SUBMISSIONS:

PUBLIC PROCUREMENT BILL (B18-2023)

To: Finance Standing Committee, Parliament

Per: Mr Allen Wicomb - awicomb@parliament.gov.za;

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1. Sakeliga (formerly Afribusiness) notes the publication of the Public Procurement Bill ("Bill") on 30 June 2023 and the call on 18 August 2023 for written submissions to be submitted by 11 September 2023.

2. At the outset we should mention that a notice of less than 1 month for the delivery of submissions is gravely inadequate for a bill with this consequential nature. There is no apparent urgency that requires a very short period for submissions. Even if there were, the saving of time in itself does not justify inadequate opportunities for public involvement. On this basis alone, the public participation process is unconstitutional.

3. Sakeliga has around 9,000 business members that stand to be affected adversely by the Bill, should it be promulgated. The public in general, businesses and the economy at large stand to be harmed by the Bill.

4. We therefore make submissions on the Bill. Our submissions herein should not be construed as our complete and final say on the Bill and its impact, lawfulness and Constitutionality. We fully reserve the right to append to our submissions at a later stage in forums where it might be appropriate.

5. Abbreviations and definitions used herein are the same as in the Bill, save where otherwise indicated.

OVERVIEW OF SUBMISSIONS

6. Sakeliga's submissions will deal with the following aspects of the Bill (relevant paragraphs of the Bill to be indicated in bold):

    6.1. Establishment and functions of the Public Procurement Office **[sections 4 and 5]**

    6.2. Preferential procurement – **[section 17]**

    6.3. Procurement system and methods **[section 18]**

    6.4. Function performed by another person or organisation **[section 20]**

    6.5. Judicial review and enforcement of Tribunal orders **[section 48]**

ESTABLISHMENT AND FUNCTIONS OF THE PUBLIC PROCUREMENT OFFICE [SECTIONS 4 AND 5]

7. The proposed Procurement Office ("PPO") within the National Treasury is proposed to be empowered to issue binding instructions to all procuring institutions and implement measures for various purposes, *inter alia.*

8. The PPO may also promote "standardisation" in procurement, in general.

9. The PPO is granted overall regulatory powers in relation to public procurement across all levels of government. It is proposed to have vast powers to make rules to all procuring entities and thus to shape the manner in which procuring entities procure.

10. In effect, the Bill proposes to grant *de facto* powers to the PPO to create law. "Binding instructions" as described in the Bill bear no difference in status to regulations that the Minister may or must make.

11. Parliament may not delegate powers to a government department or a sub-department of government to single-handedly create *de facto* regulations. This is unconstitutional.

12. In any event, if the PPO enjoys such powers it will be in a position to create a plethora of "binding instructions", leading to more fragmentation in public procurement law and defeating the very object of the Bill. This is not only irrational, but will lead to legal uncertainty and a layered public procurement law regime.

13. The proposed parts of the Bill **[section 5(2)(a)]** granting regulatory powers to the PPO are unconstitutional.

PREFERENTIAL PROCUREMENT [SECTION 17]

Discretion of organs of state

14. Section 17(1) of the Bill commences with a provision that "when" implementing a preferential procurement policy, a procuring institution must do so in accordance with the objects of the Bill, the relevant chapter in the Bill and the B-BBEE Act.

15. Given the Constitutional discretion afforded to organs of state in section 217(2) of the Constitution on whether to implement preferential procurement at all, section 17(1) of the Bill should make use of the conditional term "if", as opposed to "when", which may imply inevitability or could be interpreted as a peremptory provision.

16. Organs of state, not Parliament, are clearly the designated decision-makers in section 217(2) of the Constitution. The preferential procurement decisions may have to accord with a framework act, but this does not derogate from the Constitutionally ordained decision-making powers.

17. Any provision in the Bill proposing to force procuring entities to implement for or otherwise provide for preferential procurement in their procurement policies would be unconstitutional.

18. Case law is clear that organs of state <u>may</u> (not must) implement a preferential procurement policy, provided that if (not when) they do, it is done within a framework provided for in national legislation.

The purpose of a framework

19. Parliament may create a framework for preferential procurement, but it may decidedly not compel organs of state to conduct preferential procurement and may not traverse beyond the making of a framework.

