



MISTRA

Comments: Draft Public Procurement Bill

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Introduction

The World Bank (2018) uses the following words to describe South Africa's minimal success in attaining economic redress: 'overall, being white or South African Indian—for whom apartheid legislation was less harsh—remains a strong predictor of wealth' (World Bank, 2018: 18). This report examines varied policies aimed at addressing historical race-based economic exclusion, including Broad-Based Black Economic Empowerment (B-BBEE) and its evolution over the past 25 years. But it concludes that 'little evidence exists about the extent to which B-BBEE achieves its goals' (World Bank, 2018: 21). The Mapungubwe Institute for Strategic Reflection (MISTRA) published a researched B-BBEE book in February 2020 to initiate a discussion on the policy's outcomes.

This publication contributes to economic transformation policy debates through examining the socio-economic impact of BEE legislation and diverse experiences of black entrepreneurs in post-apartheid South Africa. This includes assessing black businesses that are not direct beneficiaries of large empowerment deals. The authors developed their policy recommendations from content analysis of academic articles, government policies, economic media reports and books. This content examination was supplemented with interviews, which considered gender, age, business size, geography and class differences amongst South African entrepreneurs. There are several themes in the MISTRA book that relate to the National Treasury's draft Public Procurement Bill (National Treasury, 2020). These include, amongst others, preferential procurement, black business development, state regulation and connecting B-BBEE with economy-wide structural change. The bill covers ten chapters, but this document specifically addresses Chapters Two, Four and Five. These chapters cover the main themes and policy recommendations from the recently published MISTRA book. We have organised our comments around the policy content contained in the relevant chapters.

Chapter Two: Public Procurement Regulator, Provincial Treasuries and Procuring Institutions

The MISTRA (2020) publication identified state capacity, especially at provincial and local levels, as a major challenge for effective public procurement that supports intended B-BBEE policy prescripts. Some of the main challenges include weak institutional capacity, maladministration, incoherent policy implementation and a poor understanding of B-BBEE legislation (Biniza, 2020; Sefalafala, 2020). Chapter Two of the procurement bill proposes establishing a Public Procurement Regulator (PPR) in the National

Treasury to address these challenges. It sets out the regulator's functions and powers within the overall framework of the Act. The functions cover training, investigations, regulatory monitoring, issuing directives for procurement regulations, and information gathering. But the relationship between this regulatory office and existing procurement oversight units within the National Treasury is not clear. For example, what is the relationship between the proposed PPR and the current Office of the Chief Procurement Officer (OCPO)? The Public Procurement Regulator's role seems to clash with existing administrative responsibilities in other offices in the National Treasury. The state is advised to minimise institutional proliferation and regulatory bureaucracy, which lead to administrative duplication and inefficiencies.

The establishment of the PPR raises additional questions regarding accountability and reporting. There is minimal clarification on how the PPR's work and mandate will be monitored. This omission is important because the regulator must carry out its functions 'without fear, favour and prejudice' (National Treasury, 2020: 13). Section 26 (1) in the bill assigns the responsibility of developing the preferential framework to the Minister of Finance after consulting specific ministries. This implicitly means that the PPR office is accountable to the Minister of Finance, even though it is not clearly articulated in sections on the PPR. It is important to set out clear lines of accountability, reporting procedures, and recourse measures for aggrieved parties if the PPR is established as new entity within the National Treasury. This includes establishing procedures for raising grievances and formal complaints against the PPR.

As argued earlier, this decision hinges on clarifying how the PPR role differs from existing procurement oversight units in order to avoid inefficient duplication. We suggest that the state embeds and improves procurement oversight responsibilities in existing units or offices if it cannot make a clear case for the peculiar administrative functions of the PPR. The PPR reporting and accounting regulations should not be confined to the National Treasury because procurement has economy-wide policy implications that cut across different departments. This document suggests a mechanism for a more inclusive policymaking and oversight approach through the Forum of South African Directors-General (FOSAD).

