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## Cleaner tenders? Not likely

### *Чисті тендери? Не схоже*

*Тендерну систему Південної Африки було названо темним серцем корупції у державному секторі та неспроможності держави. За словами адвоката Спеціального слідчого відділу Енді Мотіба, до 90 % справ, які перебувають у їхньому розпорядженні, пов'язані з шахрайством при тендерах та корупцією. Президент це знає: на нещодавньому Національному діалозі боротьби з корупцією президент Сиріл Рамафоса заявив, що ми повинні «дивитися на цілісність [тендерних] систем, тому що саме там знаходяться гроші, які хочуть вкрасти». Головний суддя Раймонд Зондо на Національному діалозі заявив, що «закриття кранів» для корупції на тендерах вплине на боротьбу з корупцією в цілому.*

<https://www.news24.com/fin24/opinion/opinion-cleaner-tenders-not-likely-20231206>

South Africa's tender system has been identified as the dark heart of public sector corruption and state failure. Despite this, National Treasury is refusing to use the first major legislative overhaul of the system to make any meaningful changes, writes Caroline James.

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Corruption is eating away at South Africa's economy, our integrity and our sustainability. And our tender systems are facilitating much of this. According to the Special Investigating Unit's Advocate Andy Mothibe, up to 90% of the cases on their books are tender fraud and corruption.

We know it: just last month we published a story on a proposed R3.7 billion deal between PetroSA and Russia's Gazprombank, based on seemingly irregular tender processes.

The president knows it: at the recent National Dialogue on Anti-Corruption President Cyril Ramaphosa said that we must "look at the integrity of the [tender] systems because that is where the money is found and that is where all these thieves, thugs, focus their attention on because that is the centre that dispenses the resources that they want to steal."

Chief Justice Raymond Zondo knows it: at the National Dialogue he said that "closing the taps" to tender corruption would make a significant impact on combating corruption as a whole.

In fact, Zondo knows so much about the link between corruption and tenders he wrote a chapter on procurement (the tendering for goods and services) in his State Capture Commission Report. He wrote that one of the lessons we must learn is that "the public procurement sector cannot defend itself against those who control the levers of political and state power."

But those who do control the levers of political and state power seem utterly unfazed by the urgent need to stem the flow of tender-related corruption.

Ramaphosa's biggest test

The Public Procurement Bill is currently before Parliament. This week, the Standing Committee on Finance accepted a revised version of the bill and sent it to the National Assembly for consideration.

We have previously described it as the most consequential piece of legislation of President Cyril Ramaphosa's administration. Yet the manner in which this bill has been handled by its drafters and Parliament is deeply concerning.

As appears to be the trend now, National Treasury, rather than the parliamentary committee, drove the law reform process. National Treasury produced the draft bill which was published for public comments, consolidated and considered those comments, and proposed changes to the bill for the committee to vote on.

However, National Treasury acknowledged in its most recent report to the committee that it had only considered 36% of written submissions. In other words, the entity responsible for reworking the bill to respond to the concerns raised by the public, simply chose not to read two out of every three public submissions.

National Treasury explained that the sheer volume of submissions meant they simply could not get to all of them.

The committee was at pains to state that it had met its obligations to facilitate public participation in the lawmaking process, referring to "robust stakeholder engagement" in their report.

But considering only a third of the submissions is not acceptable: comments, suggestions and proposals from academic experts, grassroots representatives, and those with direct experience of the tender systems are likely to have been ignored.

Even more concerning, National Treasury introduced a chapter on 'preferential procurement' based on some of the submissions received. This chapter – dealing with the thorny issue of balancing the need to transform our economy while ensuring cost-effective public contracting – was never put out for public comment.

Preferential procurement refers to the constitutional requirement that public procurement be conducted through a system that is fair and equitable. In the past, this has led to adoption of a ranking system where tenders have been scored on the 90:10 or 80:20 rule, meaning a company's BEE score counts for 10% to 20% of the points it receives.

However, as we saw during the State Capture era preferential procurement rules were manipulated to divert billions from Transnet and Eskom. And the Constitution also requires that procurement be competitive and cost-effective. The bill fails to explain how these priorities are to all be achieved.

