



## **JOINT SUBMISSION TO PARLIAMENT ON THE DRAFT PUBLIC PROCUREMENT BILL**

**22 February 2024**

Hon. YI Carrim, MP, Chairperson: Select Committee on Finance (National Council of Provinces)  
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## **TABLE OF CONTENTS**

INTRODUCTION	2
EXECUTIVE SUMMARY	3
IMPLICATIONS OF THE DRAFT BILL FOR PROVINCES	3
CASE STUDY: GAUTENG HEALTH PROCUREMENT	4
WHISTLEBLOWER SUPPORT PROVISIONS	4
TRANSPARENCY AND PROTECTION OF INFORMATION	5
RECOMMENDED CHANGES	5
SUBMISSION ENDORSEMENTS	9
ABOUT THE BUDGET JUSTICE COALITION	9
ABOUT IMALI YETHU	10

## INTRODUCTION

The [Budget Justice Coalition \(BJC\)](#) and [Imali Yethu \(IY\)](#) extend our sincere appreciation for the opportunity to submit our analysis of the Draft Public Procurement Bill [B18B-2023] currently before the National Council of Provinces (NCOP). The advent of this legislation marks a long-awaited milestone in our collective pursuit of a comprehensive and effective framework governing public procurement. Given the absence of overarching legislation in this realm, the introduction of the bill in both Houses of Parliament represents a significant development that holds the promise of shaping the future of public procurement practices in South Africa and within our nine provinces.

While acknowledging the importance of this legislative initiative, it is with a sense of disappointment that we express our concerns regarding weaknesses within the bill that were previously highlighted in the National Assembly process. Our scrutiny reveals that, regrettably, the proposed framework falls short of the robust measures necessary to adequately safeguard the public purse. The anticipation surrounding the bill's arrival has been met with the realisation that its provisions may not be sufficiently robust to address the complexities and challenges inherent in public procurement.

In this submission, we aim to articulate our reservations and propose constructive enhancements to improve the bill's efficacy. It follows a [prior submission](#) which BJC and IY made in September 2023 when the Standing Committee on Finance called for submissions. In this submission we focus on the implications of the draft Public Procurement Bill for the provinces and on whistleblowers.

We are concerned about the rushed timeline for processing the bill in Parliament after being tabled by National Treasury. It appears that public participation is not being fully respected, despite the bill taking over ten years to reach Parliament. This rush gives the impression that civil society and public input is not valued. There is a concerning pattern of bills being brought before Parliament late, particularly in the last year, resulting in parliamentarians not having enough time to properly consider submissions. In this regard, we note that National Treasury communicated to the National Assembly's Standing Committee on Finance when it made an oral response on the submissions received that officials had not in fact read through all of the 112 submissions it had received during the initial call for comments. The Bill has enormous implications for the realisation of socio-economic rights and procurement processes particularly at a provincial and municipal level where corruption has been rife.

We call on Parliament to ensure that submissions will be given thoughtful consideration, with the shared goal of refining the draft bill to better serve the interests of the country and its provinces. We look forward to actively engaging in the deliberations on the draft bill to ensure that the final legislation meets the high standards of effectiveness and accountability that citizens rightly expect. We dedicate this submission to the brave whistleblowers who have exposed corruption and particularly to Babita Deokaran and her family.

This submission has been collaboratively written by social justice activists within IY and the BJC including those located within the Working Group on Procurement. Imali Yethu (IY) is a civil society coalition for open budgets. Imali Yethu is committed to open, accountable governance. The purpose of the Budget Justice Coalition is to collaboratively build people's understanding of and participation in South Africa's planning and budgeting processes – placing power in the hands of the people to ensure that the state advances social, economic and environmental justice, to meet people's needs and wellbeing in accordance with the Constitution.

## **EXECUTIVE SUMMARY**

We express overall support for the establishment of an overarching legal framework aimed at consolidating regulations governing public procurement. While acknowledging the positive step represented by the processing of the long-awaited Public Procurement Bill, we are concerned by weaknesses in the proposed bill and identify areas for improvement to ensure its efficacy in achieving its intended objectives. The Bill should foster a culture shift towards efficiency and responsiveness without compromising safeguards against misconduct and abuse of power. This legislation must close gaps that allowed grand corruption in South Africa and prevent future abuses of power. The bill should embody our collective responsibility to act with transparency, accountability, and integrity in all matters related to public procurement.

