



Republic of Namibia

Public Procurement Bill Draft Response by the Honourable Minister

Introduction

I am thankful to the honourable members for their contribution to the debate on the Public Procurement Bill. It is also worth to point out that I also received comments and suggestions from the Institute of Public Policy and Research and from the members of the Tender Board who were participating in a workshop in Swakopmund. Based on the feedback on the current version of the Bill we can say that it has been well acclaimed as a major step towards a transparent and efficient public procurement system and people have high expectations that it will have a significant and improved impact on project implementation and delivery of services by public entities.

Before I respond to the comments, concerns and suggestions from the honourable members, I wish to thank all who have contributed. I found the discussion useful and I have therefore accommodated several suggestions. The concerns raised covered policy issues related to transparency, accountability and governance, empowerment, delivery and value for money. A number of administrative matters were offered and then there were several drafting and editorial corrections suggested.

Allow me, Hon Speaker reflect what the Bill as a whole is attempting to provide for and I want to maintain the focus on the fundamental objectives that any

public procurement system should seek to achieve, while analysing the provisions of this Bill. These universally recognised objectives, which are derived from the UNCITRAL Model Law on Public Procurement on which this Bill is based, are:

- Maximising economy and efficiency
- Fostering and encouraging the participation of bidders and suppliers
- Promoting competition
- Providing fair and equal treatment
- Promoting integrity, fairness and public confidence
- Achieving transparency in the process

The Bill in my opinion contains all these elements and therefore provides for the necessary structures and procedures to achieve the above.

Hon Speaker, Hon Members, additionally and very importantly the Bill also contains provisions for the implementation of empowerment strategies aimed at equalising and localising economic opportunities, and to achieve social-economic developmental goals, including employment creation, industrialisation and growth in production of local products. For us the ruling party an important requirement, which is specific to Namibia is, the need to correct social injustices due to past racial discrimination laws and practices. However, the growth opportunities that public procurement provides must be in balance with the primary objectives of a transparent procurement system which delivers value for money.

During the interventions of the honourable members, comments and suggestions were made in respect of the different provisions contained in the Bill. I shall now respond to the specific issues raised by the Honourable members.

Response to comments

Hon Albert Kawana pointed out that value for money should be obtained and quality should not be compromised through affirmative action. I agree with you and can point out that under Part 6 of the Bill, the bidding process is clearly defined. If we refer to section 43(2), the mandatory requirements for any procurement should be well stipulated in the bidding document together with the methodology and criteria to be used.

Hon Stanley Simataa stated that

- checks and balances must be secured and members of the board and review panel should declare their interests
- procurement overloads must be avoided in order to spread the economic benefit resulting from public procurement
- Service delivery must be assured and not be delayed unduly by processes

Response: Section 76 of the Bill provides for the disclosure of interest, whereas the avoidance of contracts overload is dealt with during the evaluation process when the financial and technical capacity of bidders is assessed. The requirement for individual procurement plans at section 25(4) mitigates the risk of delays in the process.

Hon Chief Ankama expressed concern about implementation and availability of skills and capacity building.

Response: The functions of the Procurement Policy Unit as stipulated under section 7(1)(f) and (g) caters for these concerns.

Hon Frans Kapofi suggested that good companies should not be disadvantaged.

Response: The provisions under Part 6 ensure that the best bidder is awarded a contract after the completion of a fair and transparent bidding process.

Hon Utoni Nujoma was of the view that International standards often do not support domestic requirements. I agree with you and that it why we have included empowerment provision in this Bill, which are aimed at addressing the unique social and economic challenges that the Namibian economy is facing. Even under international best practices It is an accepted principle that countries should be allowed to implement empowerment measures up to a given threshold. This was also the contention of developing countries about the WTO Government Procurement Agreement in its initial form. The Bill therefore provides for the different thresholds to be set under Part 11.

