

Time for government to use public procurement to defend small business against harmful business practices

National Treasury recently published the Draft Public Procurement Bill and called for public comments. Section 2 of the Draft Bill lists among the primary objects of the Act the following:

- Ensure that the State utilises and leverages procurement to advance economic opportunities for previously disadvantaged people and women, the youth and people with disabilities (and) small businesses;
- Provide for procurement that is developmental in nature and aspires to expand the productive base of the economy;
- Develop economic capacity in the Republic, through the provision of opportunities for local suppliers to participate in procurement; and
- Incorporate in the procurement system categories of preference in the allocation of contracts; and the protection and advancement of persons and categories of persons disadvantaged by unfair discrimination

Giving effect to the above objects, section 26(1) tasks the Minister to prescribe a framework for preferential treatment for categories of preferences, and the protection or advancement of persons, or categories of persons, previously disadvantaged by unfair discrimination, in procurement. Section 26(2)(f) specifies that the envisaged framework must include measures aimed at advancing small, medium and micro enterprises in high value procurement.

All these stipulations recognise and address the urgent need to advance the interests of those who were historically excluded from the country's economy. This category includes small businesses generally and black-owned ones, in particular. These stipulations are in line with, and seek to advance, a long chain of efforts by the government to advance the development of small businesses, dating back to the publication in 1995 of the country's very first small business development strategy since the onset of democracy.

The advancement of small business interests, using public procurement as an instrument, should be approached from two angles: Firstly, as the Bill clearly seeks to do, focus should be on the **promotion** of small businesses through enhancing their inclusion in public procurement, thereby opening up the vast public sector market to them. Secondly, the legislation should be used for the **protection** of small businesses from those, particularly in the private sector, that engage in practices that are harmful and detrimental to the interests of these businesses. It is common knowledge that small businesses are regularly subjected to various harmful practices by some of their larger counterparts. These practices have a seriously detrimental effect on small business operations and survival, imposing considerable financial and other costs on them. These practices include:

- Late or non-payment
- Unfair contract terms and practices
- Unfair payment terms and practices (excluding late or non-payment)
- Various contractual breaches
- Wider contractual disputes (relating to issues such as the interpretation of contract terms, logistics, sale of goods, dealing arrangements, and other claims involving the delivery of goods or the quality of a service).

These practices clearly go counter to the objects of the proposed Public Procurement Act, which seeks to provide small businesses with opportunities to grow and thrive via accessing the government market. If these practices are not effectively combated, they will definitely undermine and negate the small business advancement intentions of the Act.

This is especially the case in view of the fact, as the 1995 White Paper on National Strategy for the Development and Promotion of Small Business in South Africa observed, "It is generally known that small enterprises often find it difficult, financially or for other reasons, to avail themselves of the due process of law in order to defend their interests." Studies both in South Africa and internationally have shown that:

- The financial cost of unresolved disputes is heavily borne by small businesses.
- Going to court is a prohibitive proposition for small businesses because the process is cumbersome, time consuming and expensive.
- Because an unresolved dispute may result in a small business losing an important customer relationship, which translates to loss of future revenue, many small businesses simply forgo their claims, a move they can ill-afford as it places their continuity in jeopardy.

Therefore, it is our submission that the Public Procurement Act should go beyond opening up procurement opportunities to small businesses and should incorporate effective measures to protect small businesses from those larger entities seeking to do business with the government while engaging in business practices that are harmful and detrimental to small businesses. Specifically, we believe the following measures should be incorporated into the Act.

1. **Mandatory declaration** - it must be made a mandatory requirement for all bidders to declare that at the time of bidding, they have no unresolved business disputes of any kind involving small businesses and they do not owe any monies to small businesses for a period exceeding 30 days. Bidders should also be required to declare that they have not been accused of engaging or have not been involved in a harmful business practice of any kind involving a small business during the past three years.
2. **Bid invalidation and bidder debarment** - Section 22(1) prescribes circumstances under which a bidder should be debarred. We propose that, should a bidder be found to have transgressed in any of the ways mentioned above in relation to a small business, and/or to have made a false declaration pertaining thereto, that bidder should be held to have committed an offence in terms of sections 118(1)(a) and 118(2)(a), their bid should be invalidated in terms of section 20(2), and the bidder should be debarred, whether provisionally in terms of section 23(1) or permanently in terms of section 22.
3. **Verification of bidders** - we propose that the verification of bidders as contemplated in section 41 should include verification in relation to the issues covered under our mandatory declaration proposals above.
4. **Publication of names of bidders** - lastly, we propose that all bidders be publicly listed in order to give small businesses an opportunity to lodge objections, prior to the commencement of bid adjudication, concerning any bidder that is accused of engaging in harmful and detrimental business practices against small businesses.

We believe these measures will go a long way in holding larger companies accountable for their ill-treatment of small businesses and thereby providing much-needed protection against these pervasive abuses. Failure to do so will weaken the likely impact of the Act in relation to advancing the interests of small businesses and behaviours on the part of large companies that undermine and defeat government policy and efforts directed at small business promotion will continue unabated.

Septi M. Bukula has been involved in small business policy and programme research in South Africa since 1993 and has made significant input into government policy development relating to SME promotion. He is the founder and director of Osiba Analytics, a policy and programme research and advisory firm. He has served in the leadership of a number of small business organisations and think tanks in South Africa and around the world. In 2010 he was appointed by the Minister of Trade and Industry to head up an expert panel established to review government support for small business, which resulted in a comprehensive report titled *Rethinking Small Business Support in South Africa*. Bukula is the founder of Seeza Tourism SME Network.