

COMMITTEE REPORT

(Negotiating mandate stage) Report of the Standing Committee on Finance, Economic Opportunities and Tourism on the Public Procurement Bill [B 18B - 2023] (NCOP)(S76), dated 22 March 2024, as follows:

The Standing Committee on Finance, Economic Opportunities and Tourism having considered the subject of the Public Procurement Bill [B 18B - 2023] (NCOP)(S76) referred to it in terms of Standing Rule 217, confers on the Western Cape's delegation in the NCOP the authority to not support the Bill, for the reasons outlined below.

The National Council of Provinces is requested to note the following:

1. General Comments

- The Public Procurement Bill's (the Bill's) aim to consolidate procurement laws and establish a single framework is acknowledged. However, significant concerns arise from the Bill's reliance on regulations and the perpetuation of race-based categories in preferential procurement.
- The Committee acknowledges the valuable inputs from various stakeholders, including Thelma Bailey – BusyBeeSuppliers, Medical Devices Manufacturers of South Africa, the Western Cape Government, City of Cape Town, the Group of Construction and Engineering Companies, West Run Security, Worldwide Integrated Logistics (Pty)Ltd, the Procurement Law Unit at Stellenbosch University, National Research Foundation, SG Attorneys Inc., the Public Affairs Research Institute (PARI), the Joint Strategic Resource (JSR), SA Municipal Law Forum, to name a few. These inputs have been crucial in shaping the considerations and proposed amendments to the Bill.

2. Procedural concerns

This section of the report deals with procedural concerns and unpacks the broader legislative context and procedural intricacies of the Bill. This overview seeks to highlight the procedural dimensions that underpin our legislative analysis, ensuring that the subsequent concerns are grounded in a thorough understanding of the Bill's procedural landscape.

2.1 Time Constraints:

- The limited time allotted for processing this Bill has impeded thorough consultation and stakeholder engagement due to its complexity and proposed significant changes, reflecting a failure to fulfil constitutionally mandated duties regarding public participation.
- Material alterations made without public comment underscore a procedural flaw requiring correction. Parliament's discretion in facilitating reasonable public involvement is vital, considering the legislation's nature and impact, with meaningful participation crucial for influencing decision-making.
- However, the two-week timeframe provided for engagement and comments, from February 26 to March 8, 2024, is deemed unreasonable given the legislation's significance and its

implications for the public and the fiscus, hindering meaningful participation and influencing Parliament's deliberations, as evidenced by relevant legal precedents.

2.2 Socio-Economic Impact Assessment System Report (SEIAS):

- In response to the SEIAS report on the Public Procurement Bill, a detailed financial impact assessment for provinces and municipalities is essential. This assessment should cover the costs of implementing the Bill, including the operation of proposed Tribunals and the development of new procurement systems, as required by the Public Finance Management Act, 1999 (Act 1 of 1999) (PFMA). It is crucial to reconcile the discrepancy between the SEIAS report, which indicates significant implementation costs, and the Bill's memorandum which suggests minimal financial implications for the state.
- A mandatory comprehensive financial analysis is urgently needed, before passing the Bill. This analysis should quantify setup, transitional, and operational costs, particularly focusing on the Tribunals, the impact of standstill provisions, and the requirements for enhanced ICT infrastructure and human resources. The notion that existing resources can absorb these new functions is unrealistic and contradicts the need for additional capacity highlighted in the SEIAS report.
- Amendments to the Bill must be made to ensure that there is compliance with Section 35 (Unfunded Mandates) of the PFMA. These amendments should explicitly include the costs associated with implementing the Bill and detail how these will be managed within provincial treasuries and municipalities. This approach will provide a clear understanding of the financial implications and ensure adequate resource allocation for the successful implementation of the Bill.

3. **Substantive concerns**

This section, which unpacks substantive concerns related to the bill, provides a foundational assessment that sets the stage for a detailed review. It dissects the core elements of the Bill, ensuring that our analysis of substantive concerns is rooted in a comprehensive understanding of its fundamental provisions and intended impacts.

3.1 Definitions:

- The Committee asserts that the Bill must provide clear and precise definitions for over 40 currently undefined terms to avoid ambiguity and ensure effective implementation. Essential terms needing explicit definition include 'functionality', 'feasible', 'complementary goals', 'sustainable development', 'beneficiation', 'innovation', and 'types of procurement methods'. The inclusion of these definitions within the primary legislation is imperative for the practical understanding and application by provincial departments and municipalities.
- Furthermore, the Bill should establish a definitive framework for calculating premiums associated with preferential procurement, specifying minimum and maximum limits, and detailing the methodology for determining these premiums to ensure transparency and accountability in their financial impact.