20. Section 17 of the Bill goes much further than providing a mere framework. It prescribes policy content.

21. Section 17 of the Bill would require of procuring institutions to implement specified *measures* relating to specified preferential goals (such as local content), *measures* for *inter alia* set-asides, sub-contracting and "transformation" and *preferences* for citizens and permanent residents, small enterprises and enterprises based in townships *inter alia*.

22. The upshot is that all procuring institutions exercising a discretion to adopt any form of a preferential procurement policy must include in such policies B-BBEE and local content preferences, set-asides and subcontracting requirements. Such policies would also have to include preferences for suppliers that are citizens and permanent residents, small enterprises and enterprises based in townships, rural or underdeveloped areas or in a particular province or municipality.

23. The so-called framework in the Bill is therefore no framework at all, but a national policy.

24. A framework act should guide organs of state / procuring institutions in the exercise of their discretion should they decide to apply preferential procurement. Chapter 17 of the proposed Bill goes further than this, and is *ultra vires* section 217 of the Constitution.

The impact of the prescribed preferential policies

25. To the extent that preferential procurement has overridden the primary principles of sound public procurement as required in section 217(1) of the Constitution, they can be said to have reprioritised the goal of public procurement from efficiently

providing valued services to promoting the establishment and growth of preferred firms.

26. Preferred firms do indeed benefit directly from such procurement policies since they receive revenue for their services from reprioritised spending. Some other firms benefit, in turn, by being preferred suppliers to these direct beneficiary firms because their own BEE or local content scores enhance the preferred status of the procuring firms. Some other firms benefit similarly further along the supply chain. Moreover, some proportion of preferred firms may not have been formed at all, or been as financially successful, without preferential procurement.

27. Unfortunately, the promotion of certain firms does not translate into economic benefits for society as a whole. Rather, done ever more to the exclusion of efficiency considerations, it does immense economic harm.

28. In the first instance, shifting procurement expenditure to certain firms necessitates moving it away from others. This is reallocation rather than growth in business activity. If spending is reallocated from more efficient offshore to less efficient domestic firms, the higher costs incurred necessitate a reduction in spending on other locally produced goods and services.

29. Where preferential procurement reallocates spending, it implies buying more expensive or lower quality goods and services, or some combination of both. This, in turn, means fewer goods and services and a lower quality of goods and services provided to the public.

30. The public – comprising chiefly of households, firms, institutions of civil society, and state institutions – relies on a host of important state services for personal wellbeing, meeting basic needs, and providing critical inputs into productive activities. As such, a reduction in the quantity and quality of state services harms domestic industrial development.

31. Poorly serviced households must spend more money, time, and energy meeting certain needs. This pulls spending power away from other goods and services and

reduces the time and energy available to spend on both productive work as well as healthy rest.

32. Poorly serviced firms are beset by costlier and less productive inputs, lowering their productivity and earnings. They, in turn, will have to reduce investment spending, slow the pace of hiring or lay off staff, and reduce the quantity or quality of their products and services provided to other firms, institutions, and households. This sparks further rounds of cost escalations and productivity declines with negative knock-on effects on business formation and hiring.

33. With the infusion of BEE and local content policies in the private sector also comes a degradation in private services. BEE results in capital misallocation and capital consumption. This process reduces the productive capacity of the economy and slows the rate of creation of valued goods and services.

34. BEE forces productive members from all cultural communities to subsidise connected political opportunists. BEE, therefore, leads to a greater emphasis on getting ahead using coercive means and a lower emphasis on responding to the needs of customers and firms through voluntary trade. Instead of spending precious time focused on serving the needs of others using resources efficiently, much time and effort is spent securing political favour, jostling for political positions, deemphasising the needs of customers relative to those of compliance officers, and having a lower regard for economising resources and the formation of productive capital.

35. The net effect of forced BEE and local content policies in public procurement is wealth destruction in both the government and private sector, poorer service delivery and the perpetuation of economic and social dissatisfaction.

