

# PUBLIC PROCUREMENT BILL [B 18B-2023]

PROVINCIAL LEGISLATURE PUBLIC HEARINGS  
Briefing by National Treasury

PRESENTED BY:

Title:

Date: February – March  
2024



**national treasury**

Department:  
National Treasury  
REPUBLIC OF SOUTH AFRICA



**STAY  
SAFE**

VACCINATE TO SAVE SOUTH AFRICA

## INTRODUCTION

- The Public Procurement Bill was introduced in the National Assembly on 30 June 2023 and passed by National Assembly in Dec 2023.
- The bill is a section 76, meaning that it is a Bill that affects provinces. Therefore, it has to be considered by both the National Assembly and the National Council of Provinces. As part of this process, it has to be brought to the public for comments. This is an important part of the democratic process and we look forward to hearing the comments from the public.
- The presentation aims to broadly outline the key principles contained in the Bill
- It is important to note that Government procurement policy is to leverage public procurement to promote broad socio-economic objectives

## CONTEXT AND PURPOSE

- The public procurement regime in South Africa is currently fragmented as there are several laws which regulate procurement across the public administration (in the national, provincial and local sphere of government). This fragmentation results in confusion as different procurement rules apply for different organs of state. Some of these laws pre-date the constitutional order brought about in 1994.
- It is important and necessary, considering the history of South Africa and the developments after the Constitution took effect, to have legislation that creates a single framework regulating procurement, in line with all applicable stipulations of the Constitution and that effectively addresses the socio-economic challenges of South Africa.
- The aim of the Bill is to be that single framework regulating public procurement and to prescribe a framework within which preferential procurement must be implemented

# ARRANGEMENT OF THE PUBLIC PROCUREMENT BILL AND ITS CHAPTERS

## PREAMBLE

- This is the introduction to the Public Procurement Bill (the Bill). It sets the context for the Bill

## CHAPTER 1

This contains the definitions, objects, application and administration of the Act.

- Definitions: For purposes of interpretation of the Act, various terms are defined. In other words, where words are used in the Bill (or Act, when it becomes law) that are different to the way they are used in ordinary conversation, then they are defined so that the reader of the Bill / Act can understand the meaning of the word when it is used the Bill.
- The objects clause of the Bill outlines the underlying purposes of the Bill, which are to-
  - introduce uniform treasury norms and standards for all procuring institutions to implement their procurement systems as envisaged in the Constitution; and
  - determine a preferential procurement framework for all procuring institutions within which to implement their procurement policies as envisaged in the Constitution (cl 2(1))
  - Clause 2(2) sets out the minimum requirements for uniform norms and standards such as ensuring efficient, effective and economic use of public resources, advancing ethical conduct and combatting corruption, stimulating economic development and advancing transformation, amongst others.
- Application clause tells us to whom the Bill applies:
  - national and provincial departments and government components
  - a constitutional institution listed in Schedule 1 to the Public Finance Management Act, e.g the Public Protector and the IEC, to name two
  - municipalities and municipal entities
  - public entities listed in Schedule 2 and 3 to the Public Finance Management Act. (like Transnet, Eskom, PRASA, etc)
  - Provision is also made for the application of Chapter 4 (preferential procurement) to Parliament and provincial legislatures

## ARRANGEMENT OF THE PUBLIC PROCUREMENT BILL AND ITS CHAPTERS cont.

### CHAPTER 2

This chapter speaks to matters relating to the Public Procurement Office, Provincial Treasuries and Procuring Institutions.

- Public Procurement Office: In terms of the Bill, a Public Procurement Office will be established in National Treasury, and it will have a range of functions, including:
  - issuing instructions and promoting compliance by procuring institutions
  - promoting and taking measures to maintain the integrity of procurement system
  - guiding and supporting officials and procuring institutions to ensure compliance
  - implementing measures to ensure transparency in procurement
- Provincial Treasuries: The functions of Provincial Treasuries are outlined (clause 6)
- Procuring Institutions (the institutions buying or disposing of goods / services): these provisions set out the duties of the procuring institutions and who makes decisions on behalf of the procuring institution.

## ARRANGEMENT OF THE PUBLIC PROCUREMENT BILL AND ITS CHAPTERS cont.

### CHAPTER 3

This chapter speaks to matters relating to Procurement Integrity and Debarment.

- Procurement Integrity: When the procurement process is conducted with integrity and those stakeholders involved in the process act with integrity, it produces confidence in public procurement.
  - Provision is made in this chapter for codes of conduct for officials, bidders, suppliers, members of the Tribunal and other persons involved in a procurement process
  - Clause 12 provides that no person may exert undue influence and interfere in a procurement process
  - Provision is made for automatic exclusion of specified persons from submitting bids, e.g. public officer bearers, employees in public administration (clause 13)
  - Clause 14 stipulates what a person involved in procurement can do if that person is given directions inconsistent with the Act, including that the person must not comply with that instruction.
- Debarment: Provision is made for bidders or suppliers to be debarred from doing business with government if they engage in certain behaviour, such as if the bidder or supplier provided false information in a bid or any other document submitted to a procuring institution in connection with a procurement process or contract. The process that must be followed before a bidder or supplier is debarred (prevented) from doing business with government is also set out in the Bill.

