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Submissions by Corruption Watch:
Draft Public Procurement Bill
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Introduction

1. Corruption Watch (CW) is a registered non-profit company in terms of the Companies Act 71 of 2008 and an independent civil society organisation with no political or business alignment. CW works to fight corruption and the abuse of public funds and has a vision of a South Africa where citizens are able to report corruption without fear of reprisal.

2. As an accredited Transparency International chapter, CW places specific emphasis on the promotion of transparency and accountability within the private sector and state institutions. Transparency and accountability – alongside the promotion and protection of the rule of law and good governance – are essential to protect the beneficiaries of public goods and services, and to ensure the public service operates with efficacy and integrity.

3. We receive reports of alleged corruption from the public which we use as an important source of information to fight corruption in South Africa and to hold our leaders to account. CW achieves this through policy advocacy, public mobilisation, strategic litigation and select investigations.

4. Since 2012, we have received just over 30 000 reports of alleged corruption - 9% of which relate to corruption in procurement.

5. Our whistleblower data illustrates that procurement corruption is rife especially in the local and provincial government departments. Of the reports that are located

within the local government sector, 63% relate to procurement irregularities arising from the Office of the Municipal Manager. Within the provincial government, the departments of basic education (46%), healthcare (15%), public works (7%) and human settlements (3%) are hotspots for procurement corruption. Similarly, whistle-blowers have highlighted procurement irregularities within the national departments of higher education and training (15%), health (10%), SAPS (8%), public works (7%) and defence (7%).

6. Public procurement is recognised by The Organisation for Economic Co-operation and Development (OECD) as one of the government's activities most vulnerable to corruption.[1] The large sums of money involved, the complex processes and the intersection between public bodies and the private sector make it particularly susceptible to corrupt activity. The procurement process can be undermined by various types of corrupt activity including undue influence over the creation of specifications, fraud in tender submissions and conflicts of interest and bribery during the award process.[2] The human cost of such corruption is high as the diversion of funds undermines the realisation of human rights.

7. CW welcomes the opportunity to make submissions on the draft Public Procurement Bill [B - 2020] (the Bill).

8. Given our anti-corruption mandate, our submission will focus on the areas of governance, accountability and transparency addressed by the Bill. We recognise the steps taken to improve these areas but note that significant improvements are still required, as explained below.

A. Governance

Consolidated legal framework

9. We welcome the increased legal certainty created by the scope of the Bill in its application to all spheres of government departments, constitutional departments

[1] http://www.oecd.org/gov/ethics/Corruption-Public-Procurement-Brochure.pdf
[2] Ibid.

and Schedule 2 and 3 PFMA Institutions. This improves the preceding framework which was highly fragmented, inaccessible, and created confusion regarding the status of different legal instruments.

10. This consolidated and standardised framework should assist in greater good governance of the procurement process. It must be noted, however that the purpose of creating a single regulatory statute may be undermined by the Bill empowering National Treasury, Provincial Treasuries and the Regulator to issue binding and non-binding instructions and practice notes. In order to avoid proliferation and confusion, the Bill must provide clear guidance on the status of each of these instructions as well as their publication and accessibility requirements.

11. We submit that the Public Procurement Regulator should be tasked with creating and maintaining a consolidated list of all the procurement rules, including their legal status. This list should be regularly updated and easily accessible to all practitioners.

The Public Procurement Regulator

12. We note the establishment of the Public Procurement Regulator in section 4(1) but have concerns regarding this body.

13. In order for the Regulator to play an effective oversight role, as inferred from its functions listed in section 5, it is necessary for it to be sufficiently independent. Its establishment within National Treasury is therefore questionable and may undermine its ability to exercise its powers without fear, favour or prejudice as required in section 4(2).

14. Given the role of the Regulator, it is further submitted that the Bill should include the qualifications and appointment process for the Head of the Regulator such that the principle of independence is emphasised.

15. The Bill empowers the Regulator to declare certain practices as “undesirable” in section 6. It is unclear whether this relates to a specific procurement decision or award, or a more general practice within an institution, or both. The Bill is silent on the consequence of declaring a practice as “undesirable.” Accordingly it is difficult to understand the governance benefits of this power. It is submitted that further clarity is required in this regard.

Conflict between different spheres of government

16. Section 5(1)(d) empowers the Regulator *to intervene by taking appropriate steps to address a serious or persistent material breach of this Act by an Institution.* It is unclear what would constitute appropriate steps in order to satisfy this peremptory power. This power has also been given to provincial treasuries in section 9(1)(c), although they may only do so for institutions under their provincial administration.

