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CDH Insights

Unpacking the South African Public Procurement Bill

19 March 2024

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Introduction

> Public procurement is the process through which the state acquires goods, services and works needed to fulfil its public functions. Public procurement regulation functions within the tension between the ostensibly private or commercial nature of the activity at hand, that is, the purchasing of goods, services and works in the market, and the public nature inherent in procuring authorities' existence and powers.

Although, the current principles underpinning South African public procurement are sound, a major problem is that the system is fragmented, without much synergy between the various regulations. As one academic writer, Peter Volmink, has said "*South African public procurement is in a state of 'procurement purgatory'. New rules appear and disappear with alarming frequency, creating uncertainty for procuring entities.*" This was also recognised by the State Capture Commission, where Chief Justice Raymond Zondo remarked that: "*the sheer number of acts and regulations which addresses procurement issues makes it very difficult for conscientious officials to get a clear understanding of them*".

Acknowledging this, the Minister of Finance introduced the Public Procurement Bill (Procurement Bill) in Parliament on 30 June 2023. The primary aim of the Procurement Bill is to create a single regulatory framework for public procurement and to eliminate fragmentation in laws that deal with procurement in the public sector. As it stands, the Procurement Bill has been passed by the National Assembly and is currently with the National Council of Provinces (NCOP). As it is a Bill that affects the provinces, the parliamentary process requires that it be sent to the provincial legislatures for consideration before the NCOP votes on it. That process is going to take place over the next few weeks, with the Western Cape Provincial Parliament having published its call for comments on 27 February 2024, with a closing date of 8 March 2024.

Introduction...*continued*

While the NCOP process may result in changes being made to the Procurement Bill, it is useful to pause and take stock of what is currently contained in the Procurement Bill. This special publication takes a more detailed look at the provisions currently found in the Procurement Bill and unpacks them for the benefit of those who are interested in and are likely to be affected by the unification of public procurement under one statute.
This publication includes five articles, each dealing with an aspect or chapter of the Procurement Bill in greater detail.

First, Jackwell Feris and Kelo Seleka explore the provisions in the Procurement Bill that relate to public-private partnerships (PPPs) and, in particular, proposed amendments to the regulations dealing with PPPs. Their article is titled "*Unlocking South Africa's infrastructure development and investment opportunities: Amendments to the PPP regulations*".

Second, Imraan Abdullah and Kelo Seleka look at the extensive preferential procurement framework that the Procurement Bill intends to introduce in "*The soon to be 'new' preferential procurement framework*".

Third, in "*The establishment of the Public Procurement Tribunal*", Tiffany Gray, Vincent Manko, Nomlayo Mabhena-Mlilo and Mukelwe Mthembu discuss the introduction of a new dispute resolution mechanism into matters of public procurement and why this addition will be significant.

Fourth, Vincent Manko and Nomlayo Mabhena-Mlilo discuss the notion of procurement integrity in the Procurement Bill and how it features within the general procurement requirements. Their article is titled "*Procurement integrity and general procurement requirements*".

Finally, Corné Lewis, Tendai Jangara and Lerato Motlhabi explain what the Public Procurement Office is and provide an overview of its functions and powers under the Procurement Bill. Their article is titled "*What is the Public Procurement Office? Its functions and investigation and prosecutorial powers*".

Cliffe Dekker Hofmeyr Inc

Unlocking South Africa's infrastructure development and investment opportunities: Amendments to the PPP regulations

The reformation of the South African public procurement legislative framework is expected to have a direct impact on construction and infrastructure projects, particularly those that are public-private partnerships (PPPs). PPPs are commonly used by the public sector to benefit from the financial resources, expertise and skills of the private sector to improve its services and develop infrastructure. A PPP is a contract between a public sector institution and a private party, where the private party performs a function usually provided by the public sector. Most of the project risk (technical, financial and operational) is transferred to the private party.

The public sector pays for a full set of services, including new infrastructure and facilities management, through monthly or annual payments.

South Africa has a track record of successfully implementing various PPP projects. While the bulk of these PPPs are accommodation projects, other PPP projects have also been implemented in the transport, energy and water sectors. At least 34 PPP projects, valued at R89,3 billion, have been successfully completed in South Africa, such as the Gautrain Rapid Rail Link and various Renewable Energy Independent Power Producers Programmes, which have been rolled out for over a decade. This shows that South Africa is well positioned to attract private sector investment for PPP projects, which is needed for electricity, water and road infrastructure developments.