The MISTRA (2020) publication also refers to the significant role of the B-BBEE Commission in monitoring whether procurement practices promote or constrain economic transformation. This duty is carried out within the ambit of the Broad-Based Black Economic Empowerment Amendment Act (46 of 2013). The proposed bill permits the PPR 'to declare a particular procurement practice to be undesirable for all or a

category of institutions and may provide guidance on the treatment of such practice' (National Treasury, 2020: 14). It then lists several principals which must guide the regulator in making this determination. These include fairness, competitiveness, cost recovery, socio-economic, industrial, and environmental development. This section needs to be amended so that it is clearly related to B-BBEE policy practice and implementation. The form and nature of state procurement is an essential part of B-BBEE policy success or failure (Mabasa & Cawe, 2020; Sefalafala, 2020). We, therefore, advise that the underlying principles specifically refer to the B-BBEE Act and encourage the PPR to consult the B-BBEE commission when making determinations on undesirable procurement practices. This proposal is essential for maintaining policy synergy within the economic cluster in B-BBEE regulatory oversight and policy implementation. One of the main reasons for B-BBEE failures in the past 25 years is state regulatory incoherence (Biniza, 2020).

The state procurement challenges are most prevalent and vivid at the subnational levels. This trend is captured in the MISTRA (2020) publication and other research reports exploring B-BBEE policy implementation in local municipalities (Chipkin & Swilling, 2018). The findings in these studies point out systemic challenges in local municipal procurement programmes, which undermine public finance and B-BBEE policy regulatory prescripts. It is important to create a procurement legislative framework that appreciates the depth of the institutional capacity problems at the local state level. The current bill correctly focuses on the investigative, administrative, and oversight of provincial treasuries in procurement systems. This is important considering the overwhelming evidence of corruption, but policymakers must not reduce procurement policy violations to corruption only.

The poor performance of municipal entities in procurement processes, cited in several Office of the Auditor General (OAG) Reports, is attributable to both corruption-induced non-compliance and poor training. Findings from interviews conducted in our study reveal that inefficient training and poor knowledge of procurement legislation are prevalent in local municipalities (Sefalafala, 2020). The bill refers to capacity building undertaken by the Provincial Treasuries, but it is important to augment this proposal with further mechanisms for capacity building at the local municipal level. This programme must be run in consultation with the B-BBEE Commission, which has a constitutional mandate to train state institutions. This training must be based on improving the policy synergies between public finance and B-BBEE legislative policy prescripts. The MISTRA publication argues for enhanced alignment between these two policy areas in order to fully realise the intended economic transformation policy goals across the economy.

Section 4 on the establishment of a PPR should be reconsidered so it entrenches the responsibilities for procurement in the hands of accounting officers as envisaged in the Public Finance Management Act (PFMA). The responsibility for enforcing procurement regulations must fall squarely on the accounting officer to avoid abdication of responsibilities. Both the PFMA and Municipal Finance Management Act (MFMA) outline the course of action when procurement laws are not followed under financial misconduct. It is also important to consider the nature and form of misconduct in the specific case. The regulatory functions can be subsumed under the functions of the National Treasury Heads, which complements existing practices with procurement practice notes. The recommendations on the state's capacity and role in procurement are developed further in the next sections that discuss the preferential procurement framework.

Chapter Four: Preferential Procurement

The World Bank report (2018: 15) states that 'democratic South Africa inherited an economy that made it difficult for historically disadvantaged entrepreneurs to accumulate wealth by competing in the country's rigid product markets'. Section 217 of the Constitution attempts to address this historic economic exclusion in product markets. It states that 'when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective' (RSA Constitution, 1996). Subsection 217 (3) goes further and provides a national legislative framework within which certain categories of contracts can be allocated on a preferential basis in order to pursue redress for those citizens who were historically excluded from product markets.

