18 September 2023

Standing Committee on Finance
Committee Secretaries: Mr Allen Wicomb (awicomb@parliament.gov.za) Ms Teboho Sepanya (tsepanya@parliament.gov.za)

Dear Mr Wicomb and Ms Sepanya,

Public Procurement Bill Submission

1. We write to you on behalf of the Public Service Accountability Monitor (PSAM) at Rhodes University and hereby submit our comments on selected aspects of the Public Procurement Bill, 2023 (B18-2023).

2. Approximately 29 years ago the South African Constitution was introduced and required an organ of state that contracts for goods or services, to do so *"in accordance with a system which is fair, equitable, transparent, competitive and cost effective"*. Unfortunately, we have failed to introduce and maintain such a system.

3. This constitutional violation has allowed corruption to flourish and resulted in the intimidation and murder of whistle-blowers. Parliament's failure to ensure transparency throughout the current system of procurement has weakened its oversight responsibilities and allowed corruption to flourish in organs of state that have inadequate accountability mechanisms.[1] Year-on-year reports from the Auditor-General have highlighted the impacts that result from not having these accountability mechanisms in place.

4. Our submission focuses largely on sections 26 and 27 of the Public Procurement Bill and will explain why these two sections are inadequate and require further revisions to ensure that a transparent procurement system is in fact introduced. We agree with the sentiments of amaBhungane that the Bill is *"an insufficiently detailed law, which would delegate far too much decision-making power to the executive and which fails to introduce truly robust anti-corruption mechanisms. On these topics, we submit that a significant re-working of the Bill be undertaken."* [2]

5. The current Bill does not contain appropriately worded sections that will adequately support the State's constitutional obligations to *"provide effective transparent, accountable and coherent government"*.[3]

---

[1] Note the experience of amaBhungane – see paragraph 4 of their submission viewable at https://static.pmg.org.za/230913_amaBhungane_Submissions_on_Public_Procurement_Bill.pdf
[2] Ibid at paragraph 5.
[3] See section 41(c) of the South African Constitution.

6. While the Bill seeks to address historical procurement law fragmentation that has had various negative consequences, the structure and processes proposed in the Bill – many of which will only become clear through regulations and instructions – provide too much latitude to organs of state. This is likely to create further fragmentation, differences of interpretation, and inadequate transparency and accountability mechanisms, especially if left to subordinate legislation.

We agree with another submission[4] that -

> *There are two main problems with this:*
> *a. In respect of regulations, it abdicates primary law-making power to the executive, which contradicts the principles of representative and participative democracy; and*
> *b. In respect, primarily, of instructions, it is not practical to have so many responsibilities conferred on the Minister and the PPO as it will create that problematic fragmentation we have now and the PPO is not being capacitated to take on this workload.*

We note[5] that the IMF assessed the Bill in June 2023 and identified failures of the Bill to firmly establish policy in the proposed primary legislation. The IMF found that:

> *A comparison with the UNCITRAL model procurement law suggests that the bill leaves many important procurement areas to be specified by regulation such as, the definition of procurement methods (including for preferential procurement) and circumstances for use, and the standardization of transparency standards among other areas covered in the general provisions. This risks exposing the procurement system to excessive regulatory discretion and insufficient public scrutiny of changes in key areas.*

In the table below we raise certain concerns and make recommendations for consideration:

[4] See paragraph 13 of https://static.pmg.org.za/230913_amaBhungane_Submissions_on_Public_Procurement_Bill.pdf
[5] Ibid at paragraph 31.

Section	Concern	Proposed new section
26(1)	The terms of access to procurement processes should not be left to an Instruction, nor should they be restrictively framed as currently drafted.[6] If for instance, only "high value" procurement may be monitored, then the rampant and recurrent low value COVID procurement fraud committed at Tembisa Hospital would escape possible scrutiny, when its cumulative value is high, not to mention its drain on already under-resourced health services. We also propose that a provision be included to deter persons from obstructing access	26.(1) The public, civil society and the media can – (a) access and observe procurement processes; (b) scrutinise procurement; and (c) monitor procurement to assist in realising section 217(1) of Constitution (that it is fair, equitable, transparent, competitive and cost effective). 26(2) A person employed by an organ of state or a public office bearer who unreasonably restricts access to procurement processes is guilt of an offence.
26(2)(a)	Besides our above concerns with making access to procurement processes conditional upon an Instruction that has yet to be drafted, we suggest that this clause permit, but not require an instruction to manage instances where there may be concerns of undue influence, threats to officials etc that may inhibit candid deliberations. Note that our proposed revised section 26(1)(a) emphasizes that access is to **observe.**	The Public Procurement Office may by way of an instruction – (a) introduce measures to support candid deliberations and to protect officials from undue influence and threats; (b) restrict access by persons if their conduct results in threats to officials; seeks to place undue influence upon officials; seeks to inhibit candid deliberations.
26(2)(b)	We do not agree that the access provided by 26(1)(a) should be "limited to certain categories of procurement or procurement above a specified threshold." The constitutional requirement for procurement transparency does not stipulate a threshold or category. We	Delete section 26(2(b) as it currently appears in the Bill.