## ARRANGEMENT OF THE PUBLIC PROCUREMENT BILL AND ITS CHAPTERS cont.

### CHAPTER 4

- This chapter is about Preferential Procurement, and it seeks to address the fundamental Constitutional provisions in section 217(2) and (3), and provides for regulations to be prescribed that will provide more details on the principles set out in this chapter.
- The approach that was used in developing this chapter was to focus on the principles that needed to be addressed, but not to provide for percentages or threshold amounts in the Act (known as primary legislation) but to leave that to regulations (known as subordinate legislation) so that if circumstances change and those percentages need to be changed, that can happen sooner than if it were to be in the Act. But in developing regulations, the necessary public consultation would still take place, however, the process would be shorter than when an Act is changed.

# CHAPTER 4: PREFERENTIAL PROCUREMENT

## PROVISIONS IN BILL AS PASSED BY NATIONAL ASSEMBLY

- **Preferential framework and procurement policies (clause 16)**
  - This clause makes it clear that the framework set out in the chapter is giving effect to section 217(2) and (3) of the Constitution. It also makes it mandatory for procuring institutions to implement preferential procurement in a manner envisaged in the framework.
- **Set asides for preferential procurement (clause 17)**
  - Setting aside (ringfencing) for certain categories of persons to provide for protection and advancement of persons historically disadvantaged by unfair discrimination
  - Provides for regulations to set targets for set-asides
  - Provision is made for instances if not possible to find suppliers within those categories of persons - the provision for empowerment will however not be lost but provided for in terms of clause dealing with pre-qualification criteria
- Procuring institutions must record the analysis that informed its inability to procure using a set aside, and then report to the PPO and provincial treasuries
- Application of this clause will be limited to the thresholds and conditions as prescribed by regulation



## CHAPTER 4: PREFERENTIAL PROCUREMENT

### PROVISIONS IN BILL AS PASSED BY NATIONAL ASSEMBLY

- **Prequalification criteria for preferential procurement (clause 18)**
  - Prequalification will apply to procurement with a higher threshold than set asides
  - List of persons to be reached by this clause is broader than the list provided for in the Set Aside clause
  - This provision also compels the private sector to contribute to transformation and supplier development by recognizing the B-BBEE levels of contribution and making provision for subcontracting

## CHAPTER 4: PREFERENTIAL PROCUREMENT

### PROVISIONS IN BILL AS PASSED BY NATIONAL ASSEMBLY

- **Subcontracting as condition of bid (clause 19)**
  - For contracts above a prescribed amount, a procuring institution must provide for subcontracting a prescribed percentage of the contract to certain persons and categories of persons
  - List of persons to be reached by this clause is aligned with the list provided for in the prequalification for preferential procurement clause (clause 18)
  - The term “feasible” is used in recognition of the fact that it may not always be possible to subcontract in all tenders due to the nature of some bids
  - Provision is made that the persons or categories of persons identified for empowerment must be citizens, or owned by citizens, of South Africa in accordance with prescribed percentages.

## CHAPTER 4: PREFERENTIAL PROCUREMENT

### PROVISIONS IN BILL AS PASSED BY NATIONAL ASSEMBLY

- **Designation of sectors for local production and content (clause 20)**
  - In terms of this clause, the function to designate sectors, sub-sectors and products is conferred upon the Minister responsible for trade, industry and competition as industrial and trade policy falls within that Ministry's mandate
  - It also stipulates that bids that do not meet the minimum requirement for local content are unacceptable bids and thus disqualified from further evaluation
  - Unlike the way in which designations were previously determined, this clause provides for proposed designations to be gazetted and for the public to be given an opportunity to provide comments
  - Furthermore, the Minister of Finance is also provided the opportunity to comment on the proposed designation

# CHAPTER 4: PREFERENTIAL PROCUREMENT

## PROVISIONS IN BILL AS PASSED BY NATIONAL ASSEMBLY

- Other preference measures (clause 21)
  - Provision is that if sections 17, 18, 19 and 20 are not able to be applied, preferences must be allocated as prescribed
  - This is meant to ensure that even if the measures provided for in this chapter are not practicable for some reason, transformation objectives are not compromised
- Measures to advance sustainable development (clause 22)
- Measures for beneficiation & innovation, advancing creation of jobs, intensification of labour absorption & development of small enterprises within particular geographical area (clause 23)
- Contracting conditions (clause 24)

The above provisions will be expanded upon in regulations, but it was important that enabling provisions were set out in the primary legislation