Attracting private funding

Notwithstanding this background, PPPs are not sufficiently used for attracting private sector funding to public infrastructure. The majority of the public sector infrastructure is procured through the general use of the process that complies with Framework for Infrastructure Delivery and Procurement Management (FIPDM) guidelines issued by National Treasury. However, the FIPDM does not require organs of state to consider forms of procurement that would attract private funding. Moreso, considering that there is no requirement in the FIPDM that requires procuring entities to consider PPPs as an alternative procurement mechanism. However, this is expected to be better managed since the Procurement Bill intends to streamline the public procurement regulatory system and consolidate all laws regulating different methods of public procurement.

Under the current legislative framework, PPPs typically involve a four-step process that requires approvals from National Treasury at various stages of the projects, including for the feasibility study, procurement documents and PPP contract.

The Procurement Bill that was tabled in Parliament in 2023 does not have much detail on PPPs, in contrast to the 2020 Public Procurement Bill. Instead, the revised 2023 Procurement Bill gives the Minister of Finance the authority to establish a framework that procuring institutions must use for PPPs.

Unlocking South Africa's infrastructure development and investment opportunities: Amendments to the PPP regulations*...continued*

In order to establish the framework, National Treasury commissioned a review of the current PPP regulatory framework to identify changes that should be made. The review concluded that an overhaul of the regulatory framework is not necessary but that National Treasury should rather make certain changes to the provisions of the current regulatory framework.

Amendments

As result, on 19 February 2024 National Treasury published draft amendments to the current PPP regulations for public comment. The draft amendments will be open for comments for 30 days from the date of publication. One of the notable changes is the introduction of the provisions that will enable National Treasury to set up two frameworks for PPPs, i.e. one for high-value projects and a simplified version for low-value (below R2 billion) projects. The PPP projects that have a cost of less than R2 billion will be exempted from the requirement of obtaining National Treasury approvals. National Treasury has indicated that such exemption is intended to simplify and expedite the approval process to accelerate the commencement of smaller PPP projects. Despite the intended improvement of the PPP framework, one issue that still requires confirmation and clarity is the applicability of the PPP framework on entities listed in the Public Finance Management Act 1 of 1999 (PFMA). While the Procurement Bill applies to all Schedule 2 and 3 PFMA listed public entities, the proposed amendments to the PPP regulations do not make changes to the applicability of the regulations. The PPP framework, as it now exists, applies to Schedule 3 PFMA entities but does not apply to Schedule 2 PFMA entities. As such, it remains unclear whether the intention of the Procurement Bill and regulations is to do away with this distinction or retain the status quo on the applicability of PPPs.

Nonetheless, given that the PPP regulatory framework has not changed in over 15 years despite significant changes to South Africa's economic climate and socio-economic development, the planned approach to strengthen and modify the framework is a positive one. National Treasury has reported that there has been a decrease in the number of new project transactions, from an estimated R10,7 billion in 2011/12 to R7,1 billion in 2022/23. The amendments to the PPP regulatory framework will be essential for promoting and encouraging frequent use of PPPs as a tool to deliver much-needed infrastructure development and to ease the burden on the strained government budget. A streamlined and simpler approach to PPPs will result in increased clarity and uniformity in the rollout of PPPs in South Africa.

Jackwell Feris

Kelo Seleka

The soon to be 'new' preferential procurement framework

In addition to regulating public procurement generally, the long title to the Procurement Bill states that the Bill is meant to prescribe a framework within which preferential procurement must be implemented. Of course, this must be so, because the Constitution requires national legislation be enacted to provide for such a framework. It is important to note, however, that in as much as national legislation must prescribe a framework, the prerogative power to create and implement a preferential procurement policy within that framework remains with the individual organs of state and institutions. This was confirmed by the Constitutional Court, and is something that cannot be taken away from procuring entities by the Procurement Bill.

That being said, almost all organs of state have a desire to create and implement a preferential procurement policy. As a result, the framework contained in the Procurement Bill will become a critical reference point for organs of state.

In this article, we highlight key features of the framework, which can be found in Chapter 4 of the current bill.