[6] amBhungane's submission explained at paragraph 83 as follows: "The limitation of the ability to monitor procurement to 'high-value or complex procurement' should be removed. The wording of the provision is unclear, but it could be read as meaning that monitoring these types of procurement is necessary because it is only these types of procurement that 'entail significant risks of mismanagement and corruption'. It is incontrovertible that low-value procurement is vulnerable to corruption, and restricting enhanced monitoring to high-value and complex forms of procurement risks making low-value procurement being seen as an even more appealing route to corrupt wealth accumulation"

	have seen how procurement processes have been corrupted for unlawful gain across diverse organs of state and regardless of value/threshold or categories.	
27(1) 27(2)	The remaining terms of disclosure of procurement information should not be left to an Instruction, nor should they be as restrictively framed as appears in the current draft Bill. We concur with the submission of amaBhungane where they emphasise that: *"The Open Contracting Partnership – the global non-profit organisation that established and advocates for a global norm of open and transparent procurement systems – recommends that information from all five phases of procurement be disclosed. The phases are: planning; tender; award; contract and implementation. Section 27 should therefore be amended to include the requirement to disclose annual procurement plans and details about the financial and physical implementation of the contract."* While the requirement that certain procurement information be disclosed is welcome and overdue, the absence of a specific timeframe for such disclosure will likely lead to abuse and unreasonable delay – we have therefore proposed a 15-day timeframe. While section 27(2)(b)(ii)(cc) does state that only confidential information be severed from disclosed documents, we recommend that this be revised by adding the clarifier 'legitimately sensitive'.	27(1) A procuring institution must publicly disclose the following information, amongst others, to advance transparency and effective monitoring of procurement: (a) all information regarding a bid; (b) the identity of each entity which submits a bid, including information relevant to that entity contained in the companies register established under section 187(4) of the Companies Act, 2008 (Act No. 71 of 2008), if applicable; (c) the date, reasons for and value of an award to a bidder, including the record of the beneficial ownership of that bidder required under section 56(12) of the Companies Act, 2008 (Act No. 71 of 2008); and (d) all contracts entered into with a supplier; invoices submitted by the supplier; payments made to the supplier; (e) all progress reports submitted by the supplier to the procuring institution; (f) all procurement monitoring reports prepared by the procuring institution; 27(2) The information referred to in 27(1)(a) – (d) must be published as quickly as possible, but in any event, within 15 days – (a) on an easily accessible central online portal that is publicly available free of charge; and (b) in a format that— (aa) enables tracking of information relevant to the entire process of a specific procurement;

		(bb) is electronic and interoperable; and (cc) if it contains legitimately sensitive confidential information, only that information is severed.
27(3)	We agree with the amaBhungane's submission that: *"The most concerning aspect of section 27 is subsection 3 which excludes from the disclosure obligations 'confidential information'. The type of information included within the category of confidential information is impermissibly broad. The Open Contracting Partnership has highlighted the dangers of an over-reliance on 'commercial confidentiality' within procurement legislation. It has commented that "[v]ague confidentiality provisions also have a chilling effect on public disclosure where public authorities tend to redact information by default which harms markets, service delivery, and public trust."* *In a 'mythbusting' document, the Open Contracting Partnership reported on its research in 20 countries which interviewed 70 experts. The research demonstrated that there were virtually "no examples of commercial harm to companies from disclosing contracting information and a multitude of benefits, including improved competition and public probity". It made five main recommendations on the disclosure of commercial information: "disclosure should involve minimal redaction", "all information that is not legitimately sensitive should be disclosed unredacted", "a clear and detailed public justification for redactions should be provided", "it should be stated how long/what*	Significant revisions required.

	period of time the information is considered sensitive", and "withheld information should be disclosed the moment it ceases to be sensitive" *Section 27(3) of the Bill demonstrates an overly deferential approach to commercial confidentiality, and serves to dramatically curtail the transparency commitments in the legislation…* *…. Section 27(3) should also include a 'public interest override' to permit the disclosure of even legitimately sensitive commercial information if doing so is in the public interest. ….* *Section 27's deference to the Protection of Personal Information Act (POPIA) is also problematic. POPIA has an extremely broad definition of 'personal information', and conferring confidentiality on all information defined as 'personal' under POPIA for the purposes of procurement transparency is both illegitimate and unnecessary…* *The Open Contracting Partnership has 'busted the myth' that because there is personal data in procurement documents they cannot be disclosed. It stressed that '[d]isclosing some personal data is important for transparency in the procurement process and to prevent fraud'* *The Bill should reflect a weighing up of the importance of transparency in procurement and protection of personal information. As the Open Contracting Partnership explained, 'certain personal data can be disclosed without endangering people's privacy and safety'. The Bill should not confer blanket confidentiality on all personal information as this does not serve the interests of procurement*	

	transparency and serves to privilege the protection of personal information that is not 'legitimately sensitive' in the procurement sense.	

The PSAM has worked with partners around the world focussed on improving transparency in procurement in order to support national development agendas. Within our Open Government Partnership[7] (OGP) and Global Initiative for Fiscal Transparency (GIFT)[8] networks; we would like the committee to consider the following in their deliberations;

> *A fundamental reform in relation to improving transparency would be the adoption of the Open Contracting Partnership's Open Contracting Data Standards (OCDS). The OCDS facilitates the structured publication of shareable, reusable, and machine-readable data from all phases of the public procurement process that are suitable to a variety of stakeholders including oversight entities. The OCDS takes confidentiality constraints or possible unintended consequences into account (see above in our submission). Given the existing work with the OCP - we recommend a continued collaboration between the OCPO and relevant stakeholders to ensure that global best practices are core to the national procurement reform agenda*
>
> *Adopting the OCDS - or similar - as the official standard has the potential to significantly improve transparency in South Africa's public procurement systems. It is our belief that institutionalising the structured publication of information across all phases of public procurement would have many benefits, not least of which contributing to addressing the systemic weaknesses that expose the state to corruption.*

Our conclusion is that the Bill in its current form is inadequate to meet the Constitution's requirements and contains provisions that unreasonably restrict transparency so that meaningful (including timely) public oversight over procurement processes is in fact enabled.

Jay Kruuse, Director, Public Service Accountability Monitor (PSAM), Rhodes University, Email: j.kruuse@ru.ac.za

[7] Of which the South African government is a founding member
[8] Of which the South African National Treasury is a member