

Parliamentary Standing Committee on Finance

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A. INTRODUCTION

1. This submission is made by the Equality Collective in response to the invitation for public comment on the Public Procurement Bill [B18-2023], which was introduced in the National Assembly by the Minister of Finance, on 30 June 2023.
2. The Equality Collective is based in Nqileni Village in the Xhora Mouth Administrative Area in deep rural Eastern Cape. We promote the rights in our Constitution with an understanding that reliable access to quality socio-economic rights will advance greater equity in South Africa. We are committed to meeting the immediate needs of our community as well as building the capacity of community members to shape their own lives and the world around them.
3. We are grateful for this opportunity to participate in the public consultations on the Procurement Bill. In this submission we bring the perspective of a deeply rural context working in the context of failing municipalities, working to achieve improved access to socio-

economic rights; enhanced responsive governance and accountability; and a stronger, more active citizenry in our village.

B. THE PURPOSE OF PUBLIC PROCUREMENT

4. Public procurement has a strong empowerment purpose. It is an instrument of socioeconomic reform, redistribution and transformation across South Africa.
5. Public procurement is about service delivery. It is an instrument through which the State delivers on its constitutional mandate, progressively realises the brick and mortar of constitutional rights of access to adequate housing, basic education, health care, water, food as well as rights to equality, dignity and freedom. Planning for the progressive realisation of rights is linked to procurement, and procurement plans should be reflective of the State's development plans.
6. Public procurement is a mechanism through which to create, develop and sustain local industries. By prioritising local businesses and local manufacturing in the allocation of public contracts, the State can use its massive procurement power to grow local industries, which in turn can create sustainable, decent jobs, improve local competition and ensure that the billions of Rands the State spends on procurement is multiplied into sustainable local jobs and lasting, resilient, local industries.
7. Public procurement strengthens accountability. Credible, transparent, accountable, planned and functional procurement systems are at the core of the state's capacity to deliver goods and services.
8. Transparent procurement systems, coupled with real time proactive disclosure of procurement information, creates an opportunity for beneficiaries to understand procurement systems that impact their daily lives and to participate in the oversight of contract management.
9. If communities are able to participate in procurement systems, through access to information, observing procurement evaluations and other mechanisms for inclusion, communities can join hands with authorities bearing fiduciary and investigative responsibilities for preventing corruption, irregular, fruitless and wasteful expenditure.
10. When procurement systems break down, are insufficient and not fit for purpose, essential goods and services are not delivered on time, at all, or to an appropriate standard; and infrastructure is not built or is poorly maintained. Similarly, weak contract management

between the State and the private sector, means public finances can be wasted and the private sector is not sufficiently held accountable for their obligations under public contracts.

11. Through public procurement, the government can positively impact economic development, grow domestic markets, create demand and supply for goods and services where the private sector is weak, improve competition and support localisation.
12. These objectives are not reflected in the Preamble in the Bill nor in the objectives of the Bill. The Bill should aim higher than the objectives currently provided for in section 2 of the Bill.

C. OPPORTUNITIES TO IMPROVE THE PROCUREMENT BILL

In Part B of this submission, we provide detailed commentary on specific provisions of the Bill. However, we wish to note the following key issues in the Bill

The Bill retains a fragmented regulatory system

13. Equality Collective welcomes, as the Preamble of the Bill proclaims, “*a single framework that regulates public procurement, including preferential procurement, by all organs of state, which among others – promotes the use of technology for efficiency and effectiveness; and enhances transparency and integrity, among others, to combat corruption*”.
14. However, the Bill retains a system of multiple regulatory instruments, some binding and some not and subject to different public participation processes. The Minister of Finance must issue regulations.¹ Simultaneously, the Public Procurement Office can issue binding instructions,² non-binding guidelines and a model procurement policy while the provincial treasuries can also issue binding provincial instructions and non-binding guidelines.³
15. The procurement system would therefore be composed of:
 - 15.1. Regulations,
 - 15.2. binding instructions of the Public Procurement Office;
 - 15.3. binding instructions of provincial treasuries;
 - 15.4. policies of procuring entities;

¹ For example, section 1 of the Bill (definition of “decision”) provides that the time period for making a decision by a procuring institution will be prescribed; section 9(1) provides that a code of conduct must be prescribed for accounting officers and other officials, members of the accounting authority, bid committee members, the Tribunal, bidders, suppliers and any other person involved in procurement; section 18 deals with the content of the procurement system to be prescribed by the Minister; section 23(1) provides that the Minister must prescribe a bid committee system for procuring institutions and the functions of each committee amongst other provisions requiring regulations.

