

## PUBLIC SERVICE ACCOUNTABILITY MONITOR (PSAM) SUBMISSION ON THE PUBLIC PROCUREMENT BILL

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### **ATTENTION: PARLIAMENT'S SELECT COMMITTEE ON FINANCE, NATIONAL COUNCIL OF PROVINCES**

**Submitted via email to:** Mr Nkululeko Mangweni [nmangweni@parliament.gov.za](mailto:nmangweni@parliament.gov.za)

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### **ABOUT THE PSAM**

The Public Service Accountability Monitor (PSAM) was established in 1999 and works across six African countries; South Africa, Zimbabwe, Tanzania, Zambia, Malawi and Mozambique. Our aim is to contribute to addressing particular societal problems originating from systemic public resource management (PRM) failures. We acknowledge the complexity of societal problems and that they often interrelate and impact upon the realization of human rights. We also acknowledge the importance of broader institutional and systemic reforms.

The PSAM forms part of the School of Journalism and Media Studies at Rhodes University, Grahamstown, South Africa. PSAM's activities include research, monitoring, advocacy and capacity building. Working throughout Southern Africa, PSAM generates and shares knowledge about social accountability and the monitoring and advocacy tools that can build more open, participatory and accountable government. Social accountability places an explicit duty on members of the executive arm of governments, public officials and private service providers to justify their decisions and performance regarding the manner in which their use of public resources has affected the progressive realisation of socio-economic rights.

### **SUBMISSION SUMMARY**

PSAM has made a number of submissions on the Procurement Bill over the course of its development, highlighting various deficiencies in the proposed text and attempting to demonstrate potential impact and the need for revision. We recognise the complexity of procurement and the intricacies of the Bill, however, the Bill has far reaching implications for service delivery and the economy and we cannot afford to rush. We maintain our position that the deficiencies in the Bill could prevent it from achieving its objectives (see Procurement Reform Working Group statement) and urge this committee to thoroughly consider the various inputs as it deliberates on the Bill.

This submission focuses on procurement data reporting and transparency related to sections 30-36 of the Bill. In particular the submission places emphasis on the need for provisions related to open contracting. This relates to the publication and use of timely, open and accessible public contracting information. Of further emphasis is the need to clearly distinguish between the principles of openness and transparency which are occasionally conflated in the Bill. Better procurement through open contracting can:

- promote competition and economic inclusion
- support effective spending analysis in the interests of equity and social justice
- prevent and combat corruption and
- improve government service delivery and efficiency.

There is a body of evidence that shows how adopting open contracting can improve procurement.<sup>1</sup>

The submission is structured as follows:

1. Overview of concerns and references to past and present collaborative submissions.
2. Critique of existing instruments related to data and transparency.
3. Demonstration of how the Bill does not adequately address these issues.
4. Description of Open Contracting Data Standard (OCDS) and motivation for similar standard to be adopted as part of the bill (and not deferred to regulations and instructions).

In summary, we request that this Select Committee in its deliberations, thoroughly interrogate the adequacy of the existing provisions in the Bill and ensure that robust provisions safeguarding transparency are implemented urgently to enable better oversight of procurement to ensure alignment with our Constitution.

## OVERVIEW OF CONCERNS

The PSAM has drafted, contributed to and endorsed numerous submissions on the Procurement Bill, since it was initially published for comment in 2020.

<a href="#">Budget Justice Coalition/ Imali Yethu 2020 submission</a>	In this submission, we drew attention to deficiencies in the bill, demonstrating how the proposed bill would not achieve its objectives using the Global Investigative Journalism Network (GIJN) red flags methodology and applying the Giyani Water project as a case study. Notable recommendations that are yet to be addressed substantively in the current Bill included institutional arrangements, e-procurement provisions as well as the powers and functions of accounting
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<sup>1</sup> <https://www.open-contracting.org/impact/evidence/>

	authorities in relation to water authorities and contracting such as was illustrated using the Giyani Water saga which included gross abuses of Ministerial powers.
<a href="#">PSAM 2023 submission</a>	In this submission we emphasised concerns with the institutional arrangements, concentration of powers given to the minister and the inadequacy of participation and transparency provisions
<a href="#">Budget Justice Coalition/ Imali Yethu submission 2023</a>	In this submission again, members highlighted concerns with the bill and made concrete recommendations that would improve the overall impact of the provisions, with an emphasis on transparency, integrity and public participation.  Furthermore, the submission noted that the participation process had not been adequate.
<a href="#">PRWG September 2023 statement</a>	The statement, <sup>2</sup> following submissions to the NA, emphasises that one of the primary causes of the <i>dysfunctional state of public procurement in South Africa is the complex nature of the regulatory framework and shows how</i>  The Bill fails to clear up confusion around essential definitions arising from section 217 of the Constitution and calls for clear, unambiguous, accurate and consistent definitions of these and other core concepts by making a number of recommendations.
<a href="#">PRWG December 2023 statement</a>	Following passing of the Bill by the NA, this statement <sup>3</sup> further reiterates deficiencies in the Bill and calls for a number of corrections to be made to avoid “amplifying existing legal, operational, and economic chaos”. The concerns relate to participatory procedure, integrity and transparency, and preferential procurement.