36. The Bill should provide a framework for preferential procurement with wide discretion for organs of state to choose from a menu of preferential procurement options, if they elect do so at all. Invariably such policies and actions must be taken pursuant to section 217(1) of the Constitution. In its current form, section 17 of the Bill seeks to force all organs of state to disregard the provisions in section 217(1)

of the Constitution, alternatively to forfeit the discretion to align own policies and actions with section 217(1) of the Constitution.

PROCUREMENT SYSTEM AND METHODS [SECTION 18]

37. Section 18 of the Bill seeks to furnish the Minister with wide powers to determine the contours and content of the procurement policies of all procuring institutions.

38. The Minister must, for instance, prescribe a procuring system for procuring institutions, procurement methods and procurement thresholds in respect of the methods. Section 18(3) of the Bill then prescribes which matters such a procurement system must provide for. The listed matters are plenty and their proposed standardisation across all procuring institutions is not only unrealistic but will be harmful to the public administration goals of procuring institutions.

39. What is particularly concerning is that the Minister is proposed to have the powers to compel procuring institutions when to participate in a transversal term contract.

40. To force procuring institutions to participate in procurement contracts deprives them of the opportunity to determine the legality of a contract which they ultimately will have to enter into, its compliance with section 217(1) of the Constitution and its ability to respond to its needs and those of the public. This is a case of one sphere of government seeking to usurp the executive power of another sphere and attempting to operate from the same functional perspective as the encroached sphere in relation to an object of power. It is, simply, unconstitutional.

41. If one has regard to the wide powers proposed to be exercised by the Minister in relation to how procuring institutions procure, coupled with the wide regulatory powers proposed to be exercised by the PPO, one might ask: will procuring institutions have any meaningful scope left to determine their own policies? The answer is that procuring institutions will have to play catch-up with the determinations of the Minister and the instructions of the PPO.

42. The envisaged scheme for regulation in the Bill will cause more, not less, obstructions to everyday procurement processes. It will cause more bureaucracy and inefficiency, not less. Importantly, it will deprive procuring institutions the opportunity to draw from own institutional memory and to implement policies that they know to work well in pursuit of responding to the needs of constituencies that they – not the Minister -- are well acquainted with.

FUNCTION PERFORMED BY ANOTHER PERSON OR ORGANISATION [SECTION 20]

43. Section 20 of the Bill seeks to burden "a person or organisation other than an organ of state" with complying with the Bill if such a person or organisation performs a function on behalf of and with funds from a procuring institution "in terms of legislation authorising it".

44. It should be obvious that the provisions of the Bill cannot simply *mutatis mutandis* be applied to a person or organisation not part of the government, simply because they fulfil functions traditionally perceived as government functions.

45. Section 20 of the Bill seemingly covers contractors delivering goods and services on behalf of government and private partners in a public-private partnership. The intended outcome is bizarre from a constitutional and practical perspective. To subject private companies and organisations to legislation and Constitutional standards intended for the regulation of government, is unreasonable. In any event, Parliament does not have the requisite powers.

46. Section 20 will disincentivise the private sector from participating in, aiding and contracting with the government for the delivery of goods and services. This will be severely detrimental in a public procurement environment that is heavily reliant on private partners to deliver goods and services.

47. Section 20 of the Bill is unconstitutional and unfeasible and holds the potential to decimate already dwindling service delivery in the country.

JUDICIAL REVIEW AND ENFORCEMENT OF TRIBUNAL ORDERS [SECTION 48]

48. Section 48(1) of the Bill determines as a pre-requisite to approaching a competent court, that a dissatisfied bidder must first have exhausted proceedings at the Tribunal.

49. The Tribunal is proposed to have jurisdiction when it comes to reviewing decisions by a procuring institutions to reconsider, on application by a dissatisfied bidder, the awarding of a bid.

50. To interpose the Tribunal between a dissatisfied bidder and access to a court for appropriate and especially urgent relief, may in some circumstances unduly prevent access to justice and infringe the provisions in section 34 of the Constitution.

CONCLUSION

51. Sections 4, 5, 17, 18, 20 and 48 of the Bill and related sections are unconstitutional. They also hold the potential to cause considerable harm to the economy and society. Other parts of the Bill may also be unconstitutional. The Bill should not proceed through the legislative process or be passed.

8 September 2023

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