Hon Peya Mushelenga was concerned about ethics and governance and stated that:

- Ethics in the tendering process must be addressed;
- Disclosure provisions should be included and must be made clear up front;
- Undue processes like unethical offers must be prevented.

I do agree and want to point out that Part 10 of the Bill provides for procurement integrity. Section 66 regulates the conduct of staff members of the Board and public entities and section 67 regulates that of bidders and suppliers and Section 68 provide for action against fraudulent and corrupt actions of bidders and suppliers. Section 10(2) to (5) provide for the ethical conduct of the members of the Board and the penalties that may be inflicted in case of breach.

Hon Doreen Sioka suggested that

- there must be gender balance in the composition of the Board and the number of women should be increased to reflect their actual proportion in the population;
- the removal of corrupt members from the Board; and
- there must be decentralisation.

Response: I am agreeable to bring about gender balance at the Board and will propose the relevant amendment. Section 10(4) provides for the removal of a member of the Board in such circumstances. Regarding the suggestion for decentralisation, it will come with the gradual increase in thresholds along with capacity building and the evolution of the system.

Hon Veikko Nekundi had the following concerns, which I have classified under different categories as follows:

Empowerment

Concerns:

- Youth interests are not adequately covered, 30% of board members should be youths;
- 25% of the total value of tenders should be reserved for the youth;
- Restrictions must be implemented per constituency, per region etc;
- Service providers (engineers, quantity surveyors, architects etc) are not reflective of the demographic situation of Namibia;
- Namibian ownership must be used as criteria for allocating tenders;
- Innovation;

Response: The Bill contains sufficient provisions for the empowerment of different categories at sections 2(b), 5 and under Part 11 which is entirely dedicated to preferential treatment in procurement. The regulations and codes of good practice will further elaborate on specific types of preferences.

Efficiency

Concerns

- Centralization of public procurement will create a big workload and will impact on the efficiency of the public procurement system;
- The bill should cover public assets and the issuance of access licenses;

Response: The Bill provides for a prescribed threshold for a public entity at section 8(a), above which it will be for the Board to conduct the process. The thresholds will be different for different categories of public entities based on capacity available. It should not therefore affect the efficiency and cause delays.

Quality

- **Concern:** Poor quality goods and services must be assured for the whole period of the supply contract;

Response: Public entities shall have the responsibility to manage contract and ensure quality and will be subject to compliance monitoring by the Policy Unit as stipulated in section 7.

Integrity

- **Concern:** Blacklisting is good, but must be well coordinated to avoid improper conduct

Response: The Policy Unit will have the mandate of monitoring compliance as stipulated under section 7.

Hon Jagger expressed the following concerns:

- Regional procurement is not favoured
- From which sectors would the members of the board be selected (disabled)
- Regional tender boards need to be guided as to how they are constituted

Response: Section 1 defines a public entity, which includes regional councils. The constitution of the structures will be in accordance to section 25(1) and the regulations which will be issued.

Hon Maamberua made several comments as follows:

- **Concern:** The bill does not address the current class system, the working class is still disadvantaged

Response: Hon Maamberua, I do agree with you that the dynamics that drive the accumulation and distribution of wealth (capital) remains the central question of political economy. The long-term evolution of inequality is not only a challenge for the Namibian economy but the world over. The ruling Party, SWAPO Party has anchored its economic policy firmly in the principles of economic order as provided for in Article 98 of the Constitution, namely “The economic order of Namibia shall be based on the principles of a mixed economy with the objective of securing growth, prosperity and a life of human dignity for all Namibians”. This Bill and its empowerment provisions is reflective of our need to leverage public procurement as a developmental intervention aimed at equalising economic opportunities for Namibians in specific target groups. I must admit however that public procurement is but one cog of many in the larger economic system, albeit an important one.

Concern: The long title: disposal of assets should be covered in the bill, not by regulation

I agree

Response: I will propose an amendment to provide for the methods of disposal.

