



The Public Procurement Bill

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Almost a decade in the making, on 22 May 2023, the Public Procurement Bill (“2023 Bill”), has now been introduced to parliament. The Bill aims to create a single, coherent regularity framework for public procurement and eliminate fragmentation in laws that deal with procurement in the public sector. Prior to the introduction of the 2023 Bill, the Preferential Procurement Policy Framework Act, 2000, No 5 of 2000 (PPPFA), along with 29 other texts of legislation, cumulatively affected procurement processes in all spheres of government. This led to the fragmentary and unsystematic state of preferential procurement. This is expected to centralise tender processes across all spheres of government that being national, provincial and local government. The summative purpose of the 2023 Bill is set to regulate public procurement, prescribe a framework within which preferential procurement must be implemented; and provide matters connected therewith.

At present, the 2023 Bill is under consideration by the National Assembly. The 2023 Bill presented stands to give effect to the preferential procurement contemplated by the provision of section 217(1) and (2) of the Constitution, the introduction of which is the most significant development in the public procurement regulation in South Africa.

In terms of section 217(1) and (2) of the Constitution provides that “(1) when an organ of state in the national, provincial, or local sphere of government or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy for – (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.”

One of the noticeable revisions brought by the 2023 Bill, in comparison with the 2020 Public Procurement Bill (“2020 Bill”), is the change of the title of the central procurement entity from the ‘Regulator’ to the ‘Public Procurement Office’. The title change corresponds to the broad powers, inferred from the wording of section 5 of the 2023 Bill, conferred to the Public Procurement Office in terms of section 5(1) including, amongst others:

- a. to develop and implement measures to ensure transparency in procurement;
- b. to promote standardisation in procurement;
- c. to promote the use of technology and innovation and learning towards modernisation of the public procurement system; and
- d. to monitor and oversee the implementation of this Act.

Furthermore, the Public Procurement Office may, in accordance with section 5(2) of the 2023 Bill:

- a. issue binding instructions as provided for in this Act and on any other procurement matter for the effective implementation of this Act;
- b. issue non-binding guidelines to assist procuring institutions with the implementation of this Act or any other procurement related matter; and
- c. determine a model procurement policy for different categories of procuring and different categories of procurement.

It follows from the provisions of section 5(2) of the 2023 Bill that the Public Procurement Office will enjoy a great deal of autonomy in managing its public procurement affairs. The degree of flexibility contemplated in the above provisions allows the Public Procurement Office the freedom to determine and implement its procurement procedures according to its own requirements but must do so within the ambits of the Constitution.

The 2023 Bill aims to create an oversight mechanism with the establishment of centralised institutions such as the Public Procurement Office within the National Treasury. Various other institutional reforms are also proposed such as the establishment of a Public Procurement Tribunal whose duties include, amongst others, attending to adjudicating referrals and/or applications for a review by a bidder who is dissatisfied with a decision of a procuring institution as contemplated in section 31 of the 2023 Bill.

Will the long-awaited and long-drafted Public Procurement Bill address the surge of corruption and improve transparency within the South African procurement system? For the 2023 Bill to address the growing constitutional imperatives for anti-corruption, transparency, and accountability in the procurement system. It is a consequence that the 2023 bill, a point of distinction from its 2020 predecessor, that the 2023 Bill therefore enforces the principle of open contracting. This principle obligates that the procurement system engages the citizenry and discloses its entire procurement process from its planning, tendering and to monitoring activities.