We include a section containing suggested amendments to the Bill to strengthen its provisions. In order to address the concentration of powers and ensure an effective response to corruption, we recommend adopting the State Capture Commission of Inquiry's recommendation of establishing an Anti-Corruption Agency. Of specific relevance to the provincial sphere, Chapter Two of the Bill gives the Public Procurement Office and Provincial Treasuries extensive law-making power, potentially leading to unfettered discretion and misalignment in decision-making. We therefore recommend specifying the issues for which binding instructions can be issued by both entities. Transparency measures contained in the bill need to be enhanced to ensure improved availability of information to members of the public and interested parties. The current bill falls short in providing adequate protections for whistleblowers in the procurement system, highlighting a critical gap that requires urgent attention and rectification.

## **GENERAL COMMENTS ON THE DRAFT BILL**

It is important that procurement should be regarded as a strategic imperative rather than an overly administrative one. The bill should foster a culture shift towards streamlined processes without compromising safeguards against misconduct.

The bill follows the State Capture Commission's prolonged deliberations. If it is to close the legislative loopholes that facilitated large-scale corruption in South Africa and safeguard against future abuses of power, it is crucial for this legislation to act as a bulwark. However, concerns arise regarding institutional arrangements concentrating power in the Public Procurement Office and the Minister of Finance. While supporting the introduction of the Bill, we advocate for revisions to address concentrated powers and enhance institutional frameworks based on our experiences and lessons learnt with state capture. To mitigate these risks, we propose adopting the State Capture Commission's recommendation of establishing an Anti-Corruption Agency.

Balancing multiple aims, the Bill must promote transparency, efficiency, and accountability in public procurement. The Procurement Bill must ensure adequate access to information and open data, along with active and timely responses to requests for information. In its current form, we are concerned that it will result in procurement data being harder to obtain rather than becoming more transparent. It is crucial that this be addressed through amendments to the bill rather than being left to supplementary legislation.

## **IMPLICATIONS OF THE DRAFT BILL FOR PROVINCES**

The draft Bill grants the Public Procurement Office (PPO) the authority to issue both binding instructions and non-binding guidelines. Furthermore, it provides provincial treasuries with the authority to issue provincial binding instructions. However, the use of multiple binding and non-binding instruments within the

legislation raises concerns about potential regulatory confusion and perpetuates the problem of excessive regulation in public procurement.

The term "instructions" is inconsistently used throughout the Bill, creating ambiguity. The inclusion of "instructions" in the definition of "this Act" extends their legal implications, giving the PPO and Provincial Treasuries considerable law-making power, which may lead to unfettered discretion. The broad power granted to the PPO to issue binding instructions lacks specific guidance, resulting in an overly broad and discretionary authority. As a remedy we recommend introducing a new section in the bill that restricts the authority to issue binding instructions, and specifies the issues for which binding instructions can be issued.

Our reading of Chapter 2 of the draft Bill is that it will lead to a high level of complexity, as each province may have its own set of instructions and guidelines thus creating further fragmentation and incoherence between provinces. This exacerbates the challenges posed by the current legal framework. By way of remedy we recommend weighing up the potential advantages of this level of complexity to determine if it is necessary to retain certain sections in Chapter 2 in their current form.

### **CASE STUDY: GAUTENG HEALTH PROCUREMENT**

Babita Deokaran, a senior official in the Gauteng Department of Health, played a significant role as a whistleblower in a Special Investigating Unit inquiry on allegations of tender fraud. The case involved the purchasing of personal protective equipment for healthcare workers during the Covid-19 pandemic. Deokaran uncovered irregular payments amounting to R850 million to shell companies, politicians, and various service providers at Tembisa Hospital. Tragically, she was assassinated in August 2021.