Amendment to provide for disposal will be proposed through the committee stage

- **Concern:** The Central Procurement Board has no relation with the PS, only the Minister

Response: The Central Procurement Board is different from the Tender Board. Section 8 establishes the Central Procurement Board as a juristic person and sets its main responsibilities. The responsible Minister for the Act is the Minister of Finance. The Board is accountable for all actions under the Act. How can or should it relate to the PS instead of the Minister who has to table the annual report of the Board at the National Assembly as per section 24(3)?

The current Tender Board of Namibia Act.

- **Concern:** Procurement Policy Unit, must be assisted by one or more staff members

Response: This will be substituted by an amendment that I will propose.

- **Concern:** Remuneration should be aligned with the public service staff rules

Response: The Honourable member is referring to section 7(6). This is applicable to experts recruited to assist the Policy Unit.

- **Concern:** Policy Unit should not have investigative and other powers, which belong to the Central Procurement Board

Response: The mandates of these institutions should be clearly understood. The Policy Unit has the responsibility to oversee and monitor compliance and is not operationally involved in procurement proceedings unlike the Central Procurement Board. It is therefore quite appropriate for the Policy Unit to

investigate whenever required with a view to ensure compliance. How can the Board investigate into its own operations?

Concerns:

- The Minister “may remove” should be replaced by “must remove”
- Section 20 mentions “BIPA” instead of “Board”
- The table of contents is not aligned to the captions of several sections

Response: As indicated by the Attorney General, in its final form the Bill will be properly edited and all such errors duly corrected.

- **Concern:** Seven members constitute a quorum

Response: This is correct as the Central Procurement Board will be dealing with high value contracts and all risks should be mitigated.

- **Concern:** Remuneration should be determined by the Board alone

Response: The Minister is the responsible Minister for the implementation of this Act and he has a duty to ensure that the remuneration is reasonable.

- Audits to be conducted by Auditor General
- Auditor General to report to NA;

Response: Section 23 is in line with ~~current practice~~ in SOEs. The Auditor General does not have enough resources to audit the accounts of all SOEs.

- **Concern:** What are “empowerment categories”

Response: This is quite clear. Beneficiaries of empowerment measures should be categorised for the implementation of different measures for different categories.

- **Concern:** Emergency services should be limited to declared state emergencies

Response: Emergency Procurement is a method to address situations of emergency that any public entity may face in the circumstances mentioned at section 33. This should not be confused by a state of emergency declared by the President.

- **Concern:** Reviews should be limited

Response: The Honourable Member is referring to section 6(b). Procurement is dynamic and procurement legislation should be continuously reviewed to adapt to changed circumstances.

- **Concern:** Statutory increase and negotiated price variations

Response: This will be taken care of in the regulations and in the standard bidding documents.

- **Concern:** Repeals have consequences in other laws

Response: Section 80 has to be read together with section 3.

- **Concern:** Board is responsible for the whole public procurement

Response: Unlike the Tender Board Act, this Act will apply to all public entities to achieve harmonisation and wider monitoring of performance of the public procurement system.

Hon Asser Baye stated that

Concerns:

- Central procurement Board is needed, but some of its functions need to be decentralized
- Punitive measures must be strengthened

Response: The functions of the Board as stipulated in section 9, enables it to have full control of the operations during the different stages of the bidding

process with a view to avoid delays. Punitive measures for different breaches are given under each Part of the Bill.

Hon Nico Smit expressed the following concerns:

- Minister has unfettered powers to intervene in public procurement
 - Preferential powers to implement government policy;
 - Ministerial exemptions to security services, explain the reasons for this exemption;
 - Exemption for in practicable purchases;
 - Procurement Policy Unit;
 - Central Procurement Board, appointment done by Minister;

Response: The Bill is quite clear about the powers of the Minister regarding the above issues. The enabling empowerment provisions at sections 2(b), 5(1) and under Part 11 require the issue of regulations, codes of good practice and directives. Implementation of empowerment strategies is not static and circumstances are subject to change. It is therefore incorrect to say that the powers are unfettered as these implementation instruments should comply with the provisions of the Act and also with Government Policies.