² Section 5(2)(a) of the Bill

³ Section 5(2)(a);(c) read with section 6(2) of the Bill

15.5. non-binding guidelines.

16. This does not resolve the problem of a fragmented procurement system but preserves it by making provision for two binding instruments, instructions and regulations, by three authorities: the Minister, the Public Procurement Office and provincial treasuries. It retains the same potential for excessively complicated procurement rules with many pieces of subordinate legislation with varying degrees of authority.
17. It also risks overlap, duplication and inconsistencies which create problems in the integrity of the procurement system, allow for opportunities to ignore rules or use procurement mechanisms that are inconsistent with the constitutional principles of transparency, fairness, cost effectiveness and competitiveness.
18. Moreover, the duplication in the regulatory system means that municipalities will need to navigate three layers of regulations and instructions, interpret their application as well as deal with duplication and inconsistency. The regulatory burden for local government is therefore amplified.

The Bill retains and expands the use of “instructions” as a means of making law

19. Section 238 of the Constitution permits the delegation of “any power or function that is to be exercised or performed in terms of legislation” to “any other executive organ of state”. But there is a crucial proviso: the sub delegation must be “consistent with the legislation” in question.
20. The Bill allows the Minister, a provincial treasury or the Public Procurement Office to impose whatever instruction it deems fit for “the effective implementation of this Act”. In our view, instructions are a form of executive rule by decree under the guise of delegated legislation.
21. We respectfully point out that a standard practice under the apartheid legal order was to confer broad and unguided legislative powers on the executive, who in turn sub-delegated similarly broad powers on administrative officials. Conferring wide powers on the executive and administrative officials, such as in certain provisions of the Bill, echoes outdated law making practices.
22. Parliament ought not to divest its legislative power to the executive or administrative officials for broadly stated objectives. In our view, unless instructions are strictly necessary to achieve a defined purpose, Parliament ought not to transfer its plenary legislative powers. Law making, regardless of the label used, should involve some degree of consultation.
23. Law making through instructions does not involve any public notice or consultation, nor publication in the *Government Gazette*. In our view, this is a highly exceptional power that

should only be used in limited circumstances to achieve a particular purpose. Parliament should confer such a far reaching legislative power on public officials only on a limited basis and not for a broadly stated purpose such as to “*for the effective implementation of this Act*”.⁴

The use of instructions undermines the Bill’s improved transparency and oversight

24. Section 26 and section 27 of the Bill creates an important opportunity for the public to access procurement processes, scrutinize procurement and monitor certain categories of procurement. Moreover, a proactive disclosure regime is contemplated which is to be managed in “real time” and to be publicly available on a digital platform. These provisions codify the important work of *imali Yethu* and *vulekamaail*, which are important joint projects between the National Treasury and civil society coalition to improve access to budget information, procurement tracking and therefore promote public participation, awareness and accountability.
25. Equality Collective welcomes these transparency mechanisms, however we are concerned that these provisions are given effect to through “*instructions*”. As we have stated above, “*instructions*” are an opaque law making power.
26. To create a meaningful, fit-for-purpose, inclusive and workable transparency framework, Parliament ought to provide greater guidance on the manner in which access and disclosure is to be regulated and require that these be implemented through regulations rather than instructions.
27. The regulations can prescribe circumstances which require adaptability to protect members of evaluation committee, but these should be exceptional and coupled with measures to guard against intimidation in a similar manner available to judicial officers.

The Public Procurement Office is not independent

28. The Zondo Commission exposed how the procurement system, its regulations, instructions and policies were abused. It recommended an independent procurement agency to monitor and oversee procurement.
29. While we welcome the establishment of the Public Procurement Office (the “Office”) as a positive step towards the creation of an oversight body for procurement activities, and the requirement that it conduct itself “impartially and without fear, favour or prejudice”, it is unclear how this will be achieved given that the Office is within the National Treasury. The Zondo

⁴ See sections 5(2) and 6(2) of the Bill.

Commission recommended that a separate procurement agency be established outside of the executive, but that recommendation has not been followed.