In August 2023, the Gauteng High Court in Johannesburg sentenced Deokaran's murderers to prison terms ranging from six to 22 years following a plea and sentence agreement with the National Prosecuting Authority (NPA). But the person behind the plot to kill Deokaran is still at large. It is imperative for the NPA and law enforcement to thoroughly investigate all individuals implicated in corrupt activities at Tembisa Hospital.

### **WHISTLEBLOWER SUPPORT PROVISIONS**

Whistleblowers play a crucial role in upholding the rule of law by exposing corruption and misconduct that undermine the integrity of institutions. Despite their pivotal contribution, whistleblowers face an alarming onslaught, with insufficient legislative and practical measures in place to safeguard their rights and protect them from retaliation. There is an urgent need to fortify whistleblower safeguards and ensure the effectiveness of these individuals in exposing wrongdoing without fear of reprisal.

BJC and IY are aware of discussions currently underway within the DOJ&CD process regarding whistleblower legislation. However, while urgent legislative measures are being prioritised in certain areas such as procurement, the protection of whistleblowers seems to be given less urgency, often left out of bills with promises of inclusion in subsequent legislation. This delayed approach raises concerns as whistleblowers play a pivotal role in upholding transparency and accountability often at their own personal and professional expense. To ensure a comprehensive legal framework, there is an imperative need to align the timeframes for enacting legislation, addressing whistleblower protections promptly and with the same level of urgency as other critical legislative matters. The prioritisation of this legislative reform will serve to not only enhance safeguards for whistleblowers but also potentially protect funds that would have been lost in the public purse. Furthermore, we wish to support the call by various civil society formations for the inclusion of incentivised whistleblowing within this bill.

## TRANSPARENCY AND PROTECTION OF INFORMATION

The bill makes provision for the protection of information, however we argue that these provisions will only serve to exacerbate the existing frustrations with PAIA and other protection of information mechanisms. We wish to note that this may not only have implications for whistleblowers' ability to expose corruption but that it will also hinder the public's ability to request and receive full information. Additional mechanisms must be put in place in this bill to ensure that this is not the case.

Overall, transparency and accountability mechanisms can be strengthened as highlighted in our 2023 submission.

## RECOMMENDED CHANGES

The Budget Justice Coalition makes the following comments and suggested changes:

Section	Current formulation	Comment / suggested change
5. (2)	<p>(2) The Public Procurement Office may, in accordance with this Act—</p> <p>(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;</p> <p>(c) determine a model procurement policy for different categories of procuring institutions and different categories of procurement;</p>	<p>Sections 5(2)(a) and (b) grant the PPO the powers to issue binding instructions and issue non-binding guidelines.</p> <p>Broadly speaking, the Bill's use of multiple binding and non-binding instruments has the potential to create significant regulatory confusion. It maintains the <i>status quo</i> where there are a plethora of regulatory instruments governing procurement and perpetuates the issue of “over-regulation of public procurement” which this Bill is aimed at preventing.</p> <p>Moreover, there is an unclear, and in some cases, inconsistent use of the term “instructions” throughout the Bill. For example, even though “instruction” is defined as “<i>an instruction issued by the Public Procurement Office in terms of section 5</i>”, Provincial Treasuries may also issue their own binding provincial instructions in terms of section 6(2)(a).</p> <p>Significantly, the definition of “this Act” in section 1 of the Bill includes reference to “instructions”. This has wide-ranging implications for the legal effect of instructions. For example, any offence committed in terms of the Act, would include an offence committed in the implementation of any instruction. In addition, by including “instructions” in the definition of “this Act” (especially when those instructions are binding, have serious consequences for non-compliance and can be issued on any topic at full discretion of the issuing body), the Bill essentially gives the PPO and Provincial Treasuries <i>de facto</i> unfettered law making power.</p>