A good point of departure for this article is the first provision under Chapter 4, section 16, which seems to suggest that a procuring institution **must** implement a preferential procurement policy. However, this has to be an overstatement because the Constitution does not compel an organ of state or institution to implement a preferential procurement policy. Instead the compulsion is for national legislation to prescribe a framework. The obligation on procuring organs of state or institutions is to develop their preferential procurement policies within that framework, but that obligation is only triggered should they decide to implement a preferential procurement policy of their own. This is concerning because it appears that, in section 16, the Procurement Bill is creating obligations that are not contemplated by section 217 of the Constitution. Ideally, section 16 of the Procurement Bill should read that where a procuring organ of state or institution intends to develop a preferential procurement policy it must do so within the framework prescribed by the Procurement Bill, but it does not, and it appears that the liberal use of the prescriptive term *"must"* is a hallmark feature of Chapter 4, as will be seen in what follows.

The contents of the framework

Moving on, section 17 introduces a novel concept – namely *"set aside"* – which is something that is not found in the current Preferential

The soon to be 'new' preferential procurement framework...*continued*

Procurement Policy Framework Act 5 of 2000 (PPPFA) (which will be repealed with the enactment of the Procurement Bill) nor was it found in the repealed 2017 Preferential Procurement Regulations (which were declared unconstitutional by the Constitutional Court). In summary, it requires procuring organs of state or institutions to set aside bids for people listed in the sub-provision, which includes Black people, Black women, women, people with disabilities, as well as small enterprises owned by these people, among others. The concept can be likened to something similar to employment equity, save that employment equity is not as prescriptive as *"set aside"* aims to be. Again, the provision uses the term *"must"* which implies that a procuring organ of state or institution has no choice in the matter. The only choice it appears to have is that it can determine which people in the list it intends to set aside bids for, but this discretion may be superficial as the Minister of Finance is required to publish specific targets that procuring organs of state or institutions must reach.

In addition to the *"set aside"* concept, the notorious pre-qualification criteria makes a reappearance in the Procurement Bill. The reason it is notorious is because it was the subject of a legality challenge in *Afribusiness NPC v Minister of Finance* 2021 (1) SA 325 (SCA) where the Supreme Court of Appeal held that pre-qualification was inimical (incompatible) with section 217(1) of the Constitution. This finding was not interfered with by a majority of the Constitutional Court, which strongly suggests that the finding of the Supreme Court of Appeal on the lawfulness of pre-qualification is trite law – for now. Of course, it may be argued that any form of preferential procurement itself is inimical to section 217 of the Constitution; as it must be, in order to effect change, but that is a topic for another day, or perhaps a challenge in another court. For now, the point is that pre-qualification makes a return, and like every other provision is something that *"must"* be implemented by procuring organs of state and institutions.

Either way, the retention of the set aside concept and pre-qualification in the Procurement Bill and the ultimate implementation of them once enacted is likely to have a significant impact in respect of the demographic profile of service providers for procuring organs of state and institutions.

The Procurement Bill then prescribes that *"where feasible"* a procuring organ of state and institution must ensure that a prescribed minimum level of subcontracting is included in bids that exceed a prescribed threshold amount which we assume will be determined by the Minister of Finance or National Treasury. Compared to the *"set aside"* concept and pre-qualification, sub-contracting is a non-contentious form of ensuring skills transfer and transformation that has been part of the preferential procurement process since the 2001 Preferential Procurement Regulations.

Interestingly, the Procurement Bill also creates a legislative basis for local production and content. Previously, local production and content requirements were issued and made mandatory by National Treasury through circulars issued under the now-repealed 2017 Preferential Procurement Regulations. However, it turned out that there was no legislative basis for including local production and content requirements into the preferential procurement matrix, because it did not fall within the ambit of section 2(1) of the PPPFA. This was confirmed by National Treasury in the Rationale for the Draft Preferential Procurement Regulations 2022 document, and is also the reason why the mandatory

The soon to be 'new' preferential procurement framework*...continued*

requirement for local production and content has all but disappeared and no longer appears in the current 2022 Preferential Procurement Regulations. With the inclusion of the requirement in the Procurement Bill, there will be a legislative basis that provides for local production and content requirements. Conceptually, using state resources to promote local production and content requirements if implemented correctly can have a positive effect on transforming the economy.