17. Although we are not opposed to the same power being ascribed to different actors, it is important that the Bill prescribe the instances during which each must act. Without such specificity, the operation of such a power may be undermined. Such specificity is required in order to avoid potential governance and enforcement challenges this may create.

18. Section 95(2)(*b*) of the Bill empowers Provincial Treasuries to determine whether local government procurement is urgent. Beyond being a potentially unconstitutional interference with the authority of local government, this may lead to a dispute between these two spheres, and consequently prolong what could be a genuinely urgent procurement. It is submitted that the Regulator could determine the urgency of procurement for all spheres of government.

B. Accountability

Review process

19. The Bill provides for a truncated review process. Chapter 9 creates two internal objection-like procedures:

19.1. Part 2 allows for reconsideration of a decision by the procuring institution, after which the Provincial Treasury or the Regulator may be approached for a subsequent reconsideration as outlined in part 3 and 5. Thereafter a dissatisfied bidder may still invoke the review process of the Tribunal, as provided for in Part 5, and then still approach a court. This is likely to be a lengthy and expensive process, and would require a losing bidder to exhaust three internal remedies before being able to approach a court.

19.2. We submit that this process would be more effective if consolidated into a two-step process where, after an initial decision by an institution, an appeal may be made to the Public Procurement Tribunal, after which a review may be conducted by a court on legal grounds. We submit that this simple process, which only requires one internal remedy, will be more effective and therefore contribute to greater accountability.

20. We welcome the establishment, in section 99, of the Public Procurement Tribunal and its capacity to bring about greater accountability. However, it is important to note that section 99(1), which provides that the Tribunal has authority to review "administrative actions", narrows the scope of review. The Supreme Court of Appeal has held that a decision to cancel a procurement process is not considered "administrative action" and is therefore not subject to review. The Bill should seek to define the various steps in the procurement process, clarifying them as administrative action subject to review by the Public Procurement Tribunal.

Monetary compensation

21. We submit that the Bill should allow for monetary compensation as a remedy for the unlawful award of tenders.

21.1. Currently, such compensation may only be awarded under the common law in cases of intentional wrongdoing, which is difficult to prove,[3] or under the

[3] See for example *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA).

Promotion of Administrative Justice Act 3 of 2000 if it is no longer possible to review, set aside and remit the unlawful decision.[4] The difficulties inherent in these avenues effectively eliminate the possibility for compensation as a remedy.

21.2. Compensation should be an option for the Tribunal to consider, particularly in the case of smaller tenders and where the remedy of review and invalidation of a contract may undermine service delivery. We do not suggest that the successful bidder should be entitled to its loss of profits or even its out of pocket expenses, but rather that a system of "fines" be imposed on the procuring institution that erred in certain circumstances, particularly in circumstances where it is no longer appropriate to invalidate the award.

Provisions requiring further clarity

22. We welcome the inclusion of section 13 and its provision for the reporting of unlawful instructions to the Minister. It is important to note, however that the operation of such a provision will be undermined without robust and effective whistle-blower protection mechanisms. An affected individual may be forced or pressured into not complying with the reporting requirement in section 13(2). We submit that the current legal framework which aims to protect whistleblowers is ineffective and would not provide sufficient protection.

22.1. We further submit that the application of this section, as specified in section 13(2) as relating to 'any other person with authority over the affected person' is unnecessarily narrow. Its scope of operation should be broadened to include any individual who provides instructions which are inconsistent with the Act.

23. Section 18 relates to the disclosure of interest by an official however various terms are vague in formulation. "Close relative" and "close associate" need to be defined, and arguably the prefix "close" is unnecessary and vaguely narrows the scope of

[4] See for example *Trustees, Simcha Trust v De Jong* 2015 (4) SA 229 (SCA).

application. Some clarity needs to be provided on what constitutes "a direct or indirect personal interest", and it must be specified whether it applies to any official in the procuring institution or only officials directly involved in the procurement.

24. Section 115 limits liability for loss or damages suffered as a result of actions or decisions taken in good faith. Our courts have been increasingly ordering personal cost orders against grossly negligent procurement officials.[5] This section may prevent courts from doing so, and it is accordingly necessary for the scope of this section to be defined. Such a cost order is an important accountability mechanism.

25. Various provisions in the Bill require compliance with codes of conduct or standards. This is evident in sections 16 and 19 which require compliance by bidders and officials with codes of conduct issued by the Regulator and the requirement that procurement contracts comply with the Bill in section 72. However, the Bill is silent on the consequence of non-compliance, which undermines these requirements. This has concerning consequences for procurement contracts. In the event that they are invalidated by virtue of section 72, it is unclear what the consequence would be on goods or services already delivered.