Public procurement has been implemented under a national legislative vacuum for several years, with government relying largely on a plethora of practice notes or regulations to manage state procurement systems. The Preferential Procurement Policy Framework Act (PPPFA) was promulgated in 2000 with an intention to introduce a preference point system when awarding tenders. The PPPFA provides that tenders be evaluated out of a score of 100 points, with a maximum 20 or 10 points allocated on preferential basis (more specifically B-BBEE status of a company) while the remaining 80 or 90 points are to be allocated on the basis of competitive pricing. The applicable monetary threshold of the two-tiered

tender point system has been a subject of constant change and contestation as business could easily neglect the B-BBEE component and rely solely on 90 points to be awarded tenders purely from price advantage.

In 2017 the state revised regulations on preferential points, and stipulated that the 80/20 system is applicable to tender with a rand value equal to or over R30 000 and a maximum of R50 million while the 90/10 system applies to tenders above R50 million in rand value. There are, however, concerns regarding the significance of the 20 per cent B-BBEE weighting. High-value tenders are generally awarded to large established companies that operate in rigid product markets, with minimal black business penetration and significant competitive barriers (Rakabe, 2020). The MISTRA (2020) publication highlights the following points for policymakers to consider in designing the detail for preferential procurement regulations.

First, current preferential procurement point systems largely sustain the exclusion of black-owned Small Medium and Microenterprises (SMMEs) from gaining sufficient access to state contracts or benefitting from B-BBEE. Several factors cause this trend, but the primary ones are unequal product market structures, business model inefficiencies, exclusionary procurement point systems, and policy implementation incoherence (especially at municipal levels) (MISTRA, 2020). Price competitiveness and cost-effective principles, which feature prominently in the current PPPFA and this proposed procurement bill, have stymied access to contracts for SMMEs in most cases. Black entrepreneurs cannot meet the procurement criteria set out in legislation because of underlying market structure disadvantages. The envisioned point system cannot resolve all the internal and external structural impediments limiting black-owned SMME participation in public procurement. But it should factor in the findings cited above, so that the procurement point weighting methodology does not perpetuate the exclusion of these SMMEs. Relevant policymakers should consider aligning the envisioned procurement point system framework with the principles set out in section 26 (b-f) in the bill. This is essential for bridging the gap between procurement policy regulation in all state institutions and B-BBEE policy implementation. We advise that the state creates preference point systems and thresholds which balance cost-effectiveness with economic transformation imperatives set out in section 26 and B-BBEE legislation. This proposal requires both evidence-based sector research and consultations with the relevant small business stakeholders. The quantitative methodology for creating procurement points must consider the lived experiences of black businesses, which have attempted to access economic opportunities in public procurement. The current

point systems and thresholds place too much primacy on price without considering scale economies and market structure issues influencing small businesses' abilities to compete (MISTRA, 2020). This approach also undermines the economy-wide political economy policy objectives set out in the NDP such as local content designation, labour absorption, and small black business development.

Secondly, section 26 on the proposed framework for preferential treatment is a crucial component of the bill, but it lacks the necessary detail on how public procurement will advance economic opportunities for previously disadvantaged citizens i.e. women, youth, and people with disabilities. Chapter Four is a replica of the PPPFA in its current form and assigns the responsibility of developing a preferential procurement framework to the Minister of Finance after consulting relevant Ministers. The framework for preferential treatment should be an integral part of the bill either as a chapter or annexure. It is important to clearly outline the preference measures, which will be employed in setting aside the allocation of contracts as per the developmental and transformation objectives stated in section 26. We advise that the envisioned procurement system considers introducing tender award limitations or caps for businesses. This is essential for preventing dominance by certain companies in public procurement and facilitating the entry of small new enterprises. This can be addressed in section 24 on automatic exclusion from procurement process or section 30 on qualification criteria for bidders where exclusion or qualification can be based on total rand value of public contracts awarded to a certain company. Enterprises offering highly specialised services should be exempted from this requirement if they facilitate market entry for smaller companies. Big enterprise dominance in public procurement is also facilitated through the use of highly restrictive tender specifications and requirements, which only large and established companies can meet. Some sections of the framework for preferential treatment should deal specifically with these specification impediments. The setting out of tender specifications should consider the internal business model constraints within black-owned SMMEs and the sector specific market structure barriers.