We recognise that some important changes have taken place in the various iterations of the Bill and have been encouraged by the National Treasury’s efforts to convene briefings in response to public submissions received. However, we remain concerned that many of our recommendations and those of civil society partners have not been addressed in revisions, and that the current Bill is likely to maintain the status quo.

Kindly also note that we considered the submission made by the Health Justice Initiative (HJI) dated today and numbering 9 pages (excluding annexures) and do endorse and echo the concerns and proposals that HJI have made.

#### **GAPS IN EXISTING TRANSPARENCY ARRANGEMENTS**

The PSAM has examined the existing transparency measures and notes that despite South Africa being founding members of the Open Government Partnership, and having made numerous commitments to making procurement information available for civil society monitoring and oversight, there currently are

<sup>2</sup> <https://psam.org.za/wp-content/uploads/2023/09/PRWG-Statement-re-Public-Procurement-Bill-11Sep23.pdf>

<sup>3</sup>

<https://pari.org.za/wp-content/uploads/2023/12/PRWG-Statement-on-the-Public-Procurement-Bill-12Dec23.pdf>

limited amounts of information available, and this is completely insufficient to allow for meaningful monitoring amongst other forms of public participation.

National Treasury (OCPO) has issued numerous instruction notices, which in theory make submission of information to eTenders mandatory, but many entities do not report adequately or at all, and Treasury by its own admission has stated that there is no obligation for local municipalities and public entities to share information with National Treasury.

eTenders is currently the central portal for procurement information. Launched in 2015, eTenders is supposed to “provide[s] access to information on all tenders made by all public sector organisations at all spheres of government.”

Based on the mandate of the OCPO to “modernise and oversee the South African public procurement system to ensure that the procurement of goods, services and construction works is conducted in a fair, equitable, transparent, competitive and cost-effective manner in line with the Constitution and all relevant legislation.”

Much of the documentation for eTenders aligns with what is in the Bill. However, when we look more closely at the data, we find the following disclaimer:

*The data that is published on eTender does not constitute a complete record of all procurement processes in South Africa: it represents the procurement data shared with National Treasury by entities in all spheres of government. The primary source of the data is tenders, procurement plans, awards and contracts published or captured via the eTender portal. Any tenders, procurement plans, awards and contracts published or captured via eTender portal are automatically made available via the transparency portal. There is no obligation on municipal governments and state owned entities to share procurement data with National Treasury.*

Over the period from July 2022 to the present - we have occasionally monitored the functionality of the eTenders portal. We've noted that the site has numerous technical challenges, and many searches end in a broken links, or an error message. We have also struggled to find the information that we have been looking for to support public participation, monitoring, advocacy and accountability action. Below are 3 brief examples that have come up in our work, to demonstrate that the existing system is inadequate, and we are thus concerned that the provisions in the bill will not be effective.

<b>Example</b>	<b>Finding</b>
PSAM is working with a group of civic actors in Makana who would like to understand some of the challenges in their communities. As part of this process, we have tried to access information about procurement in Makana Local Municipality (streetlights, water infrastructure, road construction in townships) in order to monitor delivery and engage with officials on concerns.	No data for Makana is uploaded to eTenders

PSAM partners have tried to access information on procurement of food for the National School Nutrition programme (NSNP) to understand what happened in KZN when food was not delivered to schools.	No data on NSNP contracts in KZN on eTenders
PSAM has tried to use the data download facility to access additional procurement data.	This data download facility has not been available for more than a year.

Simply, eTenders in its current form does not enable citizen oversight of procurement, or easy access to procurement information to give effect to a range of constitutional rights. It is unclear how existing measures in the Bill will overcome some of these persistent challenges. We believe that the reporting requirement must be explicit in the Procurement Bill, with all entities required to publish minimum amount of information, and consequences for those who do not comply. There are frameworks and technology solutions available that can make it simple and affordable for entities to comply. The loose time frame and vague references to readiness will no doubt result in further delays in establishing a complete central portal for procurement data.