C. Transparency

26. Transparency is an important principle in procurement as evidenced by its inclusion in section 217 of the Constitution.[6] This section requires that procurement be done in accordance with a system which is *fair, equitable, transparent, competitive and cost-effective*. We submit that the Bill does not adequately fulfil the constitutional requirement of transparency as evidenced by the following: first, despite acknowledging due regard to these constitutional requirements, the objects of the Bill as specified in section 2, do not include transparency. Second, while the Bill includes several requirements which appear to demonstrate a commitment to a

[5] See, for example, *Westwood Insurance Brokers (Pty) Ltd v eThekwini Municipality and Others* (8221/16) [2017] ZAKZDHC 15 (5 April 2017).
[6] The Constitution of the Republic of South Africa, 1996.

transparent procurement process, their operation would not bring about greater transparency. This is demonstrated by the following concerns:

26.1. Section 7(1) limits access to information held by the Regulator to public bodies and public officials. It appears that ordinary individuals and bidders would only be able to access such information by utilising the mechanisms in the Promotion of Access to Information Act 2 of 2000 (PAIA). The lengthy process required under PAIA renders it ineffective in the procurement context which often requires swift access to documents. This does not demonstrate a commitment to proactive disclosure.

26.2. The inaccessibility of procurement information undermines the effectiveness of internal remedies. Section 96(3) allows for an unsuccessful bidder to challenge an award, but such application must be made within 10 days. In order to found an application for reconsideration, the unsuccessful bidder requires access to the record of the decision. Given that PAIA provides an institution with 30 days within which to respond to an access to information request, it would be impossible to comply with the 10-day requirement. We submit that the relevant documents, such as the evaluation report, should be made publicly available at the same time as the announcement of the award. Such proactive disclosure will allow bidders to effectively make use of the internal reconsideration process.

26.3. The Bill makes repeated reference to confidential information, but does not define the scope of what is considered to be confidential in relation to the procurement process. It is submitted that this is particularly problematic in light of its repeated use as a ground of refusal in response to PAIA requests. We submit that the Bill must include a precise definition of confidential information.

26.4. Although section 42(5) requires publication of the result of the tender, it is submitted that this requirement is insufficient - the Bill should also require publication of the contract concluded with the successful bidder. This is important for transparency and accountability, and will allow for non-state actors to monitor the implementation of the contract.

27. Section 5(1)(d) requires that the Regulator must develop and implement measures to ensure transparency in the procurement process. We note the peremptory nature of this provision however there is no guidance provided on what effective transparency requires or a minimum set of standards necessary to achieve it. We submit that in order to achieve the constitutional obligation of a transparent procurement process, government needs to commit to greater proactive disclosure and implement open contracting.

28. South Africa made a commitment to e-procurement in 2015, and although various e-procurement sites exist, their use is ineffective. Our interaction and analysis of these portals has demonstrated two problems which undermine their usefulness.

    28.1. First, insufficient information is uploaded. Second, the information which is uploaded is not done in a standardised and computer readable way. The consequence of this is that it is very difficult to analyse the data in aggregate – undermining the ability to understand trends and red flags in procurement.

    28.2. The lack of sufficient information makes it difficult for state and non-state actors to monitor the procurement process, and to ensure the effective delivery of important goods and services.

29. South Africa already has the basic infrastructure for e-procurement in place. Its effectiveness will be greatly increased when coupled with the Open Contracting Data Standard (OCDS) and data analytics. The OCDS prescribes standards for what procurement information should be published and in what format. The use of this standard ensures that there is uniformity and standardisation of data, which improves data quality and allows for comparison and analysis. Any efficiency gain achieved through the implementation of e-procurement will be enhanced when coupled with OCDS.

30. In 2014, Ukraine put open contracting and the OCDS at the heart of the country's new e-procurement system, leading to major savings for the government (over US$1 billion and counting) and significantly increased competition (with thousands of new suppliers now working with public entities). Over 80% of government

contracts are now awarded to small and medium-sized enterprises (SMEs) and perceptions of corruption have more than halved.

31. Transparency is an important principle in the procurement process, as recognised by our Constitution. We submit that the Bill falls short in creating a regulatory framework that would achieve this principle. At the very least, more specificity and a commitment to proactive disclosure is required but we submit that a commitment to Open Contracting is necessary.

Conclusion

32. We appreciate the opportunity to make comments on the Bill and hope that they will be useful in further deliberation. We confirm that we will be available to participate in any oral hearings on the Bill.

Submitted by Corruption Watch
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