Thirdly, policy implementation gaps and inconsistencies throughout different state departments and organs need to be resolved. This is essential for realising the policy goals set out in the public finance and B-BBEE policies. Interviewees in the MISTRA (2020) publication highlighted their frustrations with procurement processes and inconsistencies from several state institutions. This finding was drawn from interviews conducted with different types of entrepreneurs who have either participated in or attempted to gain access to state procurement opportunities. Section 26 (1) in the bill assigns the responsibility of

developing the preferential framework to the Minister of Finance. This clause implies that the PPR reports to the Minister who is solely responsible for developing the overall preferential framework after consulting specific Ministers. This proposal will not resolve the underlying policy implementation gaps and inconsistencies with the state bureaucracy or public enterprises. We advise that the Minister of Finance and PPR receive advice on the preferential procurement framework from departments throughout the state. These consultations with all government clusters should take place in the FOSAD.

Fourthly, South Africa needs a preferential procurement policy framework embedded in economy-wide structural reforms, which drive black-owned SMMEs development and change the balance among various economic sectors in order to broaden the number of beneficiaries through multiplier effects (MISTRA, 2020). Procurement policies should prioritise sectors in which South Africa has historic or latent competitive advantages. A prime example is the renewables sector which is in its early product-and-innovation lifecycle. It offers several market opportunities for emerging black industrialists if structured around localised value chains. Procurement policy is a crucial leverage for transforming the structure of the economy and value chain composition. This approach to procurement lays a solid foundation in defining economic transformation, entrepreneurial diversity and economic diversification strategies. We further suggest that procurement policy be linked to specific priority industrial development programmes (i.e. National Industrial Participation Program) and policy goals in the NDP. This proposal ought to cover policy goals such as local content designation, employment creation, and building domestic infrastructure value chains. Employment is a significant concern because South Africa's unemployment rate continues to expand in a political economy context of low growth and private sector investment. The role of state procurement becomes more integral for stimulating economy-wide structural reforms that create jobs. The role is twofold: first, incentivising sectors with high potential for job creation and second, to influence the way that society – and specifically the economy – assigns and remunerates labour value. On the latter point, there is a need for the state to incentivise the recognition and remuneration of invisible work performed in an economy. This applies to the domestic sphere and the formal economy of care work such as health services. Care work is at the centre of South Africa's Covid-19 response, even though it has been systemically underfunded over the past years. Structural Adjustment Programmes nudged governments to reduce expenditure on public goods, which subsequently resulted in precarious formal paid care work. The new preferential procurement framework presents an opportunity to create additional employment while considering what type of employment is required for addressing the

nation's socio-economic challenges. In other words: it is advised that the sector or nature of employment be considered when applying this principle in procurement decisions.

Another important point for policy consideration in linking procurement with economy-wide structural reform is informal enterprise development. Black-owned businesses account for 49 per cent of formal small business ownership (TIPS, 2017: 14). These companies encounter daily structural challenges such as limited access to markets, finance, minimal innovation and legislative frameworks that favour large established businesses (MISTRA, 2020; TIPS, 2017). The informal sector demographic profile is different with black-owned enterprises comprising 94 per cent of informal businesses (TIPS, 2017). The NDP recognises informal sector SMMEs as an integral part of its overall small business development strategy (Dooms, 2020). The current bill proposes contract set asides for enterprises based in townships or rural areas but does mention informal enterprises explicitly. We encourage the policy drafters to amend section 26 (c) and include informal economy businesses in public preferential procurement frameworks. The MISTRA (2020) publication cites this exclusion of informal economy enterprises from B-BBEE and procurement as a major shortcoming in the post-apartheid state's attempts to transform the economy. These findings urge state authorities to improve market intelligence on informal SMMEs, so that government designs appropriate legislative mechanisms for their inclusion in procurement and B-BBEE related programmes (Dooms, 2020). These policy measures should consider the unique operational challenges in these enterprises. Setting generic compliance standards for companies in procurement processes without factoring business operation differences amongst SMMEs is not useful. The incorporation of black-owned informal economy enterprises must include a special regulatory dispensation for these companies in the overall procurement framework. We cite some examples in the next section for the state's consideration.