#### **TRANSPARENCY PROVISIONS IN THE BILL**

Although the bill has some positive provisions related to transparency, notably the requirement for machine readable, standardised data, the use of technology and a list of information to be published, we believe that the provisions are not strong enough to compel entities to publish data timeously, and the wording in the provisions may create a situation in which entities who do not want their data to be published, will be able to ignore instruction notes, as has been the case over the past few years.

<b>Part 2 Use of technology in procurement</b>		
<b>Section</b>	<b>Comment</b>	<b>Recommendation</b>
<p><b>Information and communication technology-based procurement system</b></p> <p>30. (1) The Public Procurement Office must develop an information and communication technology-based procurement system in order to enhance efficiency, effectiveness, transparency and integrity and to combat corruption. (2) After conducting an information and communication technology due diligence of the sector, to assist with the formulation of the design brief for the development of the procurement system, referred to in subsection (1), the system must, subject to the due diligence conducted, provide for the following components progressively:</p> <p>(a) A single platform that at least provides access for officials, bidders, suppliers and members of the public to all procurement related services; (b) standardised and interoperable open data across the procurement cycle to</p>	<p>The National Treasury of South Africa has committed to use open contracting data to create a more transparent procurement system and one that is less vulnerable to corruption.</p> <p>There is already a technology based procurement system, eTenders, in its current form does not provide sufficient information to the public on procurement that has been developed by the existing OCPO over time. The system was intended to have all kinds of features, including linkage with home affairs and other databases, and ensure the publication of procurement information, but many of these features do not seem to be currently in operation.</p> <p>Despite this observation, which has been brought to the attention of National Treasury, representatives still often maintain that the data exists and is available.</p> <p>We are also concerned that the progressive adoption of the system “to be used by procuring institutions according to their readiness determined in accordance with an instruction”, will not be enough to compel entities who currently don’t publish</p>	<p>We urge this committee to request that the National Treasury/OCPO demonstrate the availability of data and explain how a new system can overcome the limitations of the existing system.</p> <p>Further, we would like to request that the committee consider whether the reliance on instruction and allowance for readiness creates a loophole for entities who do not want to publish information.</p>

<p>be used by procuring institutions according to their readiness determined in accordance with an <b>instruction</b>; (c) uniform procurement procedures and processes; (d) reporting requirements on procurement; (e) a marketplace to enable efficient procurement of common goods and services; and (f) a suitable hosting option for procurement data to enable easy reporting, analysis, research and oversight of procurement transactions.</p>	<p>information to comply</p>	
<p><b>Use of technology by procuring institutions</b></p> <p>31. (1) Procuring institutions must— (a) to the extent possible, use technology in the implementation of this Act; and (b) when available, use the different components of the procurement system, referred to in section 30(1). (2) (a) During the development of the procurement system, referred to in section 30(1), the Public Procurement Office must, <b>by instruction</b>, determine requirements for digitisation, automation, reporting and innovations that information and communication</p>	<p>The Procurement Bill has been ‘in the pipeline’ for more than a decade. In this time departments and entities have developed their own systems, employing technology to varying degrees and some have quite well established e-procurement systems ( - Western cape, City of Johannesburg, Limpopo).</p> <p>This creates the possibility that each entity develops its own system which is likely to:</p> <ul style="list-style-type: none"> <li>● Increase costs</li> <li>● Increase timeframes</li> <li>● Limit interoperability/standardisation</li> <li>● Create more confusion</li> </ul> <p>It seems that many entities prefer not to use technology as the inefficient paper XXX creates ample opportunity for interference. Entities who</p>	<p>Apply OCDS or similar and ensure that compliance (use of technology and publication of information) is enforced in the Bill and not left to instructions, which have been ineffective in the past.</p>

<p>technology may enable, applicable to procurement processes by procuring institutions. (b) The requirements referred to in paragraph (a) must include the provision for— (i) analysis and publication of data; and (ii) readiness assessments for procurement technology</p>	<p>wish to continue can use the excuse that</p>	
<p><b>Part 3 Access to procurement processes and information</b></p>		
<p><b>Section</b></p>	<p><b>Comment</b></p>	<p><b>Recommendation</b></p>
<p><b>Access to procurement processes</b></p> <p>32. (1) The Minister must prescribe measures for the public, civil society and the media to access, scrutinise and monitor procurement processes. (2) The regulation envisaged in subsection (1)—  (a) may introduce measures to ensure candid deliberations and to protect officials from undue influence and threats and to provide for disallowing or terminating access by the public or a specific category of persons or a specific person if such access resulted in, or is likely to, inhibit candid deliberations or result in undue influence of, or threats to, officials;  (b) may be limited to certain categories of procurement or</p>	<p>To date, the Department of Public Service and Administration, the Human Sciences Research Council and civil society partners within the National Open Data Steering Committee have sought to inform the public about open data and access to information policy. To this end, the provisions in the Bill can be strengthened by proposing measures more closely aligned with existing national open data platforms.</p> <p>Access to full cycle procurement processes enables real time monitoring and oversight that can assist in the prevention of poor procurement outcomes. The wording here leaves this to the Minister to prescribe rather than clarifying appropriate measures here in the Bill.</p> <p>The Open Contracting Partnership has highlighted</p>	<p>We request that the committee investigate whether these measures can be clarified in the Bill itself.</p> <p>This must align at the very least with the South African government’s current open data principles per Public Service Cloud Computing Determination and Directive;</p> <p><i>‘Government data shall be considered open if it is made public in a way that complies with the principles: Complete; Primary; Timely; Accessible; Machine processable; Non-discriminatory; Non-proprietary;</i></p>