		<p>The power afforded to the PPO to issue "<i>binding instructions as provided for in this Act and on any other procurement matter for the effective implementation of this Act</i>" is too broad since the only other provision which specifies / guides the scope and exercise of that power is section 5(3), which simply states that instructions may be issued for different categories of institutions, goods, services or infrastructure. This results in an overly broad power / discretion.</p> <p><b>Recommendations:</b> The definition of "this Act" in section 1 of the Bill be amended to remove reference to "instructions"; A section be introduced in the Bill that limits the scope and ambit of the power to issue binding instructions, and details and circumscribes the specific issues around which binding instructions be issued; The definition of "instructions" to be amended to provide clarity and bring coherence to where the Bill gives other institutions that are not the PPO the power to issue instructions.</p>
6. (2)	<p>(2) A provincial treasury, within its province, may—</p> <p>(a) issue binding provincial instructions on procurement matters for the effective implementation of this Act and not inconsistent with an instruction issued by the Public Procurement Office;</p> <p>(b) issue non-binding guidelines to assist procuring institutions with the implementation of this Act or any other procurement related matter;</p> <p>(c) assist procuring institutions in building their capacity for efficient, effective and transparent procurement management;</p> <p>(d) if of the view that the procurement policy applied by a procuring institution does not comply with a provision of this Act, review such policy and advise on amendments; and</p> <p>(e) exercise other powers conferred by this Act.</p>	<p><b>Comment:</b> (6.2) This is going to result in an extreme amount of complexity in that each province could have instructions and guidelines that are different. This further perpetuates the problematic nature of the current legal framework.</p> <p><b>Recommendation:</b> Consider whether this extent of complexity will be beneficial and if this section should therefore be retained in the final version of the Bill.</p>
6. (3)	<p>(3) A provincial treasury may issue different instructions in terms of subsection (2)(a) for—</p>	<p><b>Comment:</b> Adding to the complexity of different provinces having different instructions, there can be different instructions for different categories of procuring institutions and categories of procurement too. This is going to make the task of persons</p>

	<p>(a) different categories of procuring institutions; and (b) different categories of procurement.</p>	<p>serving in the Tribunal and SCM officials within organs of state extremely challenging. The same concerns highlighted in terms of section 5 (3) apply here. Provincial treasuries should not be granted powers to regulate procurement processes by instructions.</p> <p><b>Recommendation:</b> the entire provision should be removed.</p>
<p>8. (2)</p>	<p>(a) A procuring institution may, as prescribed, reconsider its own decision made in terms of this Act, <u>if the decision was based on error of law, error of fact or fraud.</u></p>	<p><b>Comment:</b> The provision does not require a procuring institution to consult either with the Public Procurement Office or Provincial Treasury when reconsidering its own decision. Thus, there is no oversight over whether the reconsideration of any decision is in actuality due to an error of law, error of fact or fraud. The powers given to the PPO and to Provincial Treasuries similarly do not provide for oversight over the reconsideration of decisions by procuring institutions.</p> <p><b>Recommendation:</b> “A procuring institution may, as prescribed, <b>[and in consultation with the Public Procurement Office]</b>, reconsider its own decision made in terms of this Act, if the decision was based on error of law, error of fact or fraud.”</p>
<p>14(1) and (2)</p>	<p><b>Directions inconsistent with Act</b></p> <p>14. (1) If an accounting officer, an accounting authority, a member of an accounting authority or an official of a procuring institution (herein called “the affected person”) is directed by any person with authority over the affected person (herein called “the person with authority”), to do or omit to do anything in respect of procurement, which the affected person believes he or she is not authorised to do in terms of this Act, the affected person must not comply with the direction and immediately— (a) submit in writing to the person with authority, the objection and the reason for the objection; and (b) inform in writing his or her supervisor, where applicable, and the Public Procurement Office, of the direction, the objection and the reason for the objection.</p> <p>(2) The affected person may not, despite any term of his or</p>	<p><b>Comment:</b> (14.1a) The fact that the Bill requires officials with a power differential compared to politicians to commit their objections to writing may put officials (who in effect become whistleblowers) in danger. This in turn could make it difficult to fill Accounting Officer positions, which are usually five year contracts that are political appointments.</p> <p><b>Comment:</b> (14.2) The affected person who is faced with detriment such as being pushed out of the job (constructive dismissal) has usually already faced the detriment by the time of getting to the CCMA.</p> <p><b>Recommendation:</b> It should be included in the Bill that if disciplinary procedures are initiated after an official has indicated their objection in writing, they may alert the PPO and the PPO</p>



