compatible with the principle of co-operative government as set out in the Constitution, specifically chapter 3.

In our view, the high level of national control over the procurement system is questionable, both from a constitutional perspective and a practical perspective. This is most evident in the very large number of matters that must be prescribed by way of regulation, Public Procurement Office ('PPO') instruction and notice, rather than being set out in the legislation.

It seems that the fair measure of legal power that organs of state current have in relation to framing their own SCM policies will largely disappear under the Bill, to be replaced primarily by national prescript. This is most drastic in relation to local government. Under the current MFMA regime, local councils, i.e. elected local representatives, have the legal authority to adopt their own SCM policies. All inputs from national government and provincial government can only be binding on local government procurement if the local council adopted same. This position drastically changes under the Bill with neither local councils nor local governments more generally, having any control over whether national and provincial prescripts apply to their procurement functions. There is accordingly a major shift in political power with locally elected officials (councils) losing considerable control over the approach to procurement within the local area in favour of nationally elected officials (mostly Minister of Finance).

It is questionable whether this reduction of legal authority by local government is compatible with the Constitution's co-operative government scheme. It is particularly difficult to reconcile with local government mandates under sections 151, 152 and 153 of the Constitution. Similar arguments could potentially be made in relation to provincial governments and sections 104 and 125 of the Constitution, read with Schedules 4 and 5.

From a practical perspective, it makes little sense to introduce significant distance between those framing the rules (and hence modalities) of procurement, those conducting the procurement and users benefitting from the procurement. It is widely accepted that the closer the entire procurement function can be situated to the actual user (i.e. those benefitting from the procurement), the more optimal the procurement outcomes will be.

South Africa's public procurement landscape is vastly diverse, encompassing various types of public entities, sectors, mandates, maturity levels, resources, and geographical disparities. Given this complexity, vesting primary decision-making power over key elements of the procurement system, such as procurement methods and the modalities of preferential procurement, solely at the national level raises concerns. Perhaps Parliament, representing the wider spectrum of perspectives and interests as well as bringing all spheres of government together, is better suited (and arguably constitutionally mandated) to establish the main framework for such decisions.

Our concerns regarding co-operative government is exacerbated by the lack of any provision obliging consultation with local government structures, such as CoGTA and SALGA, in relation to local government procurement in the Bill. This is most problematic in the context of issuing further subordinate instruments under the Bill, such as regulations, instructions and notices. In relation to the latter, it is worth noting that the Bill makes no provision at all on any form of consultation prior to issuing notices.

Finally, while we strongly support the introduction of an administrative dispute resolution mechanism in the form of the Tribunal, in the Bill, we are concerned about the national nature of the structure. In our view, having a single, national tribunal may create significant bottlenecks and hence delays in procurement. In our view, the tribunal structure should at the very least operate also at provincial level. Again, such an approach would be a better alignment with the principles of co-operative government under the Constitution.

We would recommend that the provisions pertaining to the Tribunal in the Bill be revised to add a provincial element. One option would be to create a national tribunal to deal with all procurement disputes involving national procuring institutions and provincial tribunals to deal with all procurement disputes involving provincial and local procuring institutions within the province. Another option would be to provide for a decentralised structure for the single Tribunal which could, for example, involve branches or panels situated in provinces with further decentralised panels at district municipality and metro levels, for example.

In our view, the Bill requires careful and serious reconsideration in respect of the allocation of powers between the three spheres of government. We are of the view that the Bill is currently not optimally, and arguably constitutionally, allocating procurement powers between the different spheres. This is most evident in relation to local government.

1.5 Capacity and Professionalisation

We are concerned that the Bill does not adequate address the inherent capacity that would be required to successfully implement the Bill nor professionalisation of public procurement.

The Bill imposes a range of additional and new functions on provincial governments, especially provincial treasuries, and local government. Examples include the new enforcement functions of provincial treasuries under section 6(1), investigations into bidders' prior convictions (section 27), investigations around transgressions that may lead to debarment (section 15), the implementation and operation of internal review structures (section 37), market research obligations for using prequalification criteria (section 18) and the range of additional elements to be included in the procurement system in terms of section 25 that did not previously form part of the procurement system (such as risk management, project management and logistics management). The Bill is, however, silent on how capacity will be enhanced to ensure effective implementation.

One would of course not expect detailed plans on capacity building, a Bill is clearly not the appropriate instrument for such plans, but the Bill will have to contain a clear basis for increased capacity. That is, in enacting the Bill, Parliament will have to clearly mandate and oblige additional capacity building, including resource allocation, in procurement in order to ensure the implementability of the new procurement regime set out in the Bill.

Of particular concern in this respect is that the Socio-Economic Impact Assessment System (SEIAS) Report accompanying the tabling of the Bill identified implementation costs for provincial departments, especially provincial treasuries, and municipalities, relating to their new functions, but that the memorandum accompanying the Bill stated that 'No substantial financial implications for the State are envisaged.' The SEIAS Report notes distinct implementation cost to organs of state, specifically including provincial treasuries and municipalities, as follows: "Increase in human resources to cater for new functions; Increase in ICT infrastructure to enable better performance of new functions and service delivery; Increase in budget to cater for additional Human resources, ICT, change management & Capacitation of staff through training". In relation to provincial treasuries specifically, the Report states: 'There may be a need for re-engineering of the current SCM transversal support units within provincial treasuries to align with the new functions that will need to be performed in line with the Bill'. The Report, however, also states in relation to field 'Cost to government': 'Not applicable; currently in terms of the PFMA and the MFMA that regulates SCM, there is a requirement for institutions to establish an SCM unit. Therefore, the functions outlined by the proposal will utilise existing resources.' This response is nonsensical given the explicit and correct acknowledgement that many functions assigned to provincial departments, specifically treasuries, and municipalities are new, i.e. will not be covered by existing capacity.

We propose that a specific provision be added to the Bill to explicitly provide for increased capacity and professionalisation, such as provision for mandatory competency levels and training obligations. This provision should place obligations on all relevant departments, such as National Treasury and Provincial Treasuries, to allocate sufficient additional resources to procurement functions in order to meet the increased mandate.

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