Apart from these big-hitting provisions, most of which were previously featured in the repealed 2017 Preferential Procurement Regulations, the Procurement Bill also provides a catchall provision to state that if for some reason the big-hitting provisions are not applicable, other preferences must be allocated as prescribed. It also makes provision for procuring organs of state and institutions to take steps to advance sustainable development in procurement, which is something topical at the moment, as well as to take steps towards beneficiation and innovation, advancing the creation of jobs, intensification of labour absorption and the development of small enterprises in specific geographical areas, all of which can translate into a positive trajectory for the economy.

Finally, the Procurement Bill seeks to introduce a legislative basis for contract management, providing procuring organs of state and institutions an option to set milestones and levy penalties for failing to meet them. Proper contract management is critical to ensuring state resources are used efficiently and that value for money is achieved by procuring organs of state and institutions.

Conclusion

The Procurement Bill has come under fire for being too prescriptive, which may be a legitimate criticism given the liberal use of the term *"must"*, which removes the discretion and flexibility that should be available for procuring organs of state and institutions in developing their own preferential procurement policies. In addition, the Procurement Bill has been criticised as being a copy/paste of the 2017 Preferential Procurement Regulations, which may be true to some extent. These critiques may be taken on board and the Procurement Bill may see further revision as it is still going through another round of public participation in the National Council of Provinces. But if it stays in its current form, there is no doubt that it will have a significant impact on how state recourses are used. Whether that impact moves the needle towards achieving the transformative goals of the Constitution is something time will reveal.

Imraan Abdullah

Kelo Seleka

The establishment of the Public Procurement Tribunal

> The complex public procurement system in South Africa has been fertile ground for litigation over many years, and to say that law reports are replete with cases dealing with public procurement would be an understatement. Litigation in this context almost invariably brings significant delays in public procurement. Those delays cost money and cause much frustration and inefficiency within public procurement, and are a significant contributor to the lack of service delivery. The unnecessary complexity in the public procurement regulatory framework often results in confusion that invariably leads to disputes.

Currently, there is no central administrative body in South Africa tasked with the enforcement of public procurement rules. Enforcement is done through a combination of legal mechanisms dispersed throughout the administration and remedies enforced in the ordinary courts. The Procurement Bill makes provision for a dispute resolution mechanism with the establishment of the Public Procurement Tribunal (Tribunal). The Tribunal is tasked with reviewing decisions taken by the procuring institutions, including decisions to debar a bidder or supplier.

Reconsideration

A bidder who is not satisfied with the procuring institution's decision to award a bid can apply for reconsideration from the same institution. The Tribunal or a court may not review a decision to award a bid unless the bidder has exhausted this internal remedy. The Tribunal or court must, if it is not satisfied that the internal remedy has been exhausted, direct the bidder concerned to first exhaust such remedy before instituting proceedings with the Tribunal for review or a court for judicial review.

There is, however, an exception that in **exceptional circumstances** and on application by the bidder concerned, such a bidder may be exempt from the obligation to exhaust the internal remedy if the Tribunal or the court considers it to be in the interests of justice. These exceptional circumstances are not set out in the Procurement Bill and will no doubt be developed by the Tribunal and courts in due course.

Review

If a bidder is not satisfied with a reconsideration decision made by a procuring institution, the bidder may, within 10 days of being informed of the procuring institution's decision, apply for review to the Tribunal. A bidder may, however, request that the Tribunal consider an application for review filed after the expiry of the period, but not later than 15 days after being informed of the procuring institution's decision, on the ground that the application raises public interest considerations.

The establishment of the Public Procurement Tribunal...*continued*

Similarly, a person debarred may, within 10 days of being informed of the decision to debar, apply for review to the Tribunal. A bidder may request that the Tribunal consider an application for review filed after the expiry of the period, but not later than 15 days after being informed of the procuring institution's decision, on the ground that the application raises public interest considerations.

Interestingly, the Tribunal's hearings must be conducted in public; however, the chairperson may direct that a person be excluded from a hearing on any ground on which it would be proper to exclude a person from civil proceedings before the High Court. The chairperson of the panel also has the power to subpoena a specific person to appear before the panel in order to give evidence and to administer an oath or accept affirmation from the person called to give evidence. A person giving evidence or information, or producing documents, has the protections and liabilities of a witness giving evidence in civil proceedings before the High Court.