	her employment, be subjected to any disciplinary measures due to the non-compliance with the direction of the person with authority	may recommend that those disciplinary proceedings are conducted by a relevant body (such as the Public Service Commission or DPSA) aside from the procuring institution.
36. (1)	<p><b>Protection of information</b></p> <p>36. (1) No person may disclose confidential information held by or obtained from the Public Procurement Office or a provincial treasury for purposes of this Act, except—</p> <p>(a) for carrying out a provision of this Act or any other legislation;</p> <p>(b) with the permission of the Public Procurement Office or the relevant provincial treasury;</p> <p>(c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or</p> <p>(d) in terms of an order of court.</p>	<p><b>Comment:</b> This provision must be balanced with an imperative for transparency in order to ensure that public funds are used efficiently and effectively. It can potentially be used in a punitive manner against potential whistleblowers and result in greater opacity of procurement information. There should be limited instances in which procurement information should be deemed confidential. There are currently existing challenges with access to information by members of the public with PAIA applications which may be further exacerbated by this provision.</p>

**SUMMARY OF RECOMMENDATIONS**

We recommend:

- A section be introduced in the bill that limits the scope and ambit of the power to issue binding instructions, and details and circumscribes the specific issues around which binding instructions be issued;
- The definition of “instructions” to be amended to provide clarity and bring coherence to where the bill gives other institutions that are not the PPO the power to issue instructions;
- The bill should make provisions in the envisioned institutional landscape for adopting the State Capture Commission's recommendation of establishing an Anti-Corruption Agency;
- Urgent attention is called for in addressing the critical gap in whistleblower protections identified in the current bill and in additional legislation specific to whistleblowers;
- Enhancing the transparency measures contained in the bill to integrate open data and open contracting seamlessly into the legislative landscape; and
- There must be a greater balance and clarity on the protection of access to information mechanisms in the bill.

**CONCLUSION**

It is essential to underscore the importance of the Public Procurement Bill currently being discussed in Parliament. This legislation will have a significant impact on the delivery of public services, directly

influencing the realisation of fundamental human rights in South Africa. Public procurement plays a crucial role in providing essential services to communities, such as education, healthcare, infrastructure, and other key aspects of citizens' daily lives.

In conclusion, the Public Procurement Bill goes beyond being a legal document; it represents a commitment to upholding human rights and ensuring the efficient delivery of public services. It is a covenant with the people of South Africa that must be solidified.

## **SUBMISSION ENDORSEMENTS**

The following organisations endorse this submission:

1. Public Service Accountability Monitor (PSAM)
2. Centre for Child Law (CCL)
3. Corruption Watch
4. Equal Education (EE)

## **ABOUT THE BUDGET JUSTICE COALITION**

The purpose of the [Budget Justice Coalition](#) is to collaboratively build people's understanding of and participation in South Africa's planning and budgeting processes – placing power in the hands of the people to ensure that the state advances social, economic and environmental justice, to meet people's needs and wellbeing in a developmental, equitable and redistributive way in accordance with the Constitution.

The organisations who make up the BJC are: Alternative Information and Development Centre (AIDC), the Children's Institute at UCT (CI), Corruption Watch (CW), Equal Education (EE), Equal Education Law Centre (EELC), HEALA, the Institute for Economic Justice (IEJ), Oxfam SA, Pietermaritzburg Economic Justice and Dignity Group (PMEJD), the Public Service Accountability Monitor (PSAM), the Rural Health Advocacy Project (RHAP), SECTION27, Ilifa Labantwana, Treatment Action Campaign (TAC), the Legal Resources Centre (LRC), Centre for Child Law (CCL), Youth Capital, 350.org, Open Secrets, Social Policy Institute (SPI), Public Affairs Research Institute (PARI), Amandla.mobi, Black Sash as well as friends of the coalition.

## **ABOUT IMALI YETHU**

[Imali Yethu](#) is a coalition of civil society organisations working with the South African National Treasury to make budget information more accessible, user-friendly and empowering. We are committed to exploring co-creation to achieve open, accountable governance. Our work is inspired by the [standards](#) of co-creation and participation envisioned by the Open Government Partnership (OGP). Refer to Imali Yethu's [website](#) for more information.