- It is also critical to refine the definition of procurement to prevent the encompassment of entire departmental functions that extend beyond the Bill's scope, particularly those concerning construction, repair, or maintenance. This refinement is necessary to preserve the functional integrity of the Western Cape's departments and to ensure the Bill's practicality.
- The roles of the Public Procurement Office and its Head require clearer articulation to safeguard independence and prevent undue influence. Moreover, the Bill should delineate 'transversal term contracts' and procurement management functions such as contract and risk management, either defining them within the Bill or relegating them to subsidiary regulations to be contextualised for local government operations.
- The Committee calls for amendments that articulate steps for accounting officers to address implicated officials and establish a clear procedural roadmap following offence qualification. These efforts collectively aim to provide clarity, specificity, and coherence in the Bill's provisions, aligning with both the PFMA environment and local government operational realities.
- Clause 17(2)(a): It is proposed that the word "targets" be amended to say "thresholds" instead. The definition of "set asides" should also be clarified.

3.2 Governance, Oversight and Autonomy:

- The review of the Minister's powers and the preservation of the autonomy of provinces and municipalities: This involves addressing the Minister's role in defining procurement frameworks (especially in Clause 25: Procurement Systems and Methods) to prevent excessive delegation of law-making authority and emphasising primary procurement principles in the Bill.
- The incorporation of Joint Strategic Resource's (JSR) strategic contracting approach into the Bill: The mandate identifies this as key for transforming public procurement from a purely administrative function to a strategic tool for economic development.
- A call for restricting the Minister's role in determining procurement frameworks and exemptions: The mandate also emphasises protecting the independence of Provincial Governments in procurement areas linked to their constitutional mandates and suggests a legislative impact analysis on Provincial autonomy before the Bill's enactment.
- The necessity for formal consultation processes with the Department of Cooperative Governance and Traditional Affairs (COGTA) and the South African Local Government Association (SALGA) to reinforce cooperative governance, as outlined in Chapter 3 of the Constitution: These consultations should ensure the preservation of municipalities' legislative and executive powers and respect for local socio-economic objectives.
- There should be affirmation of the constitutional powers of municipal councils in line with the Western Cape Government's perspective on preserving local governance autonomy, emphasising the enhancement of legislative and executive powers of provinces and municipalities.
- Amendments to include local socio-economic objectives in preferential procurement criteria, aligning them with the constitutional objectives of provinces and municipalities, are identified as crucial.

- The introduction of amendments to Clause 20 (Designation of sectors for local production and content) of the Bill is called for, requiring procurement officers to prioritise local socio-economic development per Sections 104, 125, 151, and 152 of the Constitution of the Republic of South Africa, 1996, to support regional development.
- There should be adjustments to Clause 6(1)(a)(ii) and (b) to limit the enforcement and intervention powers of Provincial Treasuries to PFMA institutions, thereby preserving the autonomy of local municipalities.
- There should be a reevaluation of Chapter 4's provisions on preferential procurement to ensure support for an inclusive economy and effective transformational procurement practices. The mandate highlights the need for these provisions to avoid fragmenting the procurement system and support the expansion and de-racialisation of South Africa's economy.
- There is a need for a more decentralised procurement framework, respecting the constitutional autonomy of different government spheres by allowing provinces and municipalities to maintain their legislative and executive powers.
- The potential risks of fragmentation due to the power granted to provincial treasuries in Clause 6(2) of the Bill have been identified. The Bill should ensure provincial instructions align with national guidelines (Clause 6(2)(a)) while preventing divergent provincial instructions that could lead to inefficiencies in procurement processes.
- Clause 39: The Minister is given the power to appoint the members of the Tribunal. There is a concern that the Tribunal will not be as impartial or neutral if the members are appointed by the Minister, and not another body. Additionally, the clause is too open-ended about the number of members that may be appointed to the Tribunal.