Regarding exemptions, the Bill makes provisions at section 4 for such exemptions to be partial.

The Minister has the responsibility to report on the functioning of the public procurement system and is accountable for the development of procurement policies. The Policy Unit will serve as an advisory unit to the Minister as stipulated at section 6.

The Minister must also have a say in the appointments done at the Central Procurement Board as it provides for checks and balances.

- **Concern:** Staffing rules etc are not provided for, should the Public Service Commission not be responsible for this function?

Response: The Public Service Act will apply to staff of the Policy Unit, but not to the Board as it is established as a juristic person like all the other SOEs. Therefore, the Board will have its own staff rules.

- **Concern:** Position of trust and senior civil servants need to be excluded from serving on the Central Procurement Board

Response: The Bill is quite clear about exclusions. Section 14 should be read together with section 8(c), which stipulates that the Board directs and supervises Accounting Officers, ~~meaning~~ *implying* that Accounting Officers cannot be members of the Board.

- **Concern:** Board is mandated to regulate itself

Response: Section 9(1)(e) obliges the Board to establish its internal rules procedures of and then compels it to live by such rules and procedures. This is quite in order and a widely accepted approach.

Concern: Bid Evaluation Committee, qualifications and greater detail on their appointment is required

Response: The provisions at section 26 contain the essential requirements concerning the constitution of bid evaluation committees. However, the regulations will have to provide more elaborated details.

- **Concern:** Review Panel is welcomed but the compilation of the pool of experts needs more transparency

Response: The pool will be constituted after a public invitation and the list will be gazetted and annually updated as stipulated at section 58(4).

- **Concern:** Protection of whistle blowers

Response: The provisions of the Anti-Corruption Commission Act are applicable and there is no need to repeat those provisions in this Bill.

- **Concern:** Thresholds should be placed on procurements under direct procurement

Response: Thresholds are applicable for types of direct procurement mentioned at section 36(2)(b) and (c). Whereas, the procurement referred to in section 36(2)(a) refers to procurements where only one supplier has exclusive right and no suitable alternative is available. What would be the purpose of setting a threshold for such procurements? Similarly, when a consultant is needed due to unique qualifications (section 36(2) (d), a threshold will not serve any good purpose. Section 36 (2)(e) refers to continuity of a consultancy assignment, where also a threshold may not be useful.

- **Concern:** Negotiation after pre selection is risky

Response: Negotiations form an integral part in the process of the selection of a consultant. The provisions at section 35(9),(10) and (11) are quite clear about the process. This is how procurement of consultancy services is done. The Honourable Member may refer to procurement guidelines of development funding agencies to have a clear idea about it.

- **Concern:** Contract termination, unilateral power by the State, too vague and dangerous

Response: Section 63 contains what is used in most procurement legislations and General Conditions of Contracts by funding agencies contain. It is therefore in line with best practices and a needed protection against unforeseen and changed circumstances.

There are two provisions, i.e. it must be in the public interest or the price is increased by more than 15%.

Further the contractor is compensated for costs incurred.

Concerns

- Youth and women to receive preferential treatment, is worrying and very risky, very dangerous
- Greater detail needed

I have responded to queries in regard of empowerment. They are important and they are needed. They are not dangerous! The opposite is probably closer to the truth. Leaving them out would be dangerous and irresponsible.

Hon Ncube suggested that persons with disabilities should be mentioned as a target group and goods and services purchased should take care of this category of users.

Response: It is not necessary to itemise all vulnerable categories in the Bill for the implementation of empowerment measures. As mentioned earlier, provisions at sections 2(b), 5 and under Part 11 are sufficient to ensure the implementation of empowerment policies of the Government.

Regarding procurements by public entities, it is not necessary to detail in the Bill what should be in the specifications for procurement. Obviously, public entities should comply with the provisions of the National Disability Council Act to ensure that the rights of disabled persons are safeguarded.