## CHAPTER 4: PREFERENTIAL PROCUREMENT

### IMPACT OF PREFERENTIAL PROCUREMENT FRAMEWORK

- Although apartheid was dismantled a number of years ago, there is still a need to eradicate its socio-economic legacy and advance policies that build an inclusive economy and promote social unity
- This framework provides a menu of preference that must be followed in the prescribed order and the options of categories that seeks to provide preference in the allocation of contracts and the protection and advancement of persons or categories of persons disadvantaged by unfair discrimination
- It goes further than the PPPFA in that it does not merely provide for preference points systems, but other measures that will ensure meaningful empowerment of the previously disadvantaged

## ARRANGEMENT OF THE PUBLIC PROCUREMENT BILL AND ITS CHAPTERS cont.

### CHAPTER 5

This chapter provides for General Procurement Requirements and provides for the Minister to prescribe, by regulation, a framework within which procuring institutions must implement the procuring system, which includes—

- (a) a strategic approach to procurement—
- (b) types of procurement methods
- (c) the requirements and procedure to be followed for each prescribed method (clause 25(1))

It also provides for, amongst others, the following-

- Measures to prevent abuse of procurement system, e.g. investigate allegations of corruptions, rejecting recommendation to award and cancellation of contracts in specified circumstance (clause 27)
- Measures for access to procurement processes are to be determined in regulations (clause 32)
- The disclosure of procurement information and its format (clause 33)
- Protection of confidential information including personal information (clause 34)

## ARRANGEMENT OF THE PUBLIC PROCUREMENT BILL AND ITS CHAPTERS cont.

### CHAPTER 6

This chapter addresses Dispute Resolution. It provides for:

- The right of a bidder to seek reconsideration by a procuring institution of its decision to award a bid and, if dissatisfied, then a review by a Tribunal (clauses 37 and 49)
- The establishment of a Public Procurement Tribunal, its composition, the qualifications of the members and other relevant provisions for the functioning of the Tribunal (clauses 38-48)
- The Tribunal to also review a debarment order issued by a procuring institution against a bidder or supplier (clause 50)
- An application made to the Tribunal to be heard by a panel constituted by the Chairperson of the Tribunal (clause 47)
- It should also be noted that:
  - A procuring institution is prohibited from awarding a contract during the reconsideration or review proceedings (clause 55)
  - A party dissatisfied with a Tribunal order may institute judicial review in terms of Promotion of Administrative Justice Act (clause 54)

These provisions are in the Bill to provide for a bidder who is aggrieved to have access to these dispute resolution mechanisms so that matters may be resolved speedily and in a more cost-effective manner than the court processes.

## ARRANGEMENT OF THE PUBLIC PROCUREMENT BILL AND ITS CHAPTERS cont.

### CHAPTER 7

This chapter deals with General Provisions. It provides for:

- The Public Procurement Office to investigate any procurement related matter for purposes of establishing any non-compliance with the Act (clauses 56-58)
- The Bill provides for the criminalisation, among others, of conduct of a person who-
  - knowingly gives false or misleading information or evidence
  - interferes with or exerts undue influence on any official of a procuring institution or a member of the Tribunal in the performance of their functions
  - connives or colludes to commit a corrupt, fraudulent, collusive or coercive or obstructive act related to procurement
  - causes loss of public assets or funds as a result of negligence (clause 61)
- Limitation of liability for powers and duties performed in good faith in terms of the Act (clause 60)
- Provision is made for exemptions from the provisions of the Act and regulations, as well as departures from instructions (clauses 62 and 63)



## ARRANGEMENT OF THE PUBLIC PROCUREMENT BILL AND ITS CHAPTERS cont.

### CHAPTER 7 continued

This chapter further provides for:

- The Minister of Finance to make regulations regarding-
  - all matters specified for regulations elsewhere in the Bill (where the term 'prescribed' is used), such as preferential procurement matters, a procurement system, procurement methods including public-private partnership and transversal term contracting and the use of another organ of state for goods and services
  - list of other matters in clause 64(1)
- Consultation with relevant Ministers, public consultation process and submission for Parliamentary scrutiny, are provided for in clause 64(2)-(6)
- Provision is made that different regulations-
  - may be made for different categories of procuring institutions and different categories of procurement
  - must be made regarding procurement of infrastructure and capital assets and goods & services related thereto (clause 64(7))
- Clause 65 provides a public consultation process for instructions to be issued by the Public Procurement Office

## ARRANGEMENT OF THE PUBLIC PROCUREMENT BILL AND ITS CHAPTERS cont.

### CHAPTER 7 continued

- Provision is made for amendments to, and the repeal of, 16 Acts listed in Schedule to the Bill which includes the repeal of the PPPFA and amendments to the PFMA and MFMA (clause 67)
- The provisions of the Act may be brought into operation by the President on different dates and allows for differentiation regarding categories of procuring institutions (clause 68)

*Thank You!*