3.3 Constitutional Rights and Legislative Clarity:

- The scope of privacy in South Africa hinges on a legitimate expectation of privacy, with limitations justifiable under Section 36 of the Constitution serving a valuable public purpose proportionately. Generally, obtaining a warrant from an independent authority before intrusion into private spheres is a crucial safeguard against abuse of public power.
- Exceptions to the warrant requirement include situations where the target consents, cases of demonstrable urgency, and regulatory inspections of commercial premises for promoting compliance with public interest regulations. The Bill addresses consent to waive constitutional rights and regulatory inspections of commercial premises.
- It is further highlighted that the legitimate waiver of rights requires fully informed consent, as per legal precedent (*Mohamed v South Africa Intervening*) 2001 (3) SA 893 (CC)). While waivers serve public purposes, they must be proportionate to pass constitutional scrutiny.
- Clause 57(2) (Power to enter and search premises) must be amended to require "informed consent" to ensure proportionality. Provisions regarding regulatory inspections of commercial premises necessitate scrutiny, distinguishing between compliance and enforcement. Searches aimed at compliance are less intrusive than those for enforcement, requiring limitations on inspectors' discretion regarding time, place, and scope to uphold property owners' rights.
- The Bill should explicitly include provisions to enhance clarity, reduce reliance on ministerial regulations, and promote transparency in the procurement process to prevent corruption and ensure efficiency.

- The Bill's grasp on constitutional requirements and its over-reliance on subordinate legislation highlights the need for revisions to address fragmentation, ambiguity, and incoherence, especially within preferential procurement laws.
- Delegation of law-making powers to the executive must be carefully defined to ensure transparency and accountability in line with constitutional principles, as outlined in relevant legal precedents.

3.4 Economic Inclusion and Support:

- The Committee recognises the challenges very small businesses face, including those expressed by Thelma Bailey of BusyBeeSuppliers, and suggests the Bill be amended to include specific mechanisms that support these enterprises. This should include micro-loan programmes and prompt payment practices, ensuring accessible capital for business initiation and contract fulfilment.
- The Bill should introduce mandatory criteria for the inclusion of small and previously disadvantaged businesses in procurement processes, as per submissions from industry representatives. A framework to assess and score bids should be established to offer these businesses a competitive edge against larger firms. This framework should be detailed within the relevant clauses of the Bill, ensuring transparency and effectiveness.
- To address industry concerns, the Committee suggests amending the Bill to direct procurement officers to prioritise local manufacturers, foster job creation and support the industrial development of sectors such as medical devices within South Africa. These provisions should be incorporated into the relevant sections of the Bill, ensuring a balance between supporting local industries and reducing import reliance.
- The Committee cautions against the Bill's possible detachment of procurement from strategic economic objectives and its broad functional scope that risks complicating the procurement landscape.
- In response to the National Research Foundation's critique and pursuant to Clause 2(2)(d), the mandate recommends expanding the scope of local economic development objectives to include provincial and municipal levels. The Bill must align with constitutional mandates for local socio-economic development and support innovative grassroots programs, thus amending Clause 2(2)(d) accordingly.

3.5 Compliance, Integration and Financial Management:

- The Committee questions the constitutionality of the Bill, particularly the lack of transparent public participation as required under Section 59 of the Constitution. It supports the Western Cape Government's (WCG) call for a reevaluation of the Bill considering its constitutional inconsistencies.
- Considering the JSR's submission, the Committee acknowledges the need for constitutional compliance and suggests a strategic approach to public procurement that moves beyond the administrative paradigm dominating the Bill. Amendments should address JSR's concerns about constitutional issues, the independence of regulatory functions, and robust anti-corruption measures, aligning with the Zondo Commission recommendations.

- The Committee is concerned about the constitutional issues highlighted by the JSR, specifically the compliance of the Bill with Section 217 of the Constitution. JSR's analysis indicates significant constitutional concerns with the revised Bill (B18B-2023), and the Committee insists that these be addressed to ensure the Bill's constitutional soundness.
- There is a notable absence of guidance in the Bill on implementing the five principles of public procurement outlined in Section 217(1) of the Constitution. This lack of clarity is problematic, especially regarding how these principles should be interpreted and applied in procurement decisions.
- The Committee endorses WCG's insights on the separation of procurement from the broader financial management framework, potentially leading to systemic inefficiencies. The recommendation is for the Bill to incorporate a more integrated approach that aligns procurement with fiscal responsibility and control measures.
- The Bill appears to conflict with the public finance management principles established by the PFMA and the Local Government: Municipal Finance Management Act, 2003 (Act 56 of 2003) (MFMA). These Acts assign accountability for financial management, including public procurement, to accounting officers and authorities within their respective institutions.
- The Bill could have unintended consequences of reducing the control these officers and authorities have over public procurement, creating a disconnect with the accountability framework of the PFMA and MFMA. This is particularly evident in Clauses 25 and 64 of the Bill, where key procurement decisions are potentially shifted away from the institutions' accounting officers/authorities. Such a shift could lead to a lack of accountability in public spending.
- To align the Bill with the existing public finance management paradigm, it is crucial to revise it to preserve the decision-making authority and primary responsibility of accounting officers/authorities in public procurement.

