

Labour's Motivation for Whistle-Blowing Incentive in the draft Public Procurement Bill

The Whistle-Blowing Incentive Proposal:

1. The draft Public Procurement Bill has proceeded through Nedlac. Unfortunately it has limited powers to make a meaningful impact on corruption. Vested and corrupt interests are vigorously defending and advancing their public procurement pillaging schemes and patronage networks with dangerous weapons: using violence and intimidation to win contracts and scare off whistle-blowers; abusing legal processes to delay adverse findings with the intention to defer and avoid justice; and infiltrating and influencing political and other social formations to shape the landscape of power in their favour. But the current draft Public Procurement Bill hopes to win this fight with sticks and knives. It cannot. It urgently needs to upgrade its weapons. At a minimum this requires creating a whistle-blowing incentive in the Public Procurement Bill to fight corruption.
2. A whistle-blowing incentive enables whistle-blowers to receive a defined percentage of monies recovered from companies or persons who are found to have made corrupt or fraudulent claims during procurement transactions. The incentive is paid when the whistle-blower has come forward with original information that contributes to successful civil litigation, and the litigation process results in the recovery of monies. The incentive entails a non-arbitrary, rule-based and just measure of the amount of reward due to the whistle-blower and doesn't prejudice but ultimately contributes to the fiscus.
3. Labour proposes that the Public Procurement Bill must include a whistle-blowing incentive provision¹. Our proposal is aligned with that of the Zondo Commission.

Benefits of a Whistle-Blowing Incentive:

4. Whistle-blowing incentives are used successfully elsewhere in the world (such as the USA, Liberia, Uganda, Ecuador, Ukraine, Indonesia, Canada, Ghana, Republic of Korea and Slovakia, amongst others) to combat public procurement-linked corruption. For instance, in the US, the federal government has long experience and demonstrated success with such a mechanism: it generates an average of around \$3bn per year in recoveries, or 70% of all recoveries in public procurement. Given the much higher rates of corruption in South Africa, the impact of such an incentive in our domestic space may be higher.
5. Incentivising whistle-blowers will use the interest and power of a larger number of actors in society to fight the problem of corruption on four critical fronts:
6. First, an incentivised whistle-blowing provision will bring to light new intelligence, insight and evidence relating to corrupt transactions.
7. Second (and related), whistle-blowers will have a larger incentive to step forward in a context where the current barriers to whistle-blowing are high and the consequences

¹ While the principle of the whistle-blowing incentive should be established in the Public Procurement Bill, further details of the incentive – such as the percentage of monies which can be claimed, etc – can be established later in Regulations.

dire. Whistle-blowing can be career-destroying and financially ruinous (not to mention life-threatening) since whistle-blowers incur new costs (e.g. personal protection) and become excluded and marginalised from economic opportunities in both the public and private sectors. These risks deter many good people, in both the public and private sectors, from exposing information at their disposal. Incentivised whistle-blowing addresses this substantial barrier.

8. Third, a whistle-blowing provision offers to disrupt, destabilize and deter cabals controlling procurement corruption. In this sense it would be similar to the successful corporate leniency policy of the Competition Commission (introduced in 2005) which uses financial incentives (i.e. exemption from massive fines) to encourage members of cartels to report on, and break up, cartels.
9. Fourth, the incentive provision can be designed to spread the weight of the task to combat corruption across a broader set of resources and competencies. Labour's proposal is to develop a provision for civil action, not criminal. It would encourage action by both State (first) and private actors (second, if the State does not wish to pursue the matter) to recover money, and this would unlock broad-based capacity to fight corruption. Damages would need to be proven and recoveries secured on a balance of probabilities. Yet whoever the litigant, evidence raised in the civil action and brought to light by the whistle-blowing incentive could then be passed to the National Prosecuting Authority to be used for criminal prosecutions. This will reduce the financial and broader resource costs of gathering evidence of wrongdoing and thereby facilitate criminal prosecutions and further consequence management.

Precedent for Whistle-Blowing Incentive:

10. There is a strong precedent of using financial incentives to shape civic behaviour in SA:
11. At least four pieces of legislation provide for whistle-blowing compensation: the Companies Act (Section 159) contains a provision around whistle-blower compensation; the Marine Living Resources Act (Section 61) enables the payment of monies for information that leads to conviction; and both the National Forestry Act (Section 60) and the National Environmental Management Act (Section 34B) empower courts to reward any person with a portion of monies collected when levying a fine on a guilty person when the evidence of the whistle-blower leads to conviction of a party for an offence.
12. SARS provides extensive tax incentives to shape personal and company behaviour towards outcomes which are deemed to be in the public interest. SARS also has a voluntary disclosure programme which allows taxpayers to avoid financial penalties through demonstrating good behaviour.
13. The Competition Act has allowed the Competition Commission to develop a corporate leniency policy that creates a financial incentive for companies to disclose anti-competitive behaviour.
14. Our police services and investigative bodies offer financial rewards daily for information that leads to the successful prosecution of perpetrators of crime.

15. State Owned Enterprises and (increasingly) municipalities are also adopting the practice of offering financial rewards to combat crime.
16. Most recently, National Treasury itself appears to be exploring developing a Work-Seekers Grant - which is effectively a financial incentive to drive behaviour deemed by the State to be beneficial.

Locating a Whistle-Blowing Incentive in the Public Procurement Bill:

17. The whistle-blowing provision should be located specifically in the Public Procurement Bill and not in other legislation, like the Protected Disclosures Act.
18. There is international precedent for whistle-blowing incentives to be located in specialist legislation (like procurement legislation).
19. Domestic precedent exists for the same. The examples of the Companies Act (Section 159), Marine Living Resources Act (Section 61), National Forestry Act (Section 60) and the National Environmental Management Act (Section 34B) have been cited above. Although it does not speak to an incentive, the Financial Intelligence Centre Act (Section 38) is also a separate standalone piece of legislation that makes provision for whistle-blowers (in this case, protections).
20. Putting the incentive in the Procurement Bill allows us to tailor it to a specific high-value and high-risk sphere of the economy. Such an incentive is really only best suited to big-ticket, high-value corruption in other areas, which includes niche activities like public procurement and tax evasion. It is more appropriate to develop specific whistle-blower provisions for those niche areas of the economy, and embed such provisions in the relevant specific legislation (in this case, the Public Procurement Bill), rather than have deferred and generalised debates about incorporating this incentive in the PDA. Of course, if it is discovered that there is a need for such a whistle-blowing incentive to be reinforced, elaborated and/or extended in the PDA, this can be done later.
21. There is urgency to establish this incentive as a critical tool to fight corruption. If it is included in the already-in-development Procurement Bill, the incentive can be adopted quickly - as soon as the Bill becomes law. But if the incentive is left to another piece of legislation, we will wait extensively for that legislation to be developed.

Conclusion:

22. On the basis of the substantial benefits of the whistle-blowing incentive, Labour proposes the Public Procurement Bill should adopt a provision that embeds the principle of such an incentive in the Bill but allows for details to be outlined in Regulations. This would entail at a minimum recognising in the Bill that:
 - a. A whistleblowing incentive must be established by regulation that must provide compensation to whistle-blowers with a percentage of monies recovered if they have voluntarily disclosed new information material to the recovery through

civil or criminal litigation of monies owed to the state due to fraud and corruption in procurement

- b. A system must be established and elaborated in Regulations to provide for administrative penalties and other enhancements of the monies recovered
- c. The principle must be adopted that whistle-blowers must have the power to litigate for civil recoveries in the name of themselves and the state