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Public Procurement Bill on a slippery slope.

The National Treasury recently gave its interpretation as to how the new Public Procurement Bill could look subject to parliamentary approval.

According to Treasury the proposed key principles dealing with preferential procurement in the Public Procurement Bill, are all in line with the constitution and recent judgments dealing with these issues.

Firstly, it is of the view by way of its own interpretation, that prequalification and subcontracting as barriers to entry in preferential procurement, are in line with Section 217(2) and (3) of the Constitution as affirmed by the Constitutional Court in *Afribusines v the Minister of Finance* in 2022.

Further, it argues that while the *Afribusines* case invalidated set-asides under the existing PPPFA, section 217(2) of the Constitution indeed allows for the application of preferential procurement to address past imbalances, and Chapter 4 of the Bill offers such measures with flexibility.

Treasury also put forward that Chapter 4 of the Bill, which is in front of parliament, will broaden preferential procurement and the points systems found in the current framework Act.

Also, that the Bill could introduce new measures to empower disadvantaged groups while ensuring responsible implementation through future Regulations that will comply with 217(2) and (3) of the Constitution, respectively.

On the aspect of bringing back the requirement of Local Production and Content for designated sectors, Treasury stated that once again, the Bill provides detailed procedures for designating sectors that prioritize local production and content, ensuring responsible implementation through public consultation and checks and balances, in line with the Constitution's section 217(2)(a) on preferential procurement.

It goes without saying that almost all civil society entities having an interest in the Bill, are opposing many of the elements and principles contained therein.

These entities are of the view that certain provisions in the Bill are in conflict with the five principles of section 217(1) of the Constitution, which stipulates that all procurement systems must be implemented on a basis that it is "Fair, equitable, transparent, competitive and cost-effective", respectively.

Civil society stakeholders has also put forward that the Bill is seen as exceeding section 217(3)'s framework requirement prescribed under section 217(2) of the Constitution.

According to Gerrit Davids, lead advisor at TaranisCo Advisory, tendering agency, "If the Bill is to be passed in Parliament, it will be followed by Regulations and it stands to reason that both the Bill itself and the subsequent Regulations could be legally challenged by opponents of some its principles."

Davids says, "However, the advice we would give to bidders is to start a process to re-align the 'makeup of their ownership' in line with the "categories of persons", meaning owners of those entities who will benefit from the preferential procurement approach, punted by the Bill."

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