Chapter Five and Two: Procurement Methods, Procuring Institutions, and Bidding Processes

The MISTRA (2020) publication identifies insufficient appreciation for the diversity in South Africa's post-apartheid business class as a significant policy issue. It proposes a more nuanced and calibrated business development approach, which takes account of differences based on access to capital and markets, enterprise size, as well as the nature of procurement and sector-specific trends. This approach needs to be applied when developing procurement regulations, so they do not perpetuate black-owned SMMEs exclusion. Section 10 (3) in the bill states that an institution can only contract with bidders who are tax

compliant. This regulatory criterion may be overly restrictive for small businesses owners, cooperatives and informal enterprises, which often struggle with tax compliance due to lack of information or resources. We suggest that a provision be included in section 10 that allows small enterprises who do not meet the tax requirement to address compliance matters during the bidding process or after the tender has been awarded.

The SMMEs also contend with an extensive regulatory burden from different state institutions (MISTRA, 2020). It is important to use technology in attempts to decrease the cumbersome regulatory processes, which limit the efficiencies of SMMEs. Section 15 makes provisions for the use of technology in procurement processes, but it is too thin in its current form. This section does not fully appreciate the importance of addressing red tape and cost burdens on small business associated with public procurement. The requirement for small businesses to submit hard and electronic copies of tender documentation when applying for bids will exacerbate entry barriers for many disadvantaged persons and limit emerging business from participating in public procurement. As a general rule, tender bid documentation must be submitted and evaluated electronically for efficiency and transparency. This can be done through a central repository system that is currently used for e-tenders advertisements. The drafters of the bill need to consider other areas in which technology can be employed in the general procurement oversight framework. One clear example is improving the business data systems at different levels of government and public enterprises. This data must not be limited to the demographic and financial profile of businesses. It must provide procuring institutions with credible information on the enterprises' products and services.

Another crucial intervention is amending section 27 (1) in order to assign the PPR powers to define procurement categories considering local content designations, the National Industrial Participation Program (NIPP), infrastructure procurement, transversal procurement, and miscellaneous procurement. The categories may be expanded through consultations with all government clusters through FOSAD. This is essential for policy alignment and ensuring that procurement categorisation supports industrialisation in the broader economy. The procurement methods and principles outlined in section 27 must consider our previous points on creating inclusive procurement regulations, which do not automatically exclude smaller enterprises. Qualifying criteria for tender bids should explicitly mention pertinent economic transformation principles derived from the NDP and B-BBEE policy goals. The current criteria list in section 30 only refers to conventional business and financial performance indicators. It is important to amend this

section so that the bid criteria accommodate other indicators, which are pivotal for economic transformation and structural change.

The major concern in the sections describing the bidding processes and methods is their alignment with the principles articulated in other chapters. This is important because the relationship between the procurement institutions, socio-economic objectives, bidding methods and tender evaluation systems must be clear. The different components of the procurement regulatory framework must complement each other in order to avoid the policy implementation inconsistencies and gaps identified in the MISTRA (2020) publication. This bill does not link these different components in the procurement framework adequately. We suggest that the policy drafters consider drafting the sections in Chapter Five in a manner that illuminates how bidding methods, tender evaluations and socio-economic policy objectives fit together in the general procurement framework. A particular area of concern is the stringent bid exclusion criteria based on errors in bidding documents. Bidders should not be excluded from accessing tenders based on administrative errors only.

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