3.6 Judicial Review and Dispute Resolution:

- The Committee is concerned with the creation of a Public Procurement Tribunal and the administrative complexity it introduces, suggesting the need for a more streamlined and accountable dispute resolution mechanism.
- While supporting the introduction of an administrative dispute resolution mechanism through the Tribunal, the Committee is concerned about potential bottlenecks due to its national structure. A provincial-level operation of the tribunal system, with geographically based standing panels, could align more closely with cooperative governance principles, ensuring efficient and localised handling of procurement disputes. This could involve an obligation in Clause 47 to establish provincial panels for handling applications within each province, overseen by designated provincial chairpersons.
- Specialised training for procurement officers should be mandated, which focuses on the nuances of the Public Procurement Bill with an emphasis on economic empowerment clauses. This training should be a required qualification for any officer adjudicating procurement tenders, ensuring they possess the expertise to justly apply the Bill's mandates.
- Implement a mechanism within the Bill to allow for expedited review processes for procurement disputes, particularly those that could lead to service delivery disruptions. This

should include a clause that stipulates a maximum allowable period for review to prevent undue delays (an addition to Clause 37 or 38).

- The Bill should be amended to include provisions for alternative procurement methods to be activated in case of significant delays caused by the review process, ensuring continuity in service delivery (an insertion after Clause 38 or 39, detailing the conditions and procedures for alternative methods).
- Provisions should be inserted in the Bill for corrective actions to be taken in place of preventative ones when this is more cost-effective. This would allow the payment of compensation to affected parties if necessary while ensuring that service delivery continues unabated (a new section to follow the review proceedings - possibly Clause 55 or a new clause).
- A structured and regular inclusion of Small, Medium and Micro Enterprises (SMMEs) in procurement planning discussions is required, and the development of an economic hub focused on bolstering small security firms within the Western Cape. This should involve setting concrete targets for SMME participation in public contracts, monitored and reported on a biannual basis.
- The Committee notes JSR's call for deeper engagement with the Zondo Commission's recommendations, such as incentivised whistleblowing and transparency standards. The mandate will seek to integrate these aspects into the Bill to enhance the integrity and public confidence in the procurement process.

3.7 Institutional Capacity and Risk Assessment:

- The Committee endorses the WCG's concerns regarding the Bill's potential to create unfunded mandates, as well as the hidden and institutional costs that have not been adequately addressed or quantified. This includes concerns about set-up and operational costs, increased capacity requirements, and obligations placed on procuring entities. The Committee recommends amendments to the Bill to ensure full transparency and financial clarity, including a clear outline of responsibilities and associated costs for procuring entities, especially concerning the extensive obligations of vetting procedures (Clause 15 relating to debarment).
- The Committee identifies a discrepancy in the Memorandum's assertion of no significant financial implications for the state while recognising the need to increase state capacity. The mandate insists on an amendment that explicitly requires the allocation of funds to actualise this capacity increase, addressing the preamble's intent.
- The additional functions, powers, and obligations assigned to the Western Cape without providing a financial implications projection as mandated by Section 35 of the PFMA are of concern. This must be remedied before enacting the Bill.
- The Committee advocates for explanatory notes on the impact assessment of the Bill's expansion at the local government level. This should address the cost implications and the capacity to manage additional functions, such as asset and contract management, within the existing Supply Chain Management units.
- The Committee insists on the provision of a detailed impact assessment report accompanying the Bill, which should outline the minimum organisational, financial, and competency

requirements for provincial entities and municipalities to effectively implement the Act. This is to address the potential for unfunded mandates and hidden costs, thereby avoiding significant financial strain on local governments.