30. For purposes of legitimacy, and if the Bill retains the Office within National Treasury, it will be important to put in place checks and balances to ensure that it is empowered to carry out its mandate impartially and without fear, favour or prejudice. In this regard, we note that the Bill does not provide any guidance on how officials in the Office are to be appointed, what kind of input from the public is required for nominees to the Office, or what their minimum qualification criteria are required to be. There is also no indication in the Bill on how the performance of the Office will be monitored, and to whom the Office will report.
31. In order to maintain the level of independence required of the Office in order to garner and maintain credibility, specific measures should be provided for in the Bill to ensure that the impartiality referred to therein can in fact be achieved.

The Bill aims for a one size fits all

32. The Bill will change the public procurement landscape from a devolved, decentralised system where procuring institutions determine their own procurement policy practices in accordance with applicable legislation, their sector and organisational structure, to a centralised system where the Minister of Finance and the Public Procurement Office in the National Treasury, will determine the procurement system for a procuring institution.
33. The Bill does not deal with the status of existing procurement instructions issued under the PFMA and the MFMA. This should therefore be clarified. The Bill does not adequately address the vacuum that will be created at the local government level once the provisions of the MFMA are repealed.
34. Notwithstanding, under section 18 of the Bill, the Minister of Finance “*must prescribe*” by regulation, “*a procurement system for procuring institutions*”. In other words, procuring institutions will no longer prescribe their own procurement systems. Of concern is the absence of any requirement or obligation that the Minister of Finance differentiate between institutions and categories of procurement, consequently there is no guidance to any authorising responsible for implementing the Bill as to when it may be appropriate and necessary to differentiate.
35. Some guiding principles or considerations for differentiation between different categories of public institutions could include any number of factors such as the designation of the entity within government, the location of the entity, the resources or organisational structure of the entity, the size of the entity, whether the entity has direct constitutional obligations, the nature of the services provided, the need to promote standardisation for a sector, to remain

competitive or innovative in the relevant economic market, to secure or compete for special commodities, or to provide a minimum basic level of service for a particular sector. The legislature ought to appropriately guide the Minister's discretion when making regulations and we see none here.

36. Significantly, differentiation is an option for the Public Procurement Office when issuing "*binding instructions*" under section 5(2) of the Bill but again, there are no guiding principles and the use of "*instructions*" and not regulations means that neither the public nor procuring institutions are guaranteed procedural rights prior to the Public Procurement Office electing whether or not to differentiate.
37. The risk of this degree of standardisation and centralisation creates a "one size fits all" procurement system. In our view, placing an obligation on the Minister of Finance and the Public Procurement Office to differentiate between procuring institutions and categories of institutions will enable a fit-for-purpose regulatory system that is capable of sustaining the complexities public procurement across the State.

The Bill must provide adequate guidance on the content of subordinate legislation

A lot of the content in the application of the Bill is intended to be provided for in regulations and instructions. In our view, it is therefore difficult to assess the real impact of the new procurement system without understanding the parameters of the content of subordinate legislation.

The Bill must innovate

38. Current "grey areas" in relation to procurement methods, such as the use of panel appointments, unsolicited bids / proposals, limited bidding, and the standardisation of pricing amongst qualified suppliers on a database, are neither provided for nor prohibited in the Bill, leaving it unclear as to whether these recognised procurement practices will be allowed, and if so in what circumstances or by which organs of state.
39. The Bill also fails to recognise or encourage the role of implementing agents in procurement for and on behalf of organs of state. While implementing agents are broadly recognised in section 20 of the Bill, the Bill fails to clearly outline the circumstances in which a procuring institution can outsource or obtain technical assistance from an implementing agent, whether it can appoint an implementing agent without conducting a procurement process, the question of whether an implementing agent can make contract award decisions on behalf of the institution or only play an advisory role, and the relationship between procuring institution

and implementing agent, are not addressed in the Bill. It is possible that section 20 is aimed at regulating this issue, but not clear.

40. Also absent from the Bill is any initiative or guidance for innovation around strategic procurement that allows for the use of procurement methods that are applied internationally but are not established practice in South Africa as yet, such as competitive negotiation, competitive dialogue and auctions.