Some of the notable orders that the Tribunal may grant are to:

i) confirm a decision made by the procuring institution;

ii) set aside a decision made by the procuring institution and refer the matter back to the relevant procuring institution for further consideration;

iii) direct a procuring institution not to make an award or cancel an award made for the procurement under review; or

iv) direct that the procurement proceedings be terminated.

In respect of review proceedings of a decision to debar, a panel may give an order:

i) confirming the debarment order of the procuring institution;

ii) substitute the debarment order for its own order;

iii) set aside the debarment order of the procuring institution; or

iv) dismiss the application.

In addition to the orders that the Tribunal may grant, it may, in exceptional circumstances, make an order that a party to the proceedings on an application for review of a decision pay some or all of the costs reasonably and properly incurred by the other party in connection with the proceedings. The Tribunal may further, by order, summarily dismiss an application for review of a decision if the application is frivolous, vexatious or trivial.

Any party that is dissatisfied with an order of the Tribunal may institute proceedings for judicial review in the High Court.

Standstill

One of the notable provisions contained in the Procurement Bill is the introduction of a standstill process which prohibits procuring institutions from concluding contracts during reconsideration or review proceedings. These provisions provide that if a procurement process is subject to reconsideration, a procuring institution may not conclude a contract with the successful bidder within 10 days after the completion of the reconsideration or review process; or if a procurement process is subject to review by the Tribunal, a procuring institution may not conclude a contract with a successful bidder prior to the completion of the review process. There is a carve-out for emergency procurement during this period, if justified.

The establishment of the Public Procurement Tribunal...*continued*

Conclusion

The impact of the establishment of the Tribunal and the standstill provisions will need to be closely monitored in practice as they can either lengthen the already somewhat elongated procurement process or shorten it considerably. As can be seen, these provisions have the potential to contribute to further delays in public procurement, as they have added an additional layer to an already complex system. It is also possible to see a proliferation of reconsiderations and reviews before the Tribunal which may give raise to an abuse of process. It may, however, be argued that the provisions empowering the Tribunal to issue costs orders reasonably incurred by the other party in exceptional circumstances in connection with the review proceedings are meant to safeguard that concern.

Even though the Procurement Bill grants the Tribunal far-reaching powers – including orders directing a procuring institution not to make an award, cancelling an award made for the procurement under review, directing that the procurement proceedings be terminated and requiring the payment of compensation for any reasonable costs incurred by the bidder submitting an application as a result of an act or decision of, or procedure followed by the procuring institution – the standard of review has not been specified. Would this entail a review in terms of the Promotion of Administrative Justice Act 3 of 2000 or under the rubric of legality? In addition, it has long been established under South African jurisprudence that the courts alone are the arbiters of legality. Would it perhaps have been better for the Tribunal to rather exercise appellate jurisdiction?

A further concern is that, notwithstanding that review proceedings must be conducted expeditiously, the Procurement Bill does not expressly stipulate a time period for when the review proceedings should be finalised and a decision or outcome of the review to be rendered from the inception of the review proceedings. There is also a concern that the absence of an express timeline for the finalisation of the review proceedings could lead to further delays in the finalisation of the review proceedings; but only time will tell.

Tiffany Gray

Vincent Manko

Nomlayo Mabhena-Mlilo

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Procurement integrity and general procurement requirements

> Public procurement is one of the government activities highly vulnerable to corruption. The financial interests at stake, the volume of transactions and the close interaction between public and private sectors in the awarding of public contracts all pose risks to the integrity of the procurement process. The findings of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State all bear testimony to this fact.

It is therefore unsurprising that "*integrity*" is one of the 12 principles included in the Organisation for European Economic Co-operation's (OECD) 2015 Recommendation of the Council on Public Procurement, which builds on the 2008 OECD Recommendation in Enhancing Integrity in Public Procurement. Although it is not a member of the OECD, the OECD has designated South Africa as a Key Partner that participates in policy discussions in OECD bodies and takes part in regular OECD surveys.