The new bill, if it becomes law, will leave it up to government departments and state-owned entities to set their own rules for what constitutes fair and equitable procurement, leaving the gate wide open for the same kind of abuses to continue.

Zondo has repeatedly stressed the need to prioritise value-for-money procurement. This is not only motivated by economic interests, but also because of how the evidence at the State Capture Commission illustrated that the lack of priority given to cost-effectiveness in awarding tenders results in corruption at government and state-owned entities.

That the committee could assent to a bill without having had public participation on such a weighty chapter is inconceivable.

### Weakening protections

Unfortunately, it appears to be just one example of the committee and National Treasury's failure to engage with the need to develop a tender system that can identify, prevent and ensure accountability for corruption.

When the bill was first published, we highlighted our concerns that the anti-corruption measures it would implement were too weak, and that its failure to consider an independent procurement accountability mechanism would open the system up to abuse.

During deliberations the bill, astonishingly, has become even weaker on integrity and anti-corruption.

The bill automatically excludes certain categories of persons from tendering for government contracts. This initially included leaders of political parties. We and others called for these categories to be expanded to include additional political party office bearers.

But the committee resolved to remove them from the bill altogether.

Zondo had recommended that whistleblowing be incentivised as a way to identify and prevent corruption. A number of the submissions also emphasised the need to incentivise and protect whistleblowing, particularly after the assassination of Babita Deokaran, the public servant who dared to blow the whistle on the Gauteng Department of Health.

However, National Treasury and the committee felt that it was not appropriate for there to be a separate whistleblowing provision for procurement only and noted that the Department of Justice is undertaking a review of the country's whistleblowing laws.

Other pieces of legislation – such as the National Environmental Management Act – have introduced sector-specific whistleblower protection clauses. And any updates to the broader whistleblower regime are likely to take years before adoption.

Another serious concern is the capacity of the Public Procurement Office (PPO) and its ability to effectively play all the roles it is allocated by the bill.

The PPO is supposed to regulate all procurement, and also conduct oversight and accountability for non-compliance. It is also required to identify possible criminal irregularities and refer those to law enforcement.

This means that the PPO is effectively a player and the referee in the tendering game, which has direct bearing on the ability of the PPO to effectively identify corruption and take action against those responsible.

There is a debate that must be had over the correct location of the PPO. Many procurement specialists – including Professor Geo Quinot and former Chief Procurement Officer Kenneth Brown – have argued for (at least) the regulatory powers of a procurement office to be located outside of National Treasury.

The problem is the committee accepted the bill without any deliberation on the PPO's location, need for independence, and capacity to effectively combat corruption in procurement processes.

Laws are failing us

In his State Capture Commission report, Zondo eviscerated the efforts of those responsible for curbing procurement-related corruption:

It seems scarcely believable that the constant flow of legislation over the years had so little impact in curbing corruption and that the combined efforts of Parliament, National Treasury, the Auditor-General, the Provincial Treasuries and National and Provincial Governments could have been so ineffectual. The efforts, albeit failed efforts, to address corruption show that there is no easy solution to the problem. Corruption has strengthened its hold and extended its hold on public procurement over a very long period of time. Clearly, a new approach is required; it cannot be the same mixture as before.

As South Africans, we should be angry that, despite Zondo's warning, those with the power to make legislative changes are treating this so lightly.

We should be angry that those we have entrusted to represent our interests have failed to take seriously the need to step the corruption flowing through procurement.

We should be angry that – despite everything we know about how tenders are used to facilitate illicit wealth accumulation – those who have the power to introduce restrictions on who can benefit from tenders have looked after their own interests rather than the country's.

Newsletter

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And we should be angry that Parliament and National Treasury pay the public so little respect that they'd rather rush through a law than take the time to consider the submissions made by members of the public desperate for a government that works.

But the bill is not yet law. The National Assembly and the National Council of Provinces have to vote on it. And then the President has to sign it into law.

The window of opportunity to create a tender system that does not serve as a cash cow to those with power and connections is closing rapidly.

But we still have a chance. We must do what we can to prevent this bill becoming law.