Preventing human Rights abuses through public procurement

41. In terms of section 7(2) of the Constitution, the State has an obligation to respect, protect and fulfil the rights in the Bill of Rights. South Africa has also ratified a number of Treaties,⁵ including The Universal Declaration of Human Rights, and Convention Concerning Forced or Compulsory Labour ILO No. 29, amongst others, and it is clear that there is an obligation on the State and its actors to actively prevent human rights abuses. Despite this, there is no explicit reference in current procurement legislation, or the Bill, to give adequate effect to the State's duty in the context of procurement. The Bill offers an opportunity to address the lack of clear policy, and provide the State with an opportunity to promote responsible and sustainable practices in the private sector.
42. Potential human rights abuses that may occur along supply chains include child labour, forced labour, illegal wages and working hours, and unsafe working conditions, and the State as a consumer, should take active steps to ensure that they are not implicated in human rights abuses through their purchasing practices.
43. The United Nations Guiding Principles on Business and Human Rights (“**UNGP**”) affirms the duty of States to protect against human rights abuses by businesses. Specifically, Guiding Principle 1 provides that “*States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises*”,⁶ Guiding Principle 4 provides that States should require that State owned or controlled enterprises should exercise human rights due diligences where appropriate,⁷ and Guiding Principles 5 and 6

⁵ Full list available at

https://treaties.dirco.gov.za/dbtwwpd/exec/dbtwpub.dll?AC=MENU_QUERY&XC=/dbtwwpd/exec/dbtwpub.dll&BU=http%3A//treaties.dirco.gov.za/dbtwwpd/textbase/treaties/treatymenu.htm&TN=Treatyweb&SN=NewTreaty&RF=Printingformat2018&EF=&DF=Web+full+recr d&RL=0&EL=1&DL=0&NP=0.

⁶ Available at https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

⁷ UNGP Principle 4 “*Where States own or control business enterprises, they have greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented.*”

make it clear that this duty extends to situations where governments enter into commercial relationships through public procurement.⁸

44. When looking at examples in other jurisdictions, in the United Kingdom, the Modern Slavery Act 2015 provides that any commercial organisations that conduct all or part of a business in the U.K. supplying goods or services above a certain turnover are required to prepare and publish an annual slavery and human trafficking statement.⁹ In the United States, the California Supply Chain Transparency Act requires that companies disclose on their websites all information about their efforts to eradicate human trafficking and modern slavery from their supply chains.¹⁰
45. There is an opportunity for the Bill, as the primary piece of legislation regulating procurement, to realise these principles and make provision for the promotion of ethical supply chain practices, either directly through the Bill itself, perhaps as another object of the Bill in section 2, or prescribing that it be realised through regulation.

The Bill must do more to protect whistle-blowers

46. In order to encourage members of an accounting authority or officials within procuring institutions to report any unauthorised or unlawful activity (thereby potentially preventing corruption and procurement irregularities), the Bill needs to ensure that measures are put in place to ensure protection for whistle-blowers.
47. As it is currently formulated, a whistle-blower in the scenario provided for in section 14 of the Bill would be required to submit their objection to the person of authority who instructed them to perform the unauthorised or unlawful activity. Although section 14(2) provides that the whistle-blower may not be subjected to disciplinary proceedings as a result of reporting unauthorised activity, the Bill fails to take into account the intimidation and victimisation which whistle-blowers may potentially face during their employment in the institution.
48. The Bill also does not provide for confidentiality of the report made by a whistle-blower. This means that such a report (which includes the name and designation of the whistle-blower)

⁸ UNGP Principle 5 “States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States – individually and collectively – with unique opportunities to promote awareness of and respect for human rights by those enterprises”

⁹ Modern Slavery Act 2015 Section 54, Transparency in supply chains.

¹⁰ S.B. 657 section 2.

would potentially be made available to third parties within or outside the procuring institution, thus exposing the whistle-blower to potential victimisation and threats to their safety.

49. The Bill should, instead, provide for an authority within the Public Procurement Office, where officials may report procurement irregularities on an anonymous basis if necessary, which reports will be investigated by the Public Procurement Office.

D. CONCLUSION

50. Equality Collective reiterates its support for the Procurement Bill, as a transformative and progressive instrument that can advance economic development, improve transparency and safeguard against corruption.
51. Equality Collective hopes that its submission and comments on the Bill will be considered and is available to make oral submissions if requested.

Yours sincerely

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