<p>procurement above a specified threshold; and (c) must exclude confidential information.</p>	<p>the dangers of an overreliance 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.</p>	<p><i>License-free.’</i></p>
<p><b>Disclosure of procurement information</b></p> <p>33. (1) The Minister must prescribe requirements to disclose information regarding procurement. (2) The regulation envisaged in subsection (1) must, among others, require— (a) the categories of information to be disclosed to enable effective monitoring of procurement, which includes among others— (i) the reasons for the decision, where a decision is made to not follow an open competitive bid process; (ii) all information regarding a bid; (iii) 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; (iv)</p>	<p>We note the importance of establishing systems of disclosure that ensure the regular publication of beneficial ownership information in alignment with the Anti-Money Laundering and Combating Terrorism Financing Amendment Act.</p> <p>Here, rather than stating that certain procurement information must be disclosed, the Minister must prescribe requirements to disclose. It is unclear whether this will be done via the regulations or instruction but we are concerned that the current situation will prevail, where disclosure is not actually mandatory, and enforceable.</p> <p>With regards to timeframes for disclosure, we believe that a set timeframe should be included, rather than requiring disclosure “as quickly as possible”.</p> <p>Again, we have raised concerns regarding the inclusion of “confidential information” without clarification of what constitutes legitimately</p>	<p>We urge the Committee to consider whether the Bill could include specific requirements for disclosure, along with consequences for non compliance.</p> <p>We have suggested the inclusion of a specific timeframe of 15 days for disclosure.<sup>4</sup></p> <p>We suggest that the bill rather refer to “legitimately confidential information” or specify what can be considered as genuinely confidential information.</p>

<sup>4</sup> PSAM submission on Procurement bill: <https://psam.org.za/wp-content/uploads/2023/09/PSAM-on-PPB-18-September-2023.docx.pdf>

<p>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(7)(aA) of the Companies Act, 2008 (Act No. 71 of 2008); and (v) contracts entered into with a supplier and invoices submitted by the supplier; and (b) that the information referred to in paragraph (a) be published as quickly as possible— (i) on an easily accessible central online portal that is publicly available free of charge; and (ii) 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 confidential information, only that information is severed.</p>	<p>confidential information</p>	
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## **RECOMMENDATIONS - ADOPTION OF OCDS AND STRENGTHENING OF TRANSPARENCY PROVISIONS**

PSAM has made a number of suggestions to amend the wording of the bill to improve efficacy. Links to previous submissions have been included in this document. Here we would like to explain the [Open Contracting Data Standard](#). We acknowledge that procurement can be complicated, and the development of this Bill requires a delicate balancing act between different, and at times conflicting objectives. This can lead readers to believe that reporting of procurement information will also be complex. This may be true to some extent but many countries have grappled with this, and to support, the Open Contracting Partnership has developed the OCDS.

Over 50 countries have adopted the OCDS to date, and the standard has evolved to accommodate an increasing range of procurement processes, and country objectives.

As more countries have adopted the standard, the [evidence base](#), to show just how effective transparency can be to improve procurement has grown. Many case studies are available on the OCP website, and include applications from Zambia, Mexico, Chile and several other contexts. In each, the adoption of the data standard, and the active participation of civil society has made a significant impact, in a short space of time.

We believe that this is an essential component of procurement reform, and must be advanced in this Bill. In closing, we request that this Committee, in its deliberations, consider whether the Bill has adequately addressed transparency in data reporting and publishing in the Bill, and use the full extent of its powers to ensure that procurement information is made available for public monitoring and oversight. We have suggested adoption of the OCDS as a tried and tested standard that can support the Bill's objectives. Further, we have made various recommendations in previous submissions for amendments to the Bill to address deficiencies and improve outcomes. we encourage the Committee to consider these as well.