- Detailed reports accompanying the Bill are needed which stipulate minimum organisational, financial, and competency requirements for entities to implement the Act, addressing the WCG's concerns about the risk of unfunded mandates (Clause 64 implications).
- The assertion in Section 5 of the Memorandum (Financial Implications for State) that there are no substantial financial implications for the state is rejected and an explanatory annex should be provided that addresses the funding required to increase the capacity of state organs as claimed in the preamble.

4. Recommendations for Amendments Based on Stakeholder Input

- 4.1 The Bill needs to explicitly respect and uphold provincial autonomy in setting procurement criteria, particularly for services within their areas of responsibility. This includes involving provinces in legislative processes to safeguard their constitutional self-governance rights.
- 4.2 A comprehensive review is essential to ensure the Bill aligns with constitutional guidelines for public procurement. This includes adherence to principles of preferential procurement, value for money, and a cohesive regulatory framework in line with constitutional standards.
- 4.3 The establishment of the Procurement Regulator should be as either an independent entity or part of the National Treasury, with assured operational independence. The process for appointing the head of the regulator, along with their responsibilities and qualifications, needs a clear definition.
- 4.4 Provisions for fair representation from each province in the Public Procurement Tribunal are crucial. This includes creating roles for Provincial Chairpersons and forming standing panels to facilitate efficient tribunal operations.
- 4.5 The Bill must address the need for capacity building and professional development in public procurement, especially for new roles undertaken by provincial treasuries and local governments like enforcement and internal reviews. While detailed capacity-building plans may exceed the Bill's scope, it should mandate resource allocation and training requirements. Responsibilities for enhancing competency levels and providing necessary resources should be assigned to relevant departments, such as the National Treasury and Provincial Treasuries.

5. Specific Amendments and Detailed Comments

- 5.1 Integrate specific amendments and concerns identified by the WCG in both the constitutional/legal and technical/clause-specific areas of their submission into the mandate.
- 5.2 Ensure proactive involvement of provinces and local governments in shaping regulations under Clause 64, reinforcing cooperative governance and effective Bill implementation.
- 5.3 Eliminate the 'trumping' clause to avoid conflicts with existing financial management and governance legislation.
- 5.4 Remove the "transversal term contract" references and clearly define asset maintenance responsibilities, ensuring compatibility with current Supply Chain Management practices in local government.

- 5.5 Conduct a meticulous review of Bill sections that might over-extend into non-procurement areas like asset management, providing clear operational definitions and consulting with relevant local authorities.
- 5.6 Define in the Bill the roles and consultation requirements with CoGTA and SALGA, upholding the integrity of cooperative governance and ensuring comprehensive stakeholder engagement.
- 5.7 Modify Clause 3(2) to avert clashes with existing laws, thereby promoting coherent governance and adherence to financial management norms.
- 5.8 Mandate comprehensive financial impact assessments for new functions or powers, aligning with PFMA requirements and the Bill's transparency and accountability goals.
- 5.9 Set explicit guidelines for municipal involvement and local economic development, aimed at facilitating municipal compliance without undue complications.
- 5.10 Amend sections that potentially encroach on provincial procurement authority to protect their constitutional rights.
- 5.11 Include a thorough annex in the Bill for a complete constitutional validity assessment, particularly for clauses related to construction and engineering procurement, safeguarding provincial interests.
- 5.12 Incorporate a constitutional review mechanism within the Bill, enabling provincial governments to swiftly contest any section that infringes on their legislative competencies, especially in procurement related to construction and engineering.

Minority View:

In accordance with Standing Rule 90, the African National Congress expressed its minority view to support the Bill, with the following considerations:

- (a) The Bill is needed to close the gaps in past public procurement processes;
- (b) The Bill is needed to stabilise the public procurement space and ensure policy stability and certainty, as required by those in the sector;
- (c) There should be more clarity on the definition of “set asides” in Clause 17(2);
- (d) There must be alignment with all relevant legislation in order to strengthen the public procurement ecosystem, so entities such as the Construction Industry Development Board, for example, are reviewed in respect of the intentions of the Bill; and
- (e) The Bill and the procurement framework should be aligned to the country’s industrialisation and localisation policies to ensure industrial capability within the South African economy.

6. Conclusion

The Committee confers on the Western Cape’s delegation in the NCOP the authority not to support the Public Procurement Bill [B18-2023] (NCOP)(S76) in its current form. Significant amendments and revisions are needed to ensure greater transparency, and independence of the procurement regulator, among other issues. The proposed amendments to the legislation aim to promote constitutional compliance, enhanced public participation, and an integrated financial management approach.



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