Procurement integrity

Chapter 3 of the Procurement Bill encompasses the notion of procurement integrity and outlines the prohibition of certain practices. Section 10, for example, provides that a person participating in a procurement process in the role of an accounting officer or as a member of an accounting authority must exercise their powers and perform their duties impartially and with the degree of care and diligence that a reasonable person would exercise in similar circumstances. In so doing, an accounting officer must not use their position, or information obtained because of their position, improperly to gain an advantage for themselves or someone else, cause prejudice to any other person, or interfere with or exert undue influence on any person involved in procurement. If a conflict of interest exists in a procurement matter, the accounting officer must disclose such conflict and recuse themselves from participating in the process of that procurement matter. These requirements underpin the constitutional prerogative for accounting officers to act in a manner that is fair, equitable, transparent and competitive. At present, National Treasury Regulation 16A8.3 provides that supply chain management officials or other role players may not use their position for private gain or to improperly benefit another person and must treat all suppliers and potential suppliers equitably.

Excluded persons

In the same vein, the Procurement Bill provides for a declaration of interest by persons involved in the procurement process. To this end, in terms of section 11, read with section 13 of the bill, a procuring institution has an obligation to identify automatically excluded persons to ensure that

Procurement integrity and general procurement requirements

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such persons do not submit a bid in a public procurement process. Automatically excluded persons include, *inter alia*:

- public office bearers;
- officials or employees of Parliament or a provincial legislature;
- persons appointed in terms of sections 9 or 12A of the Public Service Act (Proclamation No. 103 of 1994);
- officials or employees of a constitutional institution;
- officials or employees of a public entity;
- officials or employees of a municipality or municipal entity;
- entities in which such listed persons are directors or have a controlling or other substantial interest; and
- executive members of controlling bodies of procuring institutions and their immediate family members.

Non-executive members of controlling bodies of procuring institutions may not submit bids in that institution.

Conversely, automatically excluded persons, their immediate family members and related entities also bear the onus to declare any direct or indirect personal interest in a procurement matter. All procuring institutions in each procurement process ought to prescribe a declaration of interest to be made by all bidders, in respect of bids and all applicants, in the case of applications for registration on a database created by the Public Procurement Office. National Treasury Regulation 16A8.3 currently provides for the declaration of interest by supply chain management officials or other role players in procurement matters. To this end, supply chain management officials or other role players must recognise and disclose any conflict of interest that may arise. Further, and in terms of National Treasury Regulation 16A8.4, if a supply chain management official or another role player, or any close family member, partner or associate of such official or role player, has any private or business interest in any contract to be awarded, that official or role player must disclose that interest; and withdraw from participating in any manner whatsoever in the process relating to that contract.

Procurement systems

The general procurement requirements proposed by the Procurement Bill are outlined in Chapter 5. The accounting officer or the accounting authority of a procuring institution must implement a procuring system, take the necessary steps to ensure that no person interferes with its procurement system or is able to amend or tamper with any bid or contract and prevent abuse of its procurement system. More importantly, the accounting authority must investigate any allegation against an official or other role player of corruption, improper conduct or failure to comply with its procurement system, and, where necessary, take steps against that official or role player, and inform the Public Procurement Office. Moreover, the accounting authority must reject a recommendation for the

Procurement integrity and general procurement requirements

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award of a bid if the recommended bidder has made a misrepresentation or submitted false documents in competing for a particular contract or been convicted of any offence involving corruption, fraud, collusion or coercion in competing for any contract. The accounting authority has an obligation to cancel a contract awarded to a supplier it becomes aware that the supplier has made a misrepresentation, submitted false documents or information, or has been convicted of any offence involving corruption, fraud, collusion or coercion in competing for a particular bid or during the execution of the contract; or if any official or other role player was convicted of any offence involving corruption, fraud, collusion or coercion during the bidding process or during the execution of the contract.

Every procuring institution must establish a procurement function as part of its procurement system that is responsible for the implementation and maintenance of the procurement system to ensure effectiveness and efficiency. The bid committee system currently implemented by public entities is also provided for in the Procurement Bill.

Therefore, the Procurement Bill aims to expand on existing National Treasury Regulations and create uniform treasury norms and standards for all procuring institutions as outlined above.

Public procurement is a crucial pillar of service delivery for governments. Because of the sheer volume of spending it represents, well-governed public procurement processes can and must play a major role in fostering public sector efficiency and establishing citizens' trust. Well-designed public procurement systems also contribute to achieving pressing policy goals such as environmental protection, innovation, job creation and the development of small and medium enterprises.

Vincent Manko

Nomlayo Mabhena-Mlilo

Public Procurement Office: Investigation and prosecutorial powers

> In terms of section 4 of the Procurement Bill, the Public Procurement Office (PPO) is to be an office established within National Treasury that must perform its functions without fear, favour or prejudice.

The primary function of the PPO will be to promote compliance with the Procurement Bill by procuring institutions, such as public listed entities, including Eskom, Denel, Transnet, the South African Post Office, national and provincial departments, municipalities, and constitutional institutions such as the office of the Public Protector.

Section 5(1) of the Procurement Bill envisages that the PPO to must, among other things, promote and implement the necessary measures to maintain the integrity of procurement and guide and support official and procuring institutions to ensure compliance with the Procurement Bill.

The PPO has an overarching function in that it must promote, guide, support, ensure compliance, and take the required steps if there is material breach in the procurement of goods and services by a procuring institution. Where there is procurement of goods and services, there is unfortunately also opportunity for corrupt activities between officials who abuse positions of authority to unduly benefit from state contracts and service providers who want to secure contracts without going through a fair and equitable appointment process. In anticipation of this, one of the objectives of the proposed public procurement legislation, as stated in section 2 of the Procurement Bill, is to *"advance ethical conduct and combat corruption through access to procurement information and other transparency measures and introducing enforcement and appropriate sanctions for transgressors"*.

The proposed legislation empowers the PPO to, as stipulated in section 5(2)(a), "*issue binding instructions*" in accordance with the Procurement Bill. The nature and force of such binding instructions are not defined in the Bill and this clarity will be required to determine the consequences of non-compliance with the instructions. What has been clarified in the proposed legislation, however, is the investigative and prosecutorial authority which vests with the PPO.

Investigation and prosecutorial powers

In terms of section 56 of the Procurement Bill, the PPO will investigate any alleged non-compliance with the Procurement Bill if requested by a relevant treasury, a procuring institution, a member of the public, or on its own initiative. Furthermore, in the event that the investigation reveals non-compliance with the Procurement Bill, the PPO is empowered to instruct the procuring institution to take the necessary steps to stop and prevent non-compliance, or it can refer the matter to the relevant law enforcement agencies.

Public Procurement Office: Investigation and prosecutorial powers*...continued*

Such powers are limited to the offences outlined in section 61 of the Procurement Bill, which include instances where a person knowingly gives false or misleading information under the Bill, interferes in the tender process, or connives or colludes to commit a corrupt, fraudulent, collusive or coercive or obstructive act related to procurement under the Procurement Bill.

For the purposes of exercising its duties under the proposed procurement legislation, the PPO is granted powers to enter and search the premises of the procuring institution, the official(s) involved in procurement of the procuring entity, or the premises of the winning bidder or supplier itself. The power to enter and search premises is restricted and must be done with prior consent or with a warrant issued by a judge or a magistrate as per section 58 of the Procurement Bill, which details the procedure for obtaining warrants.

Upon a reading of section 57, it is evident that this section envisages dawn raids, which are unannounced inspections of premises by authorised officials of the PPO at the premises of procuring institution or private residences, in order to obtain incriminating evidence as a precursor to regulatory proceedings.

The PPO does not have prosecutorial powers, but one of its powers is to ensure compliance with the proposed legislation, which includes the power to investigate irregularities of the procurement process and to make the necessary submissions and recommendations to the National Prosecuting Authority, the Public Protector and the South African Revenue Service to further investigate and, where necessary, criminally prosecute if they conclude that there were irregularities and activities such as corruption in the procurement of goods and services.

Requirements for the success of PPO investigations

The success of the PPO and investigations into non-compliance will depend on building a team that is skilled to investigate complex and multi-faceted procurement matters with efficiency. Alignment with the abovementioned authorities is necessary to ensure that allegations of non-compliance with the proposed legislation is comprehensively addressed with publicised outcomes. This will ensure that the PPO is seen to be effective and deter parties from actions that violate the principles of fairness, equitability, transparency, competitiveness and cost effectiveness, which must be upheld in public procurement as stipulated in